IN THE SUPREME COURT OF UGANDA
AT MENGO
(CORAM: MANYINDO, DCJ, ODER, JSC. & PLATT, JSC)
CIVIL APPEAL NO. 13 OF 1992

BE T W E E N
J.W.R. KAZZORA :::::::::::::::::::::::::::::::::::::: **APPELLANT**
AND
M.L.S. RUKUBA ::::::: :::::::::::::::::::::::::::::::: RESPONDENT
Appeal from the Judgment of the High Court of Uganda at Kampala
(Tabaro, J) date 18th March, 1991)

IN

CIVIL SUIT NO. 320 OF 1988

JUDGEMENT OF ODER, JSC

This is an appeal against the decision of the High Court of Uganda dated 18th March, 1991, in H.C.C.S. No. 320 of 1988, in which the appellant was the unsuccessful plaintiff and the respondent the successful defendant.

The suit arose out of a claim of interest in land, which the appellant claimed to have bought at Makindye near Kampala. On 25th November, 1986, the appellant registered a caveat dated 20th November, 1986, in the Registry of Lands, Kampala, in respect of Mailo Register 0.4 Acres of Land comprised in Block 261, Plot No. 231, Volume 1593 at Lukuli, Makindye (hereafter "the suit property".) The Caveat stated as follows:

"**TAKE NOTICE** that I **JOHN RUTAGYEMWA KAZZORA** of P.O. **BOX 4595 —** Kampala, claim an interest in the land and property hereinabove described as a claimant of a equitable proprietory interest by virtue of a verbal agreement of sale. I therefore forbid the registration of any persons as transferree or proprietor of the above land and/or any instrument affecting the said estate or interest in land and property aforesaid until notice of such registration is given to me at the address hereinafter mentioned or unless such instrument be expressed to be subject to my claim or unless I consent in writing thereto.

I appoint M/S Mulenga & Karemera Advocates, 2 Buganda Road, P.O. Box 5987, as the address at which notices and proceedings relating to this caveat may be served."

The registered proprietor of the suit property had been Joseph Kasozi Lubega, who died in 1986. The appellant claimed to have purchased the suit property from Lubega when the latter was still alive. After Lubega's death, one of his sons, Charles Lwanga Masengere, obtained Letters of Administration of his estates including the suit property. Thereafter, the property was registered in the names of Masengere as the administrator of the estates, and the heir of his late father. Sometime in July or August, 1987, the respondent offered to purchase the suit property from Masengere for shs.2.5m/=. Masengere accepted the offer. At that stage, Masengere and other members of his late father's family were unaware of the caveat entered by the appellant. Nor were they aware that the late Lubega had sold the suit property to the

appellant as claimed by him. The late Lubega had not informed them of such a sale before his death.

At the early stages of the transaction between Masengere and the respondent, they and one Lamech Nsubuga Mukasa, advocate (DWI) who was acting for both of them, came to know about the caveat entered by the appellant. This was before the respondent had paid the purchase price for the suit property to Masengere, and before the latter had signed the document transferring the property to the respondent. As a result of a search he had carried out at the Lands Office to ascertain the title, it was the respondent who first knew of existence of the appellant's caveat. His knowledge notwithstanding, he decided to proceed with the deal. He then paid the purchase to Masengere through Mukasa (DWl) in September, 1987, and Masengere executed the transfer document on 11th September, 1987.

Subsequently the transfer to the respondent was purportedly registered on different dates,namely, 1987, 12th January, 1987 and 12th January, 1988. The appellant has contended that such discrepancies in the dates of registration of the transfer were indicative of fraud.

On 12th October, 1987, the Chief Registrar of Titles (CRT) issued a notice to the appellant as the caveator, informing him that the proprietor of the suit property had applied for registration of a transfer which appeared to affect the caveator's interest, and that if he (the caveator) had objection to the transfer he should apply to Court before the expiration of 60 days of the notice for an order delaying registration of the transfer. It appears that quite some time elapsed before the appellant had made such an application. In the meantime, he instituted the main suit in this case in the High Court on 29th March, 1988. Then on 15th April, 1988, the appellant filed an application in Court, seeking and order for extension of the caveat until the final disposal of the main suit. The application was unsuccessful, and the ruling and order dismissing it was made on 3rd May, 1988.

On the basis of that order the CRT purportedly removed the appellant's caveat and allegedly completed registration of the respondent's transfer on 6th May, 1988.

