IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: S.W.W. WAMBUZI C.J, A. ODER, J.S.C., H. PLATT, J.S.C)

CIVIL APPEAL NO. 22/92
BETWEEN

KAMPALA BOTTLERS LTD :::::::::::::::::::::::::::::::::::::: APPELLANT
AND
DAMANICO (U) LTD:::RESPONDENT

JUDGEMENT OF WAMBUZI, C,J:
The Appellant, a limited liability company, brought an action in the High Court against the respondent, also a limited liability company, seeking an order of eviction and general damages in trespass.

Briefly the facts were that the appellant is the registered proprietor of approximately 1.030 hectares of land comprised in Lease hold Register Volume 1972, folio 2, Plot No. M 271, Nakawa Industrial Area, Kampala. The appellant alleged that in November, 1991, the respondent trespassed on the appellant's land by clearing and grading the same.

The respondent admitted entry upon the land in question but denied such entry was wrongful as it was by virtue of a grant of a lease in the suit property for a period of five years. The respondent alleged that the certificate of title held by the appellant of the suit property was obtained by fraud.

At the trial, the sole issue was whether or not the appellant obtained its title of the suit property by fraud.

The learned trial Judge found there was fraud and gave judgement in favour of the respondent. The appellant -has now appealed to this Court against the decision of the High Court on two grounds, namely,
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"1. That the learned trial Judge erred in law in holding that the certificate of title was obtained by fraud.

2. The learned trial Judge erred in law in not awarding the reliefs prayed for."

In arguing the first ground, Dr. Byamugisha for the appellant submitted that by a letter dated 13th October, 1988, exhibit P.2, the appellant who had initially obtained a lease in respect of the suit property was granted an extension of two years with effect from 1st May, 1988. The Commissioner of Lands was accordingly notified by letter, exhibit P.3. Apparently, it was necessary to re-survey the plot, which was done. The City Council of Kampala demanded ground rent by letter dated 28th August, 1991 which was paid as per exhibit P.7. Exhibit P.1

which is the certificate of title was accordingly prepared and was executed on 26th September, 1991. Learned Counsel submitted that by the time the respondent was granted a lease of the same plot, the appellant had already been registered as proprietor. Learned Counsel submitted that the City Council dealt with the appellant as if it was not necessary to apply for extension of the lease as the lease offer had not been utilized because of the re—survey which had not been completed until 1991. Learned Counsel referred us to sections 184, 42 (4) and 56 of the Registration of Titles Act to the effect that the title of a registered proprietor cannot be impeached because of irregularities, that fraud must be proved. No particulars of fraud were pleaded and there is no evidence to support the learned trial Judge's finding of fraud.

For the respondent, Mr. Kateera submitted in effect that a certificate of title is evidence of a grant without which the certificate is meaningless. Learned Counsel argued in effect that the grant made to the appellant expired in 1990 and was not renewed. Accordingly the lease subsequently prepared by the Land Office was without authority.

It is not in dispute that the appellant was initially granted a lease over the suit property. The dispute is whether or not this lease was extended as claimed by the appellant. It is also not disputed that the appellant is the registered proprietor but it is claimed for the respondent that the registration was obtained by fraud.

In so far as is relevant, section 56 the Registration of Titles Act provides as follows:—

"……and every certificate of title issued under the provision herein contained shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in the land therein described in is seized or possessed of such estate or interest ……."

According to these provisions, it would appear to me that production of the certificate to title in the names of the appellant is sufficient proof of ownership of the land in question unless the case falls within the provisions of section 184 of the Registration of Titles Act. The section provides as follows

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under the provisions fo this Act, except in any of the following cases—

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of lessor against a lessee in default;

(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud

(d) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof bona fide for value;
(e) the case of a registered proprietor claiming under a certificate of title prior in date of

registration under the provisions of this Act in any case in which two or more certificates of title may be registered under the provisions of this Act in respect of the same land,

and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the grantee, owner, proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding."

In the first place and needless to say, lack of grant is not one of the grounds for impeaching the title of a registered proprietor on the wording of this section and also of section 56 to which I referred earlier in this judgement. I must, therefore, reject Mr. Kateera's argument that a certificate of title is meaningless unless a grant has been shown to have been made in respect of the land in question.

Secondly, on the wording of section 184 it would appear that an action for recovery of land can lie or be sustained only by "a person deprived of any land" against the person registered as proprietor of such land through fraud."

In the case before us it must be show that the appellant was registered as proprietor of the land through fraud. In its written statement of defence, the respondent pleaded in paragraph 6 as follows,

"It is submitted that the certificate of title annexed to the plaint was obtained by fraud as since 1990 the City Council of Kampala never sat to give further extension of the lease to the plaintiff."

Normally, where fraud is pleaded, particulars of the fraud must be given. It was submitted before us that the particulars of the fraud in this case were the fact that the City Council did not sit since 1990 to give further extension of the lease to the plaintiff.

