THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 017/2013

(Civil Suit 49 of 2013)

ORIKURUNGI AUGUSTINE :::::::::::::::::: APPELLANT

VERSUS

KABALE MUNICIPAL COUNCIL :::::::::::::::: RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an Appeal against the Judgment and orders of **HW OTTO GULAMALI** Chief Magistrate of the 22nd of May 2013.

The background is that the appellant, **Orikurungi Augustine**, was the plaintiff in the lower Court. He sued the defendant **Kabale Municipal Council** praying for a Declaration that he applied for and was granted Plot 36 Ndorwa Road; a permanent injunction against the defendant; general damages and costs of the suit.

The brief case for the appellant in the lower Court is that on the 25th of June 1997 he went to the Notice board of the defendant where he saw an advert for plots. He was interested in Plot 36 Ndorwa road which he applied for on the 1st of July 1997. On the 22nd of August 1997 the shortlist with his name was released. On the 27th of May 1998 the allocation of the plot to the appellant was made by the Kabale General Purpose Committee and the next day a lease offer extended to the appellant. A certificate of title in the appellants name was issued on the 30th of March 1999. The appellant was then surprised to receive a letter

from the Town Clerk dated 20th June 2001 which informed him that the allocation of Plot 36 Ndorwa road was null and void. It was following receipt of this letter that the appellant filed the first suit on the 1st of September 2002. That suit proceeded *Exparte* with Judgment entered on the 2nd of September 2003. The respondent applied to have it set aside and a fresh trial was held resulting in the Judgement of HW Otto Gulamali mentioned above.

The Respondent was the defendant and opposes this appeal. Their case in the lower Court was that the appellant was the customary owner of land for which he applied for a title in 1978. A survey was done and resulted in the plotting of what became Plot M79 Ndorwa measuring 1.02 Hectares. The respondents aver that the appellant included public land in this survey and as a result he was not allowed to develop the land. In 1992, in a bid to correct the mistake, the appellant applied to have the demarcation rectified by curving off 0.25 hectares which was due to him. The rest was to be reserved as public land. The appellant is said to have connived with officials to instead curve off 0.27 hectares which was named as Plot 36 Ndorwa road. Another piece designated Plot 38 was also created. The respondents aver the appellant has built a residential house on Plot M79. In 1997 he applied for Plot 36 Ndorwa road which was subsequently allocated to him before the respondent rescinded the allocation citing anomalies in the survey that created the plot and stating the allocation was null and void. The defendants lodged a counter claim and prayed for a declaration that the plaintiff was wrongfully registered as Proprietor of Plot 36 Ndorwa road; a permanent injunction restraining the plaintiff from trespassing on the land or registering it again in his names; and costs of the Counter claim.

The trial Magistrate believed the defendants case and entered Judgment in their favour.

The plaintiff being dissatisfied filed this appeal with 7 grounds namely,

1. The learned trial magistrate erred in law and in fact by holding that that the appellant was wrongfully registered as the proprietor of Plot 36 Ndorwa Road.
2. The learned trial magistrate erred in law and in fact by granting an injunction against the appellant and by ordering re registration.
3. The learned trial magistrate erred in law and in fact by granting costs to the respondent and in the counter claim.
4. The learned trial magistrate erred in law and in fact by holding that the plaintiff's certificate of title over plot 36, Ndorwa Road was fraudulently obtained.
5. The learned trial magistrate erred in law and in fact by holding that the applicants application was made without verification by the general purpose committee of the respondent.
6. The learned trial magistrate erred in law and in fact in holding that there was fraud attributable to both officials of the respondent and to the appellant.
7. The learned trial magistrate erred in law and in fact when in reaching his decision he engaged in conjecture and speculation there by basing his decision on erroneous assumptions not supported by the evidence on record.

This is a first appeal. It was held in **Kifamunte Henry vs. Uganda** Supreme Court Appeal No 10/97 (unreported) that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind ... Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law.

I shall consider Grounds 1, 2, 4, 5, 6 and 7 jointly.