Subsequently the appellant lodged another caveat dated 1st July, 1988, which was subsequently removed after the respondent's Counsel protested in writing to the CRT. But when the appellant's Counsel also complained to the CRT in writing .to the effect that the second caveat should not have been removed as the matter was subjudice, the caveat was apparently restored on 5th July, 1989, but was subsequently cancelled.

In the suit which he brought against the respondent, appellant's claim was that the respondent had never bought the suit property. It was also averred in the amended plaint to the effect that by acknowledging the appellant's caveat, the respondent knew at the time when he purported to buy the suit property that the appellant had already bought it and that Masengere had no title to pass to him before the caveat was withdrawn; that the respondent's act of inducing Masengere to sell the suit property to him, constituted an inducement to commit a breach of an existing agreement which was illegal and against public policy; that the respondent having made a declaration against his own interest was estopped challenging the appellant's title to the suit property; and that the appellant was not aware of the respondent's dealings with Masengere until 16th December, 1987.

Remedies prayed in the amended plaint were: possession of the suit property and declaration that the title issued to the respondent on 12th January, 1988, was invalid; an order of eviction

against the respondent, and mesne profits; an injunction against the respondent, his agents or servants restraining them from damaging the suit property; and costs.

The suit was countered by a w.s.d. in which the respondent denied the appellant's claims and contentions. The respondent averred that notwithstanding his knowledge of the caveat, the respondent was a bona fide purchaser for value without notice; that the respondent's caveat which by operation of law lapsed on 12th December, 1987, was not a proprietory interest in land to prevent a sale, but was merely a caution by the caveator in case a dealing was presented by the registered proprietor; that notice under S. 149 of the Registration of Titles Act (RTA) served on the appellant expired on 12th December, 1987; and that the appellant was not entitled to any of the reliefs sought in the plaint. The w.s.d. then prayed for dismissals of the suit and that the CRT proceed to register the transfer as the law required.

At the trial of the suit, no issues were agreed, and none was framed. The learned trial Judge heard evidence adduced by both the parties and their submissions and dismissed the suit. Hence this appeal. The appellant did not give evidence at the trial, but three other persons did as his witnesses. Twenty grounds of appeal are stated in the Memorandum as follows: —

MEMORANDUM OF APPEAL

"1. The Appellant above named being aggrieved appeals to the Supreme Court of Uganda against the whole of the above mentioned decision on the following grounds:-

1. Because the learned Judge erred by holding that the Transfer executed on 11th day of September, 1987, by the Administrator of the Estate of the late Y. Lubega (Charles Masengere) in favour of the Respondent was not vitiated by a fundamental mistake which rendered the entire transaction void ab initio.

2. Because the learned Judge erred by holding that the Respondent, was a bona fide purchaser for value without notice, although the Respondent was well aware at all material times that there was in existence a caveat lodged in the Land Registry by the Appellant forbidding the Transfer of the Land in dispute.

3. Because the learned Judge erred by holding that even though the mandatory provision of Order 18 Rule 7 (3) (4) were not complied with, the irregularly extracted Order was, nevertheless a valid Order upon which the Chief Registrar of Titles could rely and register the Respondent's invalid Transfer.

4. Because the learned Judge misdirected himself on what constitutes 'service' under the Registration of Titles Act and other similar enactments.

5. Because the learned Judge erred by holding that the appellant's caveat lapsed on the 12th December, 1987, after the expiry of 60 days although the Notice Lo Caveator was not "served: upon the Appellant until 16th December, 1987.

6. Because the learned Judge erred by not holding that the property in dispute should not have been transferred to the Respondent while there was a pending case in the High Court which was filed on 29th March, 1988, concerning the ownership of the same property.

7. Because the learned Judge erred by not holding that the unexplained but, intentional falsification of the Land Register (in the Land Registry) and, the Title Deed issued thereafter were results of fraudulent and manifestly criminal acts which constituted evidence of a contrived fraudulent transaction which rendered the Title Deed issued to the Respondent invalid in law.

8. Because the learned Judge erred by not acting on the evidence of Charles Masengere (PWI) and on the contents of a letter he wrote to the Respondent dated 12th December, 1987, (Exh PWI) in which he admitted that he was mistaken when he purported to sell the property in dispute to the Respondent.