I must confess I am a little at a loss as to who was being alleged to have been fraudulent.

Be that as it may, on the question of fraud which in a way was the sole issue in the lower Court, the learned trial Judge had this to say,

"The spring board of the 1st issue is to get the meaning of 'fraud'. It is well established law that fraud means actual fraud or some act of dishonesty. In Waimiha Saw Milling Co. Ltd.vs. Waione Timber Co. Ltd. (1926) AC 101 at p. 106. Lord Bushmaster said 'Now fraud implies some act of dishonesty' . Lord Lindley in Assets Co. vs. Mere Roihi (1905) Ac 176 states, 'Fraud in these actions (i.e. actions, seeking to effect (sic) a registered title) means actual fraud, dishonesty of some sort not what is called constructive fraud an unfortunate expression and one may opt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar to those which flow from fraud"

This case was applied by our Court of Appeal in David Sejjaaka vs. Rebecca Musoke, CA No. 12 of 1985.

Reviewing the whole evidence and both counsels' submissions about the issue of fraud and given the available legal issues, I think Mr. Kateera's submissions are unassailable. There was

fraud and it was committed by someone in the land Office. That someone had by design incorporated the minute quoted in the lease and persisted in sending the lease document for execution by the Council. The Council Chairman and Town Clerk must have perused the lease document containing the said minute. They are supposed to peruse it in any case before signature. However, they went ahead and executed the documentation 8.10.91. The minute is the root from which the offer and certificate of title derive their validity. This has been held to be the legal position in Livingstone Sewanyana vs. Martin Aliker, CA No. 4 of 1990 (SC). In this case the plaintiff under KCC minute DC 20/233/88 dated 7.9.88 was given a two year lease effective from 1.5.88. For reasons stated the Plaintiff did not apply for extension and there was actually no extension granted by the Council. The Defendant under Mm DC 9.8.91 of 9.9.91 was granted a lease for an initial period of 3 years from 1.10.91, (Exh. D.1.). Then out of the blue on 8.10.91, the plaintiff was granted a lease fro two years from 1/8/91 quoting KCC Mm DC/233/88 dated 7/9/88 (Exh. 15). This lease was processed by the Land Office.

I agree with Mr. Kateera that the Land Office has no general agency to prepare certificates of title. They only prepare a certificate where they have been instructed by the City Council which is the controlling Authority.

I refer to section 17 of the Public Lands Act.
In this particular case evidence in this respect was adduced by DW1 when he stated that a lessee whose lease has expired before the survey (in this case a re—survey) has been completed, it would still be necessary to re—apply after that re—survey and the application be subjected to further consideration by the Council. In this case there were no instructions contained in any minute found on the preparation of the certificate which was issued on 8/10/91. The Land Office by design quoted an earlier minute on which an expired grant had been based. I say by design because I cannot think of any other explanation why a basic matter like a minute should not have put them on notice. I also fail to understand why the Council Chairman and the Town Clerk signed the lease without perusing it as they ought to. Had they perused it they would have found out that the lease was not a wrong minute (sic) and that barely a week earlier the City Council had granted a lease offer to the Defendant of the same plot …….

The way the 1st issue has been framed does not compel me to determine who committed the fraud. The facts disclosed an irregularity surrounding the grant so grave as to amount to a dishonest dealing with the grant. Both the Land Office and Council Chairman and Town Clerk share responsibility for this by their refraining from carrying out basic inquiry.

In my considered view, there is no sound reason disclosed why the Land Office and that of the Council Chairman and Town Clerk could not peruse the minute under which the Plaintiff's certificate was processed. That was the basic pre-requisite. They refrained from doing that and the result was fraud. I therefore find that fraud was committed.

Dr. Byamugisha submitted that even if there had been any fraud on the part of the Council, that fraud could not be used to impeach the Plaintiff's title.
In support of his argument, he referred to ss 56 and 184 of the Registration of Titles Act.

I wish to answer Dr. Byamugisha's argument by the following quote from the case of Robert Lusweswe vs Kasule&Anor HCCS No. 1010 of 1983, where Odoki J. as he then was said,

'Therefore while the cardinal rule of registration of titles under the Act is that the Register is everything, the court can go behind the fact of registration in cases of actual fraud on the part of the transferee."

Taking the last point first and with respect to the learned trial Judge, I do not think that Dr. Byamugisha's point was answered by the authority cited. If anything, the authority supports Dr. Byamugisha's point and as already indicated in this judgement, 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.

Returning to the judgement of the learned trial Judge, he seems to have held that there was fraud because he could not otherwise understand how all those concerned would fail to notice the duration of the lease which was indicated in the Minute of the City Council Meeting. He went on to find fraud committed by someone in the Land Office by the Chairman of the Council and by the Town Clerk. The latter two apparently for failure to notice the error.