The gist of the appellants submission here is that there was a trail showing the acquisition of Plot 36 Ndorwa Road by the appellant. That it is not true there

was any misrepresentation made by him. There was no evidence to show that Plots 36, 38 and M79 all came out of Plot 79. That DW 1, Reuben Ntegyereize, the respondents Ag Town Clerk, who had on behalf of the respondent, written the letter recommending the cancellation of the allocation to the Appellant, did so without authority. It is argued farther that since the appellant is the holder of a certificate of title then there is conclusive evidence of proof of his ownership.

It was also argued that the application for an Injunction by the respondent was misplaced. That the respondent could only defeat the appellant's title if there was proof of fraud (see **Kampala Bottlers vs Damanico (U) Ltd CA No 22/92**). It was also argued that the title of the appellant should not be defeated by reason of irregularity in the procedure of processing it.

Regarding the finding of the trial court that the General Purpose Committee (GPC) of the respondent acted outside their mandate to allocate the land the contention of the appellant is that the actions of the GPC were lawful pursuant to the provisions of S. 30 of **the Interpretation Act**

The Respondents compressed the grounds into 6 issues which they argued seriatim.

In sum the argument was that the initial registration of the appellant on the land was fraudulent and made by a committee that did not have the legal mandate to make the allocation. That the registration was secured fraudulently and did not follow the right procedure especially in the manner in which the surveys were conducted and the plots created.

The submission also tackled the injunctive orders given and whether they were properly given by the trial Court.

I will lay out the relevant evidence.

According to the appellant he saw an advert on the respondent's notice board advertising plot 36 Ndorwa Road. He applied for and was eventually allocated the plot.

PW 2 stated that he is a retired Government Surveyor. On the 30th of March 1978 he received instruction No. C0357 sending him to Kirigime in Kabale Municipality to survey a plot of land belonging to the appellant. The survey resulted in a Plot M79 of 1.02 Ha belonging to the appellant.

After 14 years, on the 17th of November 1992, the same witness, on the application of the appellant, was sent back to the same plot 79M to sub divide off 0.25 Ha. The curved off piece of land was to go to the appellant and the rest to be retained as public land held by the respondent. The instructions PW 2 used were the very same he used in 1978, that is, No. C0357.

PW 2 created 3 plots out of these instructions namely M79, Plot 36 (0.27 Ha) and Plot 38 Ndorwa Road. It is Plot 36 that now forms the suit land.

PW 3, Rutalo Richard, the District Staff Surveyor Kabale, states that the appellant was supposed to get 0.25 Ha but surveyed off 0.27 Ha which was a chunk in excess of the issued instructions. The same witness states there should have been another number for Plot M79 resulting out of this resurvey. According to this witness, when the appellant applied for the subdivision of M79 in 1997, that was a misplaced application because the survey had long been done in 1992. The request made by the appellant to the Council for the sub division of M79 was made in January 1997. The application lodged for the allocation of Plot 36 was done in July 1997.

Orikurungi Augustine, the appellant stated that on the 25th of June 1997 he saw an announcement on the respondent's Notice board advertising plots. His interest was in Plot 36 Ndorwa road which he applied for on the 1st of July

1997. On the 22nd of August 1997 the shortlist with his application named was released. The shortlist was exhibited as P Exh 2 and reads in part,

> '... This is to bring to your attention that the Council has received applications to formalise the under mentioned plots which were customarily owned.
>
> ....
>
> 1. 36 Ndorwa Road Orikurungi A.'

On the 27th of May 1998 the allocation of the plot to the appellant was made by the Kabale General Purpose Committee and the next day a lease offer extended to him. The offer is made by the Town Clerk Kabale Municipal Council. On the 30th of March 1999 a certificate of title for a 5 year term was issued to the appellant by the District Land Board Kabale.

According to DW 1 the appellant wrote to the Town Clerk on the 1st of June 2001 requesting for permission to divide Plot 36 Ndorwa road which measures 0.25 Ha into 3 plots. The Town Clerk delegated the District Land Supervisor to study the request and advise. His (DLS) response was by way of minute to the Town Clerk and reads,

> 'His plot M79 is the one to be subdivided to measure 0.25 Ha ... Plot 36 and 38 Ndorwa Road cover the open council land and therefore the offer to Orikurungi of plot 36 should be nullified.'

It was following this advice that the allocation to the appellant was reversed.