9. Because, the learned Judge erred by not commenting on the confused evidence of (OWII) who alleged "that the registration of the Transfer was completed on 6th May, 1988," when the Land Registry entries show that the date when the Respondent was purportedly "registered as a proprietor of Plot 234 Block No. 261 were 12th January, 1988 and 12th October, 1987".

10. Because the learned Judge misdirected himself by holding that the sale of the property in dispute by Charles Masengere to the respondent, could not have been vitiated by mistake in view of the fact that Charles Masengere stated in his testimony that he was aware at the time he executed the transfer, that there was a caveat forbidding the sale transfer and registration of the property in dispute which had been lodged to protect the Appellant's interest.

11. Because the learned Judge misdirected himself by engaging in guess work in stating without evidence being adduced "that it is highly improbable that sale of Plot 235 by Masengere (PWI) to the Plaintiff would be affected without mention of Plot 234 by the Plaintiff to him PWI".

12. Because the learned Judge erred by not addressing his mind to the contradictions in the Defendant's evidence and the evidence of his witnesses.

13. Because the learned Judge erred by basing his judgment on erroneous assumptions and reaching conclusions which are not valid in law.

14. Because the learned Judge erred by holding that the Appellant did not seek the High Court Order for restraining the Registrar from registering the Defendant's interest until 5th April, 1988.

15. Because the learned Judge erred by holding that the Court Order which was made per incurium and which irregularly extracted contrary to the mandatory provisions of Order 18 Rule 7 (3) (4) of the Civil Procedure Rules, did not 'cause a miscarriage of justice' since precisely this invalid Order upon which the Chief Registrar of Titles relied in registering the invalid transfer of the Respondent before the High Court adjudicated upon the merits of the Appellant's claim in H.C.C.S. No. 320 of 1988 which was at the time pending before the Court.

16. Because the learned Judge erred by stating that although he was "conscious of the importance of observing rules of procedures", he could nevertheless ignore the fact that Order 18 Rule 7 was not complied with thus, defeating the very purpose for which the rules of Procedure were intended to serve.

17. Because the learned Judge erred by holding:—

(a) that the Appellant’s Caveat was lawfully removed from the Land Register; and

(b) that the Respondent’s transfer was, therefore, validly registered.

18. Because the learned Judge erred by holding that “a chose in action” is not an interest in law which can be protected by lodging a Caveat.

19. Because the learned Judge erred by misconstruing the ratio decidendi of Kristofa Simbu Tokana Kamanza 7 ULR and of other authorities cited by the Defendant’s advocate.

20. Because the learned Judge misdirected himself as to the result of the legal cumulative effect of the irregularities committed in the Land Registry at the behest of the Respondent’s Advocates vis-a-vis the Appellant’s interest in the subject matter of this Appeal.

WHEREFORE The Appellant humbly prays:-

(a) that this appeal be allowed and, that the judgment and Decree of the High Court be set aside;

(b) that’ the Certificate of Title purportedly issued to the Respondent be cancelled;

(c) that the respondent be ordered to vacate the property in dispute within 60 days from the date of the Judgment of this Honourable Court;

(d) that the land register be rectified so that the name of the respondent to replaced by the name of Mr. Charles Masengere the Administrator of the Estate of the late Y. Lubega or, by the name of the Appellant;

(e) Costs in this Court and in the Court below;

(f) rent, and mesne profit from October, 1987;

(g) any other Order this Honourable Court may deem necessary to meet the ends of justice”.

Arguing ground one, Mr. Kazzora submitted that when Masengere signed the transfer, the former did not know that his late father had already sold the suit property to the appellant, and that a caveat had been lodged in 1986, protecting the appellant’s proprietory interest. Masengere, therefore, acted under a fundamental mistake of facts, which rendered that transfer void ab initio. The mistake made it legally impossible for Masengere to sell the property which he purported to do.

