

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 45 OF 2023

(Formerly Masindi Civil Appeal No. 0063 of 2017)

*(Arising from the Judgment of H/W Sayekwo Emmy Geoffrey, the Chief Magistrate, Hoima,
Civil Suit No. 033 of 2012)*

MAKURU ROBERT :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

HANANA MPANGIRE :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

[1] This is an Appeal from the Judgment and orders of the Chief Magistrate of Hoima H.W Sayekwo Emmy Geoffrey dated 3rd of October, 2017.

Facts of the Appeal

[2] The Appellant filed a suit against the Respondent in the Chief Magistrate's Court of Hoima for trespass on his land at **Kyentale, Hoima District** and a declaration that he is the rightful owner of the suit land thereof.

[3] It was the Appellant's case that he is a customary owner of the suit land having acquired the same from his late father, **George**

Byabataguzi who had also acquired it from **Bunyoro Kitara Kigndom** which issued him a receipt as proof of its offer. That he was born on the suit land and had been using the same for grazing and cultivation for many years without interruption until on the 19th April, 2012 when the Defendant trespassed on the land by way of depositing building materials, digging a foundation and constructing a house thereon. He contended that the Defendant's certificate of title to the suit land was fraudulently obtained.

[4] The Respondent/Defendant on his part denied the Appellant/Plaintiff's allegations and contended that he was owner of the suit land having bought it from its previous owners, **Buhanika SIDA Co-operative Savings and Credit Society Ltd (Buhanika SIDA SACCO)**. He filed a Counterclaim that the appellant/Counter Defendant without authority, or any claim of right forcefully entered upon the suit land and planted thereon, maize and continues to interfere with the Counterclaimant's right to land. He prayed for inter alia, a declaration that the Appellant/Counter defendant's claim over the suit land is unlawful and therefore, he is a trespasser and a permanent injunction restricting the Appellant/Counter defendant, his servants, relatives, agents or otherwise from entering upon or remaining on or otherwise interfering with the suit land in any manner whatsoever.

[5] The trial Magistrate on the other hand found that the Respondents/Counterclaimant is the registered owner of the suit land and by virtue of the provisions of the Registration of Titles Act (RTA), the certificate of title is conclusive proof of ownership

of land and can only be impeached if fraud is proved which the Appellant/Plaintiff failed to do. Further, that looking at the history of the suit land, the Respondent/Counterclaimant acquired the suit land from **Buhanika SIDA SACCO** without any encumbrance on the title and therefore, the Respondent/Counterclaimant was a bona fide purchaser for value without notice. The Appellant's claim was therefore dismissed with costs to the Respondent/Counterclaimant.

[6] The appellant was dissatisfied with the Judgment and orders of the trial Magistrate and lodged the present Appeal on the following grounds as contained in his Memorandum of Appeal.

1. *The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus leading him to reach a wrong decision.*
2. *The learned trial Magistrate erred in law and fact when he held that the Respondent was a bona fide purchaser without notice.*
3. *The learned trial Magistrate erred in law and fact when he relied on the evidence allegedly obtained by him while at the locus when there is no record of locus proceedings thus leading him to reach a wrong decision.*

Counsel legal representation

[7] In this appeal, the Appellant was represented by **Mr. Aaron Baryabanza** of **Baryabanza & Co. Advocates, Hoima** while the Respondent was represented by **Mr. Kobwemi Peter** of **Peter Kobwemi Advocates & Solicitors, Hoima**. Both Counsel filed

their respective written submissions for consideration of this Court in the determination of this appeal.

Duty of the 1st Appellate Court

- [8] As correctly put by Counsel for the Respondent, the duty of this Court as a first Appellate Court is well settled. It is to evaluate all the evidence that was before the trial Court and arrive at its own conclusion as to whether the finding of the trial Court can be supported by the evidence that was adduced before the trial court, **F.J.K. Zaabwe Vs. Orient Bank & Ors S.C.C.A. No. 4 of 2006**.
- [9] In this appeal, this Court is therefore required to evaluate all the evidence that was before the trial Court and establish whether the position the trial Magistrate reached on both questions of the law and fact including the remedies were justifiable in the circumstances of the case.
- [10] In this appeal, as can clearly be seen from the grounds of the appeal formulated in the Memorandum of Appeal, the 1st and 2nd ground revolve around how the trial Magistrate evaluated the evidence before him. In the premises, I shall deal with the 1st and 2nd grounds together and then the 3rd ground of appeal separately.

