

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CIVIL APPEAL NO. 101 OF 2012

(Arising from Mukono Civil Suit No. 0082/2009)

**PETER NTABAZI KABANDA :::::::::::::::::::::
APPELLANT**

VERSUS

**YUSUF WALUSIMBI
SEMPALA:::::::::::::::::::RESPONDENT**

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

JUDGMENT

This Appeal arises out of the Judgment and Orders of the Chief magistrate Mukono, Her Worship Ikit Mary delivered on 10/07/2012.

The Plaintiff who is now the Appellant had sued the Defendant/Respondent for trespass on his land. He sought orders that the his portion of the suit land be excluded from the Defendant's land, an order directing survey of the Plaintiff's land, an Order directing the Defendant to vacate the Plaintiff's land, a permanent Injunction, General damages for trespass and Exemplary/aggravated damages.

The trial magistrate dismissed the Plaintiff's suit on grounds that he had failed to prove the alleged trespass.

5 Being aggrieved, the Appellant filed this Appeal and cited the following grounds:

1. That the learned Chief Magistrate erred in law in that she shifted the burden of proving the Defendant's case on to the Plaintiff when this conflicted with the law.

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2. That the learned Chief Magistrate erred in law and fact in ignoring the District staff Surveyor's Report when it clearly indicated that Plot 1772 covered part of the Plaintiff's customary tenure.

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3. That the learned Chief Magistrate erred in law and fact when she disregarded the evidence at the locus when it clearly indicated that Plot 1772 covered part of the Plaintiff's customary tenure.

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4. That the learned Chief Magistrate erred in law in that she allowed the Defendant to introduce documents which he did not disclose in his pleadings.

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5. That the learned Chief Magistrate erred in law in that she disregarded the fact that the Defendant's Title contravened the provisions of the law.

6. That the learned Chief Magistrate erred in law and fact in that she failed to evaluate the evidence before the Court.

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Before the hearing of this appeal, the parties filed a joint Scheduling Memorandum in which they indicated the following as issues to be determined by the Court:

10 1. Whether the trial Magistrate erred in holding that there was no fraud by the Respondent.

2. Whether the trial Magistrate erred when she did not rely on the evidence of PW2.

15 3. Whether the trial Magistrate properly evaluated the evidence on record.

4. Remedies available to the parties.

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Strangely, the Appellant did not file submissions on the grounds of Appeal or on the issues much as Counsel for each party requested to be allowed to file written submissions.

25 Instead, it is the Respondent who filed submissions and the Appellant filed a Rejoinder thereto. Both submissions focus

on the issues in the Scheduling Memorandum rather than on the grounds in the Memorandum of Appeal.

5 It has been submitted for the Respondent that no fraud was pleaded by the Appellant in the trial Court. That fraud was not framed as one of the issues for determination and that fraud must be specifically provided in Court.

10 It is accordingly submitted that the Appellant cannot appeal on an issue that he did not raise at the scheduling level or that was not proved in evidence or even in the Appellant's submissions in the lower Court.

15 Secondly that fraud was not specifically proved. That fraud is defined as **“Intentional deceit, a false representation of an existing fact made knowingly, or without belief in its truth, or recklessly, carelessly whether it be true or false, with the intention that the claimant should act on it and which results in damage to the claimant.”**
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It is submitted that the evidence on record reveals that the Appellant does not know the dimensions of his kibanja and cannot therefore tell the level of encroachment.

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That this is shown by the Appellant's own evidence, and that of PW4, the person who sold to him the kibanja. Further that the same PW4's evidence is to the effect that it is Lule (the former landlord to the Respondent) and not the Respondent
5 who carried out the survey leading to the contested boundary now being adjudicated upon. That it is Lule who knew the boundaries. The Respondent cannot therefore be held responsible for fraud.

10 In reply, it was submitted for the Appellant that amongst other complaints, the issue of the Respondent including the Appellant's kibanja in his Plots was central as seen from paragraphs 3(ii), 11, 12, 13, 14, 15, 16 and 17 of the Plaint.

15 Further that the Appellant pleaded illegal inclusion of part of his kibanja in the Respondent's Title and is entitled to a decision on it.

That the Appellant is entitled to cause an appeal upon
20 matters which he pleaded, led evidence on and was aggrieved by the or lack of decision thereon.

It is further submitted that the Appellant be allowed to benefit from Articles 126 (2) (e) of the Constitution and
25 Section 176 (c) and (d) of the R.T.A since he never

sanctioned the inclusion of the part of his kibanja by the Respondent.

5 The Magistrate in deciding on the issues raised stated that the Plaintiff does not know the size of his kibanja interest, so does the person who sold to him.

Further that under Section 59 R.T.A, a Certificate of Title is conclusive evidence of ownership of the land. Ref:
10 **Kampala Bottlers Vrs. Damanico (U) Ltd SCCA 22/1992.**

That fraud must be proved. The transferee must be guilty of some fraudulent act or must have known of such act by
15 somebody else and taken advantage of it.

It has to be established that the registered proprietor gained registration through participation in fraud. She then outlines how each of the parties got his kibanja and efforts to
20 have the same registered.