It is a well — known principle in the law of Contract which renders the contract void ab initio. If for example the subject of the contract consists of goods, no property in the goods passes under the contract, and they may be recovered by the true owner even from a bonafide purchaser for value. This is so at common law. But in equity the effect of mistake renders the contract voidable. A fundamental mistake nullifies consent, because it prevents the parties from reaching agreement. The rationale behind this legal principle is that the extreme

injustice of holding one of the parties to the contract outweighs the general principle that apparent contracts should be enforced. The leading case on this topic is the case of Bell vs. Lever Brothers Ltd. (1932) A.C. 161. It is also authoritatively discussed in the Law of Contract, by Treitel, 6th Edition, from page 210, and in Chitty on Contract Vol. 1, 26th Edition, from page 227. In the instant case, the appellant's case was that he had bought the suit property prior to Masengere's purported sale of the same to the respondent. The claim was made only in the plaint. No evidence was adduced to support it. The appellant or anybody else on his behalf did not give evidence to indicate when he bought the property, the consideration he gave for it, etc. Masengere's evidence was that he knew nothing of the alleged sale of the suit property by his late father to the appellant. He first heard of the sale in connection with the appellant's caveat. Apart from the caveat, the appellant showed him no proof of the alleged sale. Nor did he ask the appellant to satisfy him about the sale.

In the circumstances the learned trial Judge came to conclusion that the sale of the suit property by Masengere to the respondent was not vitiated by mistake. I agree with that finding. I think that the transaction of sale between Masengere and the respondent could have been vitiated by the fact that the property had already been sold to the appellant if there was some evidence of that sale.

Though the issue of whether the late Lubega had sold the appellant and the appellant had, in fact, bought the property was not an issue for decision by the learned trial Judge, I think that there ought to have been at least some evidence before him to raise a prima facie presumption that such a transaction had, in fact, taken place. As it happened, there was no such evidence.

The Appellant also contended that because Masengere did not know that there was a caveat on the land, the transfer he executed was done under fundamental mistake of fact, which rendered the transfer void ab initio. With respect, that contention appears to be at variance with the evidence available. Masengere's evidence on point was as follows:—

"The defendant told me that he had learnt I had la and I did tell him. He agreed upon the purchase price of 2.5m/= (two and half million shillings) r currency. He was willing to buy but demanded to the title. As at that time I did not have the land title, so I gave him the particulars of the land Blc 261 Plot 234, Lukuli Makindye. This should enable h to search the Land Registry. After two days he was again in the same office. He informed me after checking he found a caveat lodged on the land by M:
Kazzora. I then told him that since there was e caveat our deal had failed. He answered that the caveat lodged could not prevent sale or transfer of the property. I then stated that if it was the case then he could pay me the purchase price. He agreed to pay me through Lawyer Lamech Mukasa."

Later in cross examination, he said this:—
"Eventually I sold the Plot to Mr. Rukuba. We signed the transfer witnessed by our Advocate in September, 11th 1987."

Mukasa, Advocate (DWI) acted for both parties in the sale by Masengere to the respondent. His evidence also indicates that Masengere. signed the transfer, and the appellant paid the purchase price, after he had informed and advised them about the appellant's caveat. After saying that Masengere and the respondent were introduced to each other in his office; and

the two agreed on the purchase price of shs.2.5m/= (new currency); and that the appellant then left to go and organise funds, Mukasa's evidence runs as follows:-

"I sent my assistant Mr. Kagwe to search the registry on 28th August, 1987. He found there a caveat which he photocopied, lodged by Mr. Kazzora as claimant of equitable interest by virtue of verbal agreement of sale. It was of sale. It was lodged on 25th November, 1986. When Kizito came, to me I asked him about the caveat. He said he was not aware, and I told him to call Masengere. Masengere came and stated that he did not know of Mr. Kazzora's interest or any sale agreement between their father and Mr. Kazzora.We parted when he had stated that Mr. Kazzora had no claim to the house and would subsequently contact him so that Mr. Kazzora removes the caveat. Later Mr. Rukuba came ready for payment. I told him about the caveat and what I had discussed with Mr. Masengere. I told Mr. Rukuba that he could either opt out or pay and lodge his transfer and ask for removal of the caveat. He was interested in the property. He informed me that he would pay and lodge the transfer and wait for the caveat to be removed. Mr. Rukuba paid by cheque in September, 1987. I then waited for Masengere to come. He came and signed the transfer on 19th September, 1987."

The respondent's evidence is also to the effect that after Mukasa had informed him about the caveat, he questioned Masengere about it. The latter replied that the family did not know anything about any claim from Mr. Kazzora. Thereafter, the respondent paid the price of shs. 2,500,000/= to Mukasa and got the transfer document.

In the light of the evidence from Masengere, Mukasa and the appellant to which I have referred, there is no doubt that when Masengere signed the transfer in favour of the respondent both of them were aware of the appellant's caveat. They proceeded with and concluded the deal not in ignorance of the caveat but inspite of the caveat, apparently because they knew that there is nothing to support the caveat. In the circumstances I think that the learned trial Judge was entitled to find that the transfer by Masengere in favour of the respondent was not vitiated by mistake of facts. There was no such a mistake.