Grounds 1 and 2: Evaluation of evidence

Submissions of Counsel

- [11] Counsel for the Appellant submitted that whereas it was correct for the trial Magistrate to hold that a certificate of title is conclusive evidence of ownership of the land covered by the said certificate of title, had he properly evaluated the evidence on

record and applied it to the facts of this case, he would have found that the suit land formed part of the customary holding of the Appellant and that the Respondent got registered on the said certificate through fraud.

- [12] According to Counsel, the evidence on record is to the effect that the Appellant acquired the suit land from his father **George Byabataguzi** and he had been using it for grazing and cultivation of crops. That at the time of the Respondent's trespass in 2012, the Appellant had planted maize, slashed part of the suit land and fenced it off with barbed wire, as corroborated by the evidence of the other witnesses: **Pw2-Pw5**. It is Counsel's contention that this evidence was never challenged by the Respondent by way of cross examination or otherwise
- [13] Counsel for the Petitioner concluded that at the time of the alleged purchase of the suit land by the Respondent, there was evidence on the suit land to put the Respondent on notice that there were 3rd party interests in the suit land. That therefore, the Respondent's omission to inquire from the neighbours of the suit land, the LCs and the Appellant's relatives who live near the suit land amounted to fraud as his conduct was not of an innocent person. That besides, at the time of purchase of the suit land by the Respondent allegedly from **Buhanika SACCO**, the suit land was not yet registered as admitted by the Respondent himself, who testified that he purchased the suit land in **February, 2011** yet, the evidence on the certificate of title is to the effect that it was issued to **Buhanika SACCO** on the **12th January, 2012**. He

relied on the authority of **Konde Mathias Zimura Vs. Byaruhanga Moses & Anor H.C.C.S. No. 66 of 2007.**

[14] Counsel for the Respondent on the other hand submitted that the Respondent is a registered owner of the suit land having acquired legal ownership from **Buhanika SACCO** and he is therefore protected from ejection under **S.184(c) of the RTA** save for fraud. He relied on the case of **Kampala Bottlers Ltd Vs. Damanico Ltd S.CC.A. No. 22 of 1992.**

[15] Counsel concluded that the Respondent is a bona fide purchaser for value without notice of another claim to the property whether actual or constructive notice of any defect or informality. That in this suit, the Appellant adduced no evidence that would prove any particulars of fraud as against the Respondent but only adduced oral evidence of customary ownership.

Determination of the Appeal

[16] In civil suits, the burden of proof lies on the Plaintiff/Appellant who has to prove his case and the standard of proof is that on the balance of probabilities; **Sebuliba Vs. Co-operative Bank Ltd [1982] HCB 130.** See also **S.101 (1) of the Evidence Act** which provides that

“Whoever desires any Court to give Judgment to any legal right or liability dependent on the existence of facts which he or she assert must prove that those facts exist”.

[17] In relation to fraud in civil matters, it is trite that fraud must be specifically pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in civil

matters. Further, the party must prove that the fraud was attributed to the transferee. It must be attributed either directly or by necessary implication, that is, 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; **Kampala Bottlers Ltd Vs. Damanico (U) Ltd (Supra)**.

- [18] In this suit from which this appeal emanates from, the Appellant raised allegations of fraud against the Respondent and therefore, the burden to prove the alleged fraud to the required standard fell on him, the Appellant.
- [19] In this case the Appellant adduced evidence that he is the customary owner of the suit land which he acquired from his late father where he practiced cultivation of crops and grazing of animals. That by 2009, the entire piece of land was fenced though some of the fencing materials were uprooted in certain places. His evidence was corroborated by that of **Ephraim Byakisaka** (Pw2), **Debra Musinguzi**, a neighbour (Pw3), **Stuart Kyakutegekire**, also a neighbour (Pw4) and **Byabagambi Gerald** (Pw5), a police scene of crime officer who visited the scene upon he Appellant reporting to police a case of malicious damage when the fence of the suit land was uprooted.
- [20] According to **Byabagambi Gerald** (Pw5), it was on 24th January, 2013 when the Appellant reported a case of malicious damage and he visited the scene at Kyentale village to ascertain the allegations. He found an old barbed wire fence of dry poles and a garden of sweet potatoes which had been uprooted and a new

fence erected. He took photographs of the scene which were exhibited in Court as **P.Exh.1**.