With respect, this verges on constructive fraud if there was any fraud rather than actual fraud as required by the authorities referred to in the lower court. Besides, it was not shown nor did the learned trial Judge find that the appellant was guilty of any fraud or that he knew of it.

Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. The learned trial Judge did not indicate the standard at which fraud had been proved. There may have been negligence on the evidence before the learned trial Judge but equally all those concerned may have thought that the appellant was entitled to a term after the re-survey as the offer had not been utilised. With respect I am unable to say that fraud was proved against the appellant or anybody for that matter.

I would allow the appeal, set aside the judgement and the judgement and Decree of the High Court and substitute therefore judgement for the appellant with costs her and in the Court below.

There appears to be evidence that trespass had at some stage ceased and therefore there is no necessity for an eviction order. I would otherwise remit the case to the High Court for assessment and grant of general damages for trespass. As both Oder and Platt JSC agree with my proposed orders it is so ordered.

Given under my hand and the seal of this Court this 12th day of January 1993.

S.W.W. WAMBUZI
CHIEF JUSTICE

JUDGEMENT OF PLATT, J.S.C:

The Kampala Bottlers Ltd, a limited liability company, brought an action against Damanico (U) Ltd. praying for the eviction of Damanico (U) Ltd. general damages in trespass and costs.

There is no dispute that the Plaintiff had originally been granted a lease of a parcel of land registered in leasehold register Vol. 1972, Folio 2, Plot No. M.271, Nakawa Industrial Area. The lease was extended from 1988 for two years with effect from 1st May 1988 (see exhibit P. II). That was followed by a notification to the Commissioner of Lands, from the City of Kampala, asking the Commissioner to effect the extension. This notification was given on 28th February, 1989 (see exhibit P.111). However when the extension was to be effected, a complaint was received from the Foods & Technology Department of the Ministry of Rehabilitation, that the Plaintiff had encroached upon the Ministry's land. Consequently, the extension was not carried out, because of the necessary re-survey which took some time. The lease expired before the survey was completed in early 1991. There was some delay in obtaining prints of the new survey. But it seems that on the basis of the old lease, there followed a demand for land premium and ground rent dated 28th August 1991 for shs 705,000/= (see exhibit PVI). The money was paid on 4th September, 1991. On 26th September, the Plaintiff was given a lease for two years from the 1st day of August 1991 which was registered on 8th October, 1991.

In the meantime, on 15th July, 1991, the Defendant Damanico Ltd. applied for a plot on which to erect a bottling plant. On 31st October 1991 the Defendant was allocated Plot M. 271 Nakawa Industrial Area with a lease for three years extendable to 49 years. The Defendant was told to contact the Commissioner of Lands for the preparation of a formal lease offer. Accordingly, the Commissioner for Lands made out a lease offer on 7th November, 1991 (exhibit 0.1). It seems that the Plaintiff objected, and the Town Clerk answered on 27th November 1991 (exhibit D.4). The Town Clerk explained to Dr. Byamugisha, the Plaintiff's Advocate, that the Plaintiff's lease had expired on 13th April 1990, and accordingly the plot reverted back to the City Council. Indeed the Council had allocated it to another developer on 9th September, 1991. The Town Clerk explained that the Plaintiff no longer stood as the registered proprietor of the land, and by a copy of the letter the Defendant was requested to proceed with development on the site.

Strangely enough, the land premium and ground rent was still demanded from the Plaintiff Company on 21st January 1992, and again on 17th February 1992.

At the end of 1991 or the beginning of 1992 the Defendant Company went on to the land and started to clear and grade it in preparation for building a factory. In its defence the Defendant admitted that it had done so and claimed that its entry upon the land was lawful. First the Defendant pointed out that the Plaintiff's lease had expired in 1990, and the City Council had granted a leasehold to the Defendant on 9th September, 1991. The Council had followed it up with the letter of allocation of the 31st October 1991 and then the lease offer of 7th November 1991.

How the letter of 31st October 1991, and lease offer of 7th November 1991 came to be made, is difficult to understand, because the lease to the Plaintiff had been made out on the 26th September, 1991 and registered on the 8th October, 1991, several weeks before the allocation of the land was notified to the Defendant on 31st November, 1991. What is more remarkable is that Mr. Patrick Makumbi, the Town Clerk has signed all these documents; the lease to the Plaintiff and the allocation to the Defendant. Nevertheless, the Plaintiff relying on its registered title vis the lease registered on 8th October 1991, brought this action against the Defendant, which replied that the Plaintiff had obtained its Certificate of Title by fraud, for the reasons that the Kampala City Council had never given authority for a further extension

of the lease to the Plaintiff. In fact, the Defendant is quite correct. The Plaintiff's lease had expired on 1990 and it was not renewed by any further offer of an extension. But the Plaintiff was awaiting the result of the re- survey.