The appellant also submitted under ground one of the appeal that because Masengere and the respondent both knew of his caveat and yet executed the transfer without his consent, it meant that the transfer was vitiated by fraud. He is therefore, entitled to the protection provided by section 184 of the RTA. In this regard Mr. Kateera learned counsel for the respondent submitted that the appellant's case and plaint in the High Court was not based on fraud, but on appeal the appellant has now alleged and argued fraud against the respondent. This, according to Mr. Kateera, the appellant is not entitled to do.

It is well established principle of law that a party relying on fraud must specifically plead it and that particulars of the alleged fraud must be stated on the face of the pleading. In Bullen and Leake and Jacobs Precedents of Pleadings,. 12th Edition page 452, the principle is stated thus: —

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the ward "fraud" should be used the facts must be so stated as to show distinctly that fraud is charged (Wallingford v. Mutual Society (1880) 5 App. Cass. 685 at 697, precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence v. Lord Norreys (1890) 15 Appl Cas. 210 at 221). It is not

allowance to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. (Davy v. Gannet (1878) 7 Ch. D. 473 at 489)". In B.E.A. Timber Co. v. Inder Singh Gill (1959) E.A. 463 at 469, V-P said this: —

"Fraud, however, is a conclusion of law. If the facts alleged in the pleading are such as to create fraud, it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently, but the acts fraudulent intent may be inferred. (Kerr on Fraud and Mistake (7th Edn.) P. 644. In Davy V. Garret, 1878, 7 Ch. D. 473 at 489 Thesiger, L.J. said:

"In the common law counts no rule was more clearly settled than that fraud must be distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts.

It is said that a different rule prevailed in the court of chancery. I think that this cannot be correct. It may be necessary in all cases to use the word "fraud" indeed in one of the most ordinary cases it is not necessary. An allegation that the defendant made to the plaintiff representation on which he intended the plaintiff to act, which representation were untrue and unknown to the defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the defendant - that he intended the representation to be acted upon and he knew them to be untrue. It appears to me that a plaintiff is bound to show distinctly that he means to allege fraud…………."

As to standard of proof the law is that allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere probabilities is required. See Ratlal G. Patel vs. Baiji Makayi (1957) EA 314 at 317.

In the instant case fraud was not specifically pleaded. Nor was fraudulent intent pleaded or the facts set out in the plaint such as to create fraud. Fraud was not only not pleaded but it was also not proved. Further, the appellant's case in the lower Court, was founded on and argued on the basis of fundamental mistake. I do not think, therefore, that on appeal he is entitled to rely on fraud, which is different from his original case. This view, I think is supported by the case Vidyarthi Vs. Ram Kalcha (1957) EA 527 AT 529. In the case the respondent, who was the registered owner of certain premises occupied by the appellant obtained from the Supreme Court an order for possession, the appellant's defence that he was a co-owner and held with others under a resulting trust being rejected on appeal, Counsel for the appellant without abandoning the plea of the existence of a resulting trust submitted that the evidence established the existence of an express trust. It was held, inter alia, that in view of the pleadings, the appellant could not be heard to allege an express trust.

For the reasons discussed above, I think that ground one of the appeal should fail. I think that grounds eight. ten and eleven should also fail for the same reasons.

Since most of the other grounds of appeal focus on the validity and effects of the appellant's caveat, I will next consider the evidence, law and the learned trial Judge's findings relating to the caveat. The caveat was registered on 25th November, 1986. As long as caveat remained in the force, section 150 of the TRA forbade CRT, except in accordance with provision of the caveat or with the consent of the caveator from entering in the Register Book any change in