- [21] It is apparent from the evidence on record that the suit land is comprised of what was public or government land (see the evidence of Dw2 and Dw3) though the Appellant claim that his father **George Byabataguzi** who died in the 1980 as per (Pw3 and Dw3) got it from Bunyoro Kitara Kingdom. On record, however, there is no such proof that the Appellant was offered this particular suit land at Kyentale in view of the absence of the land details on the Bunyoro Kitara Kingdom land receipt which the Appellant relied on. In the premises, since there is overwhelming evidence that the Appellant was in occupation and use of the land, I proceed on the basis that the suit land was comprised of public land whereby under **S.24 of the Public Lands Act 1969**, it was lawful for a customary occupant to occupy the public land without a lease, grant, or license from the government, see also **Muwulize Growers Co-operative Society Ltd Vs. Robert Rwenzigye C.A.C.A. No. 13 of 2014** where it was held that

“Under this Section (S.24(1) of the Public Land Act) it was lawful for a customary occupant to occupy free public land without a lease, grant, or license from the government. The government was prohibited from granting in freehold or leasehold any public land that was lawfully occupied under customary occupants”.

- [22] In the instant case, the Appellant aged 55 years, pleaded and testified that he was born on the suit land and that his late father gave it to him before he died. In the premises, I find that **S.24 of**

the Public Lands Act applied to him in view of the fact that the **Land Reform Decree 1975** permitted the system of occupying public land under customary tenure to continue though only at sufferance. In the case of **Mark Matovu & 2 Ors Vs. Mohammed Sseviiri & Anor, Civil Appeal No. 7 of 788 (CA)**, it was held that customary tenure can be established by the cultivation of seasonal crops and related other activities on the land.

- [23] In the present case, the appellant's activities on the suit land as confirmed by **Pw5** were not challenged by the Respondent. The Defendant (**Dw1**) at **page 15 of the typed proceedings** state thus:

"Before I could do anything, found Makuru (Appellant) had planted there maize".

Sabiti Christopher (**Dw2**), then aged 70 years, at **page 16 of the typed proceedings** stated thus:

"I know Makuru who is a resident of Kyentale. He was born there I grew up knowing this land as public land. If Makuru was grazing there he was grazing on public land I remember that one Makuru fenced this land. He was never stopped by LC III Chairperson. The same fence was removed by someone I do not know".

During cross examination, he stated further thus:

"The barbed wire fence had been erected around 2007 and 2008".

- [24] The above in my view is sufficient evidence that by virtue of the Appellant's activities on the land, it is sufficient evidence that he

occupied the suit land under customary tenure and therefore, thus being the owner of such interest thereof.

- [25] The Defendant however denied being the one who destroyed the Appellant's barbed wire fence and the crops thereon. However, it is the evidence of **Stuart Kyakutegekire** (pw4) that the suit portion of the land is in the middle of the Appellant's land. He found the Defendant pour building materials on the land something he used to do at night.
- [26] Considering the circumstances of this case which are to the effect that it is undisputed that it is the Defendant who was building on the suit land, I have no reason for not believing the Appellant's case as put across by **Pw4** that it is the Respondent who must have been behind the uprooting of the barbed wire fence over the suit land.
- [27] Counsel for the Respondent however viciously submitted and relied on the plea of bona fide purchase in favour of the Defendant who claim that he purchased the suit land from **Buhanika SACCO**, the registered proprietor of the suit land.
- [28] As both Counsel rightly submitted, it is well established that for Defendant to be deemed a bona fide purchase of land whose title is unimpeachable on grounds of fraud, he has to prove all the elements of a bona fide purchaser laid down in **Hannington Njoki Vs G.W. Musisi H.C.C.S. No. 434 of 1996 [1999] KALR 794** namely:
- (i) That the Defendant holds a duplicate certificate of title

- (ii) That he or she purchased the property for valuable consideration
- (iii) That he or she bought in good faith without any defect in title
- (iv) That the vendor was the former registered owner of the property.