The appellant had earlier on the 27th of January 1997 written to the Town Clerk requesting for permission to sub divide his plot M79 into 2 plots with one to measure 0.77 Ha which would be public land and another 0.25 Ha to belong to the appellant. He wanted to embark on construction as delays had caused his materials to get stolen.

On these facts, it is clear to this court that the appellant made an application to formalise his holding of land ostensibly held by him as customary land and did not just see an advert for a random plot like is represented in his evidence and pleadings. That application thus stated that he customarily owned a piece of land that he knew did not belong to him. it was in this way he initiated the application for Plot 36 Ndorwa Road in 1997 (see P Exh 2).

From the appellants own evidence as plaintiff, it is clear that all the surveys done on the land were outside the survey instructions issued from Commissioner of Surveys, Entebbe.

Firstly in 1978 he should have made provision for Public land out of the survey which he did not. The intention to correct the anomaly in 1992 was instead used to create the three plots M79, Plot 36 and plot 38 again outside the instructions of the Commissioner Surveys in Entebbe. What is more, there should have been a fresh set instructions issued to carry out this resurvey. As it stands, the same instructions employed in 1978 were used in 1992. Even his own Plot M79, from his own witness PW 3, should not exist in its current state but should have got another number if that resurvey had been properly done.

Following from this plaintiff evidence, DW1 states that since Plot 36 was allegedly a sub division of M79 then it should have had a full term lease of 49 years like M79. It was instead created on an initial term of 5 years. On top of that, the new plot surveyed overshot from 0.25 Ha to 0.27 Ha. In addition there are no records for Plot 38 which was created at the same time as plot 36 although the respondent has built a health centre on it.

It is clear to this court that the one party present and central to all these machinations is the appellant.

In the present case the appellant was the registered proprietor for the initial term of the land which was to run for five years from 1st September 1997. It has now run out.

The respondents have pleaded fraud as a defence for the manner in which the Plot was created and allocated to the appellant. The law states that fraud must be pleaded. Secondly as held in **Kampala Bottlers vs Damanico UGSC CA 22/92,**

> '…fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.'

As stated in the instant case the appellant initiated all actions in this matter. He caused the wrong surveys to be made; he wrongfully stated he was the customary holder of Plot 36 whereas not; the land was allocated to him based on this assumption; he caused the creation of plots that should never have existed.

Those were all fraudulent actions of the appellant. They would have been sufficient to nullify his registration as proprietor of Plot 36.

In **Kampala Bottlers** (supra) it was stated farther that *Registered title cannot be set aside for mere irregularity in the preliminary stages. (See Sec. 56 of the Registration of Titles Act). It is fraud that has to be proved where Section 184 (c) of the Registration of Titles Act is involved.*

In my view Fraud has been shown in the instant case.

Regarding whether the DW 1 had the authority to act as he did in recommending cancellation of the allocation, it is clear that he sought the advice of the land supervisor who minuted the advice to him. It was that advice that was eventually communicated to the appellant. The designation of DW 1 did not negate the actions of the appellant already spelt out above. I have not seen

any evidence to move court to hold that DW 1 was acting outside his mandate as Ag Town Clerk in this matter.

It is also my finding that it is true the General Purpose Committee of the respondent should not have acted as the party making allocations for the land considering that there was first an interim land board and later a permanent land board at the time. This again however does not ratify or cure the fraud that has been imputed to the appellant or that the title created was for the wrong term.

For the above reasons ground 1, 2, 4, 5, 6 and 7 must fail.

3. **The learned trial magistrate erred in law and in fact by granting costs to the respondent and in the counter claim.**

The gist of the appellants' submission here is that the appellant was properly allocated and registered as proprietor of the suitland. That the action of DW 1 in declaring the allocation of the land null and void was done ultra vires.

The respondents rely on S. 27 of **the Civil Procedure Act** specifically that costs follow the event and are awarded at the discretion of the Court.

I have already found that the appellant was culpable in this matter and perpetuated the fraud. With respect, the submissions of appellant's Counsel on record are not borne out of the evidence as it stands. My findings in the last grounds refer.

I can therefore find no reason to interfere with the exercise of the discretion of the trial Court which awarded costs to the respondent.

Ground 3 therefore fails.

In the result the appeal is dismissed with costs and the orders of the trial Court upheld.

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Michael Elubu

Judge

14.09.2017