

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

**LAND DIVISION**

**CIVIL APPEAL NO. 50 OF 2021**

**(ARISING OUT OF CIVIL SUIT NO. 121 of 2012 IN THE CHIEF MAGISTRATE'S  
 COURT AT ENTEBBE)**

**1.MELINDA WILTSHIRE BATARINGAYA**

**2.NSUBUGA AIDA NANYANZI-----APPELLANTS**

**VERSUS**

**1.RASHID KATO**

**2.ASHA BABIRYE-----RESPONDENTS**

**Before: Hon. Lady Justice Olive Kazaarwe Mukwaya**

**JUDGMENT**

The Appellants, Melinda Wiltshire Bataringaya and Nsubuga Aida Nyanzi being dissatisfied with the judgment and orders of Her Worship Nakitende Juliet, Chief Magistrate, made on the 14<sup>th</sup> of September 2021, lodged an appeal to this court.

**BACKGROUND TO THE APPEAL**

The suit was filed in 2012 before the trial court. The Respondents, who are twins, were minors and their paternal uncle, Erias Musoke, brought the suit as next friend. As it turned out, the twins attained majority age before the hearing commenced and the plaint was amended to allow them prosecute the suit on their own behalf. During the decade that the suit was pending before the trial court, the 1<sup>st</sup> Appellant got herself registered on the suit land on the 5<sup>th</sup> December 2017. Currently, the suit land is no longer a Kibanja, as it initially was, but is comprised in Freehold Register Volume Wakiso 3640 Folio 22 Busambaga Plot 29 land at Katabi.

The twins are biological children of the late Jamada Nsubuga who died on the 13<sup>th</sup> August 2006. At the time of his death, he was resident on the suit land, which he had acquired by way of purchase, together with the 2<sup>nd</sup> Appellant, his wife. They lived with their three daughters, who are half-sisters to the Respondents.

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About two years after Jamada Nsubuga died, the 2<sup>nd</sup> Appellant sold the suit property to the 1<sup>st</sup> Appellant on the 16<sup>th</sup> May 2008, for a sum of UGX 25,000,000/=. According to the agreement, fifteen witnesses were present, including several leaders on the Local Council of Katabi, Busambaga. With the proceeds, the 2<sup>nd</sup> Appellant paid for her needs and bought an alternative piece of land. Almost a year later, on the 8<sup>th</sup> May 2009, vide Administration Cause No. 196 of 2009, she obtained letters of administration to the late Jamada Nsubuga's estate, as his widow.

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Meanwhile, three of the deceased's siblings; Erisa Musoke Nsubuga, Said Kijjambu Umar and Taqqiya Namubiru protested the sale by lodging complaints with the Resident District Commissioner, the Administrator General and the Police. These offices responded by writing to the Chairperson LC1 Katabi- Busambaga and the Officer in Charge of Kajjansi Police Station on the 4<sup>th</sup> December 2008, 27<sup>th</sup> January 2009 and 2<sup>nd</sup> February 2009. The purpose of the letters, respectively, was to summon the 1<sup>st</sup> Appellant, as purchaser; to direct that investigations be carried out into the claim of malicious damage of property levied against her by Said Kijjambu Umar; and to appoint the three siblings as interim administrators to their late brother's estate, in a bid to preserve the estate property.

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The 1<sup>st</sup> Appellant maintained that she is a bona fide purchaser for value and she conducted due diligence prior to the purchase. A position the Respondents opposed. They contended that the Appellants were aware that the suit property formed part of the estate of the late Jamada Nsubuga and that the Respondents, as his children, had a beneficial interest in it.

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After hearing the evidence of the parties' witnesses and visiting the locus in quo, the learned trial Chief Magistrate found in favour of the Respondents. She held that the 1<sup>st</sup>

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Appellant has no interest in the suit land since the sale was null and void under **section 26(1) of the Succession Act Cap 162**. And she issued a permanent injunction against her, awarded a sum of UGX 2,000,000/= in compensation for destruction of structures to the Respondent, and general damages of UGX 8,000,000/= plus interest and costs.

5 The Appellants listed 12 reasons for their dissatisfaction with the trial court's decision.

#### GROUNDS OF APPEAL

- 10 1. The learned Chief Magistrate erred in law when she failed to consider that the Respondents had no locus standi to challenge the sale of the suit land comprised in FRV WAK 3640 Folio 22 Busambaga Plot 39 land at Katabi.
2. The learned Chief Magistrate erred in law and fact when she ruled that the 2<sup>nd</sup> Appellant did not prove her marriage to the late Jamada Nsubuga whereas it was not in dispute.
- 15 3. The learned Chief Magistrate erred in law and fact when she held that the suit land constituted part of the estate of the late Jamada Nsubuga, was not matrimonial property and could not be sold by the 2<sup>nd</sup> Appellant.
4. The learned Chief Magistrate erred in law and fact when she disregarded the contradictions and inconsistencies in the Respondent's case regarding their residence prior to the death of the late Jamada Nsubuga.
- 20 5. The learned Chief Magistrate erred in law and fact when she held that the 1<sup>st</sup> Appellant unlawfully purchased the suit land from the 2<sup>nd</sup> Appellant.
6. The learned Chief Magistrate erred in law when she held that the 2<sup>nd</sup> Appellant did not have capacity to deal with the suit land and that the sale violated the Succession Act.
- 25 7. The learned Chief Magistrate erred in law when she held that the suit property could not lawfully be sold.
8. The learned Chief Magistrate erred in law when she held that the 1<sup>st</sup> Appellant did not acquire any legal interest in the land and that the sale of the suit land by the 2<sup>nd</sup> Appellant without the grant of letters of administration rendered the same null and void.
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9. The learned Chief Magistrate erred in law when she indirectly impeached the 1<sup>st</sup> Appellant's title comprised in FRV WAK 3640 Folio 22 Busambaga Plot 39 at Katabi in absence of fraud and without jurisdiction to do so.