The onus of establishing the plea of a bona fide purchaser lies on the person who sets it up; **David Sejjaaka Nalima Vs Rebecca Musoke [1992] KALR 736**

“Purchaser for value” as defined in **Grace Asaba Vs. Grace Kagaiga S.C.C.A. No. 14 of 2014** is

“purchase of value means that valuable consideration must be given to earn immunity from equitable claimants. Value means any consideration in money or money worth” *“Good faith”* as defined in **Obira & 6 Ors Vs. Okumu & Ors H.C.C.A. No. 43 of 2018** is -

“ A person is considered a purchaser in good faith if he or she buys the property without notice that some other person has a right to or interest in such property and pay its fair price before he or she has notice of the adverse claimants and interest of another persons in the same property ...”

“Without Notice” means that the purchase must have no notice of the existence of any equitable interest. He or she must have neither actual, or constructive notice nor imputed notice; **Grace Asaba vs. Grace Kagaiga (Supra)**.

- [29] In the instant case, the Respondent/Defendant testified that he bought the suit property from **Buhanika SACCO** in **February, 2011**. That it was bushy and they opened its boundaries while led by the SACCO officers and the local council officials.
- [30] The Respondent did not however, adduce or offer any evidence in support of the above claims. In the first instance, he did attach to his pleadings or exhibit in evidence a copy of his purchase agreement to prove that he purchased the property for valuable consideration and how much. Secondly, from the certificate of title he exhibited (**D.Exh.DIDI**), it is evident that the said **Buhanika SACCO** got registered on the suit land on 12th January, 2012 yet as per his evidence, he purchased the suit land in February, 2011 signifying that at the time of sale, the vendor was not the former registered owner of the property. Lastly, the Defendant/Respondent himself testified that the neighbours to the suit land were a one **Tamale** on the North, **Makuru** on the South and **Kamita** on the West and that they signed on the purchase agreement. However, as I have already observed, the agreement was not exhibited, so this Court is not able to ascertain the Respondent's claims on this aspect and none of the neighbours testified to state that they witnessed the sale and signed on the agreement including **Makuru** and **Bitamale** who testified in Court and neither were they cross examined on that aspect of the Agreement.
- [31] On the other hand, it is the clear evidence of the Appellant, **Pw3** and **Pw4** that neither the neighbours to the suit land nor LCs were consulted as a part of due diligence on the part of the Respondent

prior to the purchase of the suit land. **Sabiti Christopher** (Dw2) contradicted **Christopher Bitamale** (Dw3) on the claims that the Appellant was ordered by the LC III to remove the barbed wire which he did. Dw2 testified clearly that the Appellant was never stopped by LC III Chairperson fence the land.

[32] The totality of the above clearly show that the Respondent failed to prove that he is a bona fide purchaser for value as he failed to satisfy the legal requirements for one to qualify as one. Had he carried out due diligence before he allegedly purchased the suit land as he claims, he would have been able to know that the suit land had 3rd party claims and he would not have purchased the same, and if at all he did carry out any due diligence then, it was a perfunctory one which still must have brought to him notice of the 3rd party interest on the land but ignored it under wilful blindness.

[33] In conclusion, as was held in **John Katarikawe Vs. William Katwiremu [1977] HCB, Buhanika SACCO's** registration on the suit land and the Respondent's purchase of the suit land with glaring evidence of the Appellant's unregistered interest hereon was intended to defeat the Appellant's interest and therefore amounted to fraud. Though the said **Buhanika SACCO** is not party to this suit, the Respondent did not bring any officer of the said SACCO to support his claims and or rebut the appellant's claims especially, in regard to the Appellant's particulars of fraud which are that the Respondent is hiding behind **Buhanika SIDA SACCO** and obtained title which he stealthily transferred into his names with the view of defeating his interest in the suit land. As rightly

observed by Counsel for the Appellant, the fact that the Respondent refused to exhibit the agreement upon which he purchased the suit property leads to an irresistible suggestion that the Respondent could have fraudulently processed a certificate of title over the suit land in the fictitious name of **Buhanika SACCO** and thereafter transferred it into his names to mislead the public and this Court, that he is a bona fide purchaser for value which he is not.