The learned Judge found no fraud on the part of the Appellant, but the officials in the City Council and Land Office were guilty of fraud. Consequently he set aside the registration of the Plaintiff's lease dated 8th October 1991. The Plaintiff appeals against the decision. I shall now refer to him as the Appellant.

It is, at first sight, somewhat difficult to see why the officials should have been fraudulent while the person to benefit was not so guilty. I suppose it might just be that the officials could have some grudges against one of the parties. On the other hand, it is easy to see a case where the registered owner to whom the land was transferred could be guilty of fraud together with the officials, or where he could see a wrongful action by the officials about to take place and take advantage of it.

The nearest illustration of fraud in this case might be the last one Viz where the officials had acted wrongly and the registered owner had taken advantage of it. But the learned Judge has negatived that result by not finding that the Appellant -the registered owner was guilty of any fraud.

From the sequence of events set out above, I have great sympathy with the learned Judge's exasperation at the manner in which these important industrial developments were handled almost simultaneously, in granting the Appellant a lease which was registered on 8th October 1991, the same month as that in which the Council offered a lease in the same land to the Respondents. Such a record can only lead to sinister suspicion. But there was no evidence that the Appellant knew anything of the Respondent's activities until the Respondent appeared on the Appellant's land. The Appellant could well have thought that the Council was putting the record straight after the re-survey. The extension to 1990 had not been completed. Certainly, the Council can hardly claim that there should have been a fresh application, until the re-survey was complete and after the Council demanded in August 1991 land rent and received in September 1991, in the sum of shs. 705,000/=; no small sum. I would agree with the learned Judge that there was no evidence of fraud upon the Appellant's part, and the failure to apply for a further extension, if it was a failure, is quite understandable.

In these circumstances the issues for trial required a careful approach.

In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the defence. If, on the other hand, the officials had been implicated, then on the usual interpretation of Section 184 (c) of the Registration of titles Act, that would have been found to be insufficient. It is generally held that fraud must reside in the transferee. Whether the learned Judge's wider interpretation of the words of Section 184 (c) —

"…….as against the person registered as proprietor of such land through fraud"

can mean that the fraud of third parties quite apart from the transferee, is sufficient to set aside registered title, is a matter which may possibly need further elucidation. But it is not

open for consideration in this case, because of another important procedural lapse. Had that been the Respondent's Case, he should have brought the Land Office officials and Town Council Officials before the Court. It is important that before someone's reputation is besmirched, he has had an opportunity to defend himself. The officials here might have explained the confusion in their action. Even incompetence might not be fraudulent.

It must be understood from the nature of the defence, that the unspecified fraud must be primarily directed against the party in the case, against whom the defence has been made. That is to say, that primarily, the Respondent's allegation of fraud must relate to the way in which the Appellant gained registration, as the Appellant was the only other party in the case.

The resultant situation then is that as no fraud was found on the part of the Appellant, that was the end of the matter. The learned Judge held that the vagueness of the pleadings allowed him to find fraud wherever he might see it. That, with respect, was allowing himself too great a latitude. His proper course was to have called the Respondent's attention to the vague allegation of fraud before the trial, and ascertain whether an amendment was necessary, to specify what fraud it was that the Respondent alleged. That would have clarified the issues for trial. This case seems to call for greater pre-trial clarification as on summons for directions.

Then once the Appellant had a registered title, and that prior in time to the lease offered t the Respondent the Respondent had no right to trespass on the land of the Appellant.

The Respondent vacated the land promptly. Hence no eviction order is now necessary. But general damages were claimed and that issue was not resolved. I agree with My Lord,The Chief Justice that the record should be remitted to the trial Court for the assessment of damages. It is usual for the trial Court to assess damages in case its main finding is upset. I would agree with all the consequent orders proposed by him on allowing this appeal.

Before I leave the matter, I should perhaps add one or two words on the place in proceedings such as this, of the preliminary steps leading to registration of title of land.

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. It may be that the various steps taken illustrate fraud. Such a case was SEWANYANA VS MARTIN ALIKER NO. 4 of 1990 (S.C.). The authority had no right to grant the land. The allocatees had put in false papers, which have been wrongly passed by the Council's officer. Altogether there was collusion and fraud in the transferee.

Delivered at Mengo this 12th day of January 1993.

H. G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.

B.F.B. BABIGUMIRA
REGISTRAR SUPREME COURT

JUDGEMENT OF ODER, J.S.C:

I have had the benefit of reading in draft the Judgement of Wambuzi C.J., and Platt, J.S.C. with which I agree, and have nothing useful to add.

DATED AT MENGO THIS 12th DAY OF JANUARY, 1993.

A.O. ODER
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.
B.F.B. BABIGUMIRA
REGISTRAR OF SUPREME COURT.