10. The learned Chief Magistrate erred in law and fact when she issued a permanent injunction restraining the 1<sup>st</sup> Appellant from laying claim to the suit land.

11. The Chief Magistrate erred in law when she failed to consider that the 2<sup>nd</sup> Appellant's acquisition of letters of administration ratified the previous sale of the suit land if the same constituted part of the estate of the late Jamada Nsubuga.

12. The learned Chief Magistrate erred in law and fact when she awarded unjustified general damages to the Respondents.

### REPRESENTATION

The Appellants were represented by M/S JByamukama & Co. Advocates while the Respondents were represented by M/S Magna & Co. Advocates.

### DUTY OF FIRST APPELLATE COURT

It is the duty of the first appellate court to give the evidence led by the trial court, a thorough reevaluation and draw its own conclusion. See Kifamunte Henry v Uganda (Criminal Appeal-1997/10) [1998] UGSC 20 (15 May 1998) where it was held that;

**'The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.'**

### PRELIMINARY OBSERVATION OF THE COURT

#### Jurisdiction of the trial court

Counsel for the parties filed submissions which ably augmented the grounds for and against this appeal. I noticed immediately that the description of the suit land had changed from Counsel for the Appellants' submission. It had graduated from a Kibanja to Freehold.

This fact was brought to the attention of the trial court at page 50 and 51 of the record of appeal. Counsel for the Respondents objected to the admission of the certificate of title since it was not originally part of the Appellants' pleadings and the learned trial Magistrate overruled him. It is on the record as DEXH.4. The batch of documents demonstrating the conversion process from customary tenure to freehold was admitted and marked DEXH 5A-5R, see pages 103- 135 of the record of appeal. According to these exhibits, the process commenced on the 23<sup>rd</sup> June 2008 with a request to survey written by the 1<sup>st</sup> Appellant to the Town Clerk, Entebbe Municipal Council, and ended 9 years later with her registration on the title on the 5<sup>th</sup> December 2017.

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Therefore, as of 5<sup>th</sup> December 2017, the subject matter land before the trial court was no longer a Kibanja but registered Freehold land. And certainly its value had increased. By the same token, the protections under the law provided for persons with registered interests in land became due to the 1<sup>st</sup> Appellant. **Section 59 of the Registration of Titles Act cap 230** provides;

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*59. Certificate to be conclusive evidence of title*

*No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.* (I have underlined for emphasis).

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Relatedly, **section 64(1) of the Act** provides;

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*64. Estate of registered proprietor paramount*

(1) *Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud, hold the land or estate or interest in land*  
5 *subject to such incumbrances as are notified on the folium of the Register Book constituted by the certificate of title, but absolutely free from all other incumbrances, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title*  
10 *of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.*

These succinct provisions of the law direct that to impeach the 1<sup>st</sup> Appellant's title, fraud had to be proved against her, to a standard higher than a balance of probabilities. See;  
15 **section 77 of the RTA and Frederick Zaabwe v Orient Bank & 5 others SCCA No. 4 of 2006.**

The judgment of the trial court is silent on whether the 1<sup>st</sup> Appellant was fraudulent in acquisition of the Freehold title and yet it did proceed to grant the Respondents the  
20 following remedy at page 22 of the record of appeal;

'a) A declaration that the 1<sup>st</sup> defendant has no interest in the suit land and that the sale is null and void for fraud and lack capacity on the part of the 2<sup>nd</sup> defendant'

25 In my view, this declaration amounted to impeachment of the 1<sup>st</sup> Appellant's title, which the learned trial Magistrate had not interrogated in her judgment and was not clothed with the jurisdiction to handle under **section 207(1)(a) of the Magistrates Courts Act Cap 16;**

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207. *Civil jurisdiction of magistrates*

(1) *Subject to this section and any other written law, the jurisdiction of magistrates presiding over magistrates' courts for the trial and determination of causes and matters of a civil nature shall be as follows—*

(a) *a chief magistrate shall have jurisdiction where the value of the subject matter in dispute does not exceed fifty million shillings and shall have unlimited jurisdiction in disputes relating to conversion, damage to property or trespass;*

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**With these preliminary observations, I am persuaded that the judgment and orders of the learned trial magistrate cannot stand. They are hereby set aside. To seek redress, the Respondents ought to file a suit in a court of competent jurisdiction to impeach the 1<sup>st</sup> Appellant's title as provided for under the law. This appeal to that degree, partially succeeds. Resultantly, the Appellants are awarded 40% of the costs.**

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**Olive Kazaarwe Mukwaya**

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**JUDGE**

**14<sup>th</sup> March 2023**

**Delivered by email to Counsel for the parties.**