[34] The trial Magistrate merely considered the fact that the Respondent was the registered owner by virtue of the certificate of title he held and ignored the provisions of **S.184(c) RTA** where, with the available evidence that such certificate of title was obtained through fraud, it is impeachable. Had he considered the provisions of **S.184 (c) RTA** and applied them to the facts, he would have found that the certificate of title in question was procured through fraud and the Respondent is not a bona fide purchaser for value.

[35] In the premises I find the 1st and 2nd grounds of appeal having merit and they are accordingly allowed.

Ground 3: The learned trial Magistrate erred in law and fact when he relied on the evidence allegedly obtained by him while at locus when there is no record of locus proceedings thus leading him to reach a wrong decision.

[36] In his Judgment, the learned trial Magistrate found and held that

“During locus there was no evidence to show that the Plaintiff (appellant) occupied or anything to show that he is using the

land in dispute. The land is bushy save for the fence portion of the land”.

In **Rwanseri Abumereki Vs. Mbabazi H.C.C.A. No. 9 of 2003**, it was held that the practice of visiting locus is to check on the evidence as given by the witnesses in Court and not to fill the gaps in their evidence for them. **Practice Direction No. 1 of 2007** guides Courts, among other things, to record all proceedings, any observations, views, opinion or conclusion of the Court including drawing sketch plan, if necessary at the locus in quo.

- [37] In the instant case, whereas it is true that the typed record lack or missed the locus proceedings, the hand written script is clear that locus visit took place on 3rd April, 2017 and both Counsel for the parties are recorded to had been present.
- [38] However, as correctly observed by Counsel for the Appellant, the trial Magistrate did not record any of his observations, views, opinion or conclusion of the Court despite drawing the sketch plans/map depicting the Appellant and the Respondent’s respective versions of the case. As a result, there is nothing on record to show how the trial Magistrate came to reach the conclusion he reached that the Appellant neither occupied the land nor was using the land in dispute. It is in fact, evident from the locus proceedings though inadequate that the Appellant showed the trial Magistrate the positions of his uprooted fence and there was also evidence of his cultivation of crops.
- [39] Nevertheless, though the manner in which the trial Magistrate recorded the locus proceedings is wanting and therefore unsatisfactory, the entire body of evidence adduced in Court and

in particular, that of the Police scene of crime officer (**Pw5**) which in my view would substitute the locus visit and the proceedings. **Pw5** took photographs of the scene (**P.Exh.1**) and in my view, they were sufficient for the trial Magistrate to consider along other evidence adduced in Court and reach a fair decision for the parties.

[40] In view of the above, I find that despite the misdirection of the trial Magistrate at locus, the evidence adduced by the witnesses in Court clearly proved that the Appellant was the lawful customary owner of the suit land, the certificate of title over the suit land was procured fraudulently and therefore, Judgment ought to have been entered in favour of the Appellant.

[41] In conclusion, I find the entire appeal having merit and it is accordingly allowed with the following orders:

1. The Judgment and orders of the trial Magistrate are accordingly set aside and substituted with an order that the suit land belongs to the Appellant.
2. Consequentially, the Commissioner Land Registration is directed to cancel the Respondent's certificate of title comprised in **Block 20, Plot 77 Land at Kyentale, Buhanika, Hoima District** for it was procured through fraud.
3. A permanent injunction issues against the Respondent and his agents restraining them from trespassing on the suit land.
4. An eviction order against the Respondent and his agents issues in case of default to vacate the land.

4. Trespass is actionable per se, that is, in an action of trespass, if proved by the Plaintiff he or she is entitled to recover damages even though he or she may not have led evidence that he suffered loss. Nevertheless in this case, it is evident that the Appellant had fenced off the entire of the suit land but the fence was maliciously uprooted and his crops that comprised of sweet potatoes were destroyed. He has definitely suffered loss and has been inconvenienced in the utilisation of his land and as a result, he must have suffered mental stress and trauma. As a result, I award the Appellant a sum of **UGX. 10,000,000=** (ten million shillings only).
5. The Appellant is also awarded costs in both the Appellate Court and the lower Court.

Dated at Hoima this **18th** day of **August, 2023**.

Byaruhanga Jesse Ruggyema
Judge