The evidence of the Plaintiff is that he tried to register his piece in 2008. The Defendant on the other hand surveyed his piece in 2005 and this was done at the instance of the
25 landlord who sold to him.

The magistrate concluded that no evidence of fraud was adduced.

5 The Magistrate then dealt with the evidence at the locus where she observed that there is a hedge separating the parties' homes. According to PW1, PW2 and PW5, the hedge is the boundary between the parties' homes. She however found/observed that the mark stones do not correspond with the hedge but instead some extend to the
10 Plaintiff's kibanja.

In her observation, the encroachment is less than a metre. She also concedes that if the Plaintiff proved that this was part of his kibanja then it cannot be ignored by the law.
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It is my observation that while the trial Magistrate concluded that the possession of the Certificate of Title by the Defendant is conclusive proof of ownership in the absence of evidence of fraud, she did not consider all the evidence and
20 circumstances as a whole.

The parties, it is agreed have each been on his kibanja and they were separated by a hedge which is not disputed (until the Defendant surveyed his part and placed mark stones
25 beyond the hedge into the Plaintiff's kibanja).

Much as the Magistrate concludes that the Defendant played no part in the survey of the land, the same was done to facilitate him obtain a Title to his kibanja. So this was done with his knowledge and complicity.

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There is no evidence that he sought the consent of the Plaintiff when he installed mark stones into the Plaintiff's land. Neither does he adduce evidence to show the boundaries of his kibanja before the survey. In **National**
10 **Provincia Bank Vrs. Anisworth (1965) AC 1175**. It was held that an interest in land must be one capable of surviving the parties and must be recognizable to the whole world.

15 Our law recognises the interests of Kibanja holders/customary tenants/bona fide tenants and they cannot just be wished away. Ref: **The land Act** refers. The same was alluded to in the case of **Kampala District Land Board & another Vrs. National Housing**
20 **Corporation SCCA 2/04**. When it dealt with the question of what are the rights of a tenant in possession?

In **Marsh Investments Vrs. Kachara**, the Court laid out what amounts to fraud as follows:

- 25
- a) Where there is some act of dishonesty or actual fraud.
 - b) Any intent to defeat an interest in land.

Where there is fraud then the Certificate of Title or any proprietorship is void. Finally in **Fredrick Zzaabwe Vrs. Orient Bank SCCA 4/2006**; it was held that the effect of
5 fraud is to make the whole transaction a nullity.

It is my finding that evaluating the evidence as a whole, the conduct of the Defendant/Respondent, the installation of the mark stones after survey on the Plaintiff's side of the hedge
10 without his knowledge or consent amounts to fraud.

That notwithstanding the interests of the Plaintiff are also catered for under Section 176 (c) and (d) of the R.T.A. those provisions protect the rights of those whose land is
15 included in any Certificate of Title by misdescription of any other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide.

20 It was incumbent upon the Defendant before he acquired his Title to cater for the interests and rights of those that would be affected by his actions.

Instead he quietly facilitated acquisition of his Title after
25 survey and now seeks to hide behind Section 59 R.T.A. That

is fraud. The other aspect is that the way he procured his registration amounts to illegality.

Illegality is one of the grounds for challenging a Certificate of
5 Title.

Illegality is;

- (a) An act that is not authorized by law.
- (b) The state of not being legally authorized.
- 10 (c) The state of being unlawful.

The Courts will ordinarily not condone acts of illegality once brought to its attention. Ref: **Makula International Vrs. Cardinal E. Nsubuga.** On the findings already discussed
15 above, the Defendant's activities in procuring his Title were not only fraudulent but illegal.

It is my finding that the findings above are based on the failure by the Magistrate to properly interpret the law based
20 on the evidence and circumstances of the case. Those findings dispose of the whole appeal and it is not necessary to go into discussion of the other issues.

This appeal succeeds. The Judgment and Orders of the
25 Magistrate are set aside.

They are instead replaced with the following orders:

- (1) The Appellant is declared the owner of the portion of the land encroached upon by the Respondent.
- 5 (2) The said portion is to be excluded from the Defendant's Certificate of Registration.
- (3) The Defendant/Respondent is to immediately vacate the said portion of the land.
- 10 (4) A permanent Injunction is issued restraining the Defendant/Respondent, his servants and or agents from trespassing on to and interfering with the Plaintiff's land.
- 15 (5) The land of both the Plaintiff and Defendant is to be surveyed to properly exclude that portion encroached upon. In that respect, the Defendant/Respondent's Certificate of Title is to be cancelled by the
20 Commissioner for land Registration, and a fresh Certificate with the demarcations excluding the encroached portion issued to the Defendant/Respondent.
- 25 (6) The Respondent is to meet the Appellant's costs of this appeal and in the trial Court.

Godfrey Namundi

JUDGE

5 **16/04/2015**

16/04/2015:

Kasiisa Ronald for Appellant

Appellant absent

Respondent present

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Court: Judgment read in open Court.

10 **Godfrey Namundi**

JUDGE

16/04/2015

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