proprietorship or transfer or other instrument purporting to transfer or affect the appellant's interest. Section 149(2) provides that except in the case of a caveat lodged by a beneficiary claiming under a will or statement every caveat lodged against a proprietor is deemed to have lapsed upon the expiration of sixty days after notice to caveator that such a proprietor has applied for the removal of the caveat. The appellant's caveat in the instant case was registered on 25th November, 1986. After the respondent's transfer was lodged for registration, notice under section 149(2) was issued to the appellant. The evidence of Grace B. Elue, the Chief Registrar of Titles (PW3) and Jonathan N. Tibisasa, the Deputy CRT (DW2) say that the notice was issued on 12th October, 1987. It required the appellant, if he had objection to the registration of the transfer, to apply to the High Court for an order delaying the registration of the transfer. It also stated that the appellant should obtain such an order within 60 days from the date of service of the notice on him. The appellant was also warned that if he did not do so, the caveat would lapse and would be removed from the Register Book. It is to be noted that Section 153A of the RTA provides that when a caveat has lapsed the Registrar shall cause the same to be removed from the Register Book and shall enter in the margin of the original entry of the caveat the date of such removal. This means, in my view that the Registrar does not have to be moved by anybody or ordered by the Court to remove a caveat which has lapsed. It is mandatory for him to remove such a caveat on his own motion.

According to the evidence of PW3 and DW2, the period of sixty days stated in the notice to the appellant depended on when the notice was served on the appellant, for time began to run from the date of such service. PW3 said that she did not know when the appellant was served with the notice. She and DW2 also said that the notice was sent by registered post 12th October, 1987. But it seems that PW3 and DW2 were wrong about the date when the notice was posted, because the registered envelope labelled "Kampala C2123" (Exhibit P.5) in which the notice was sent, bears a post mark apparently of 26th October,1987. It was addressed to the appellant, c/o *MIs* Mulenga and Karemera, Advocates, P.O. Box 5987, Kampala. This was the address for service given in the appellant's caveat. In the circumstances, I am satisfied that the notice to the appellant was posted on 26th October, 1987, and not 12th October, 1987. The next issue is when was it served on the appellant?

In this connection, section 210A of the RTA provides as follows: —

"210A —
(1) Any notice under the provisions of this Act may be served or given by letter posted to the person concerned at his address for service
………………………………………………………………………………………

(2)………………………………………………………………………………………

(3) The address appointed in a caveat as the place at which notices relating to the caveat may be served shall be the address for service for the caveator.
(4)……………………………………………………………………….
(5)………………………………………………………………………….
(6) When a notice is sent by letter posted to any person at his address for service and the letter is returned by the post office the Registrar may if in the circumstances and having regard to the provisions of this Act he thinks fit —
a) direct any further notice be given; or

b) direct substituted service; or

c) proceed without notice.”

Other statutory provisions which I think are relevant on the point are in section 35 of the Interpretation decree, 1976, which states as follows:—
“35 — Where any Act or Decree authorises of requires any document to be served b post, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time which the letter would be delivered in the ordinary course of the post.”

In the instant case the notice posted in the registered envelope, Exhibit P.5, was received by the applicant’s Advocates on 16th December, 1987. DW2 says that that is when it was collected from the Post Office. This evidence is in accordance with a letter dated 20th March, 1990, from Uganda Posts and Telecommunications Corporation, addressed to M/s Sam Kuteesa & Co. Advocates, which was admitted in evidence as Exhibit P.15 and reads as follows: -
“Re: Registered Article Kampala “C”
No. 2123 of 26/10/87

This refers to the request which you made to the Managing Director of this Corporation in your letter reference SKK/LEG/1. dated 1st December, 1989, concerning the above subject. I have been instructed “to inform you as under:

1. Local Delivery invoice No. 2020 was dated 26th October, 1987, prepared in the name of Mr. John Wycliffe Rutagyemwa Kazzora do Box 5987, Kampala advising him to report to the Post Office and take delivery of registered article Kampala C.2123 which was addressed to him.

2. The same registered article remained unclaimed up to 16th December, 1987, when it was collected and delivered against a second reminder.”

Relying on the New Zealand case of Wilson Y. Moir (1916) NZLR 480 and on Section 283 of the Transfer of Land Act 1928 of Victoria, Australia, the provisions of which are identical to those of Section UOA of our RTA, above referred to, the learned trial Judge found that the appellant was served with the notice under consideration on 12th October, 1987, and that, therefore, the notice expired on 12th December, 1987. The learned trial Judge, however, was also alive to the possibility that his finding to that effect might be wrong. This is what he said in that regard:

“The plaintiff took delivery of the notice on 16th December, 1987. Even if the time began to run then (16/12/87) the caveat would have expired and lapsed on
16th December, 1988”

In view of the evidence I have already referred to in this judgment, I am satisfied that the appellant was at least served with the notice on 16th December, 1987. That would also cover ground 4 of the appeal. That is the date when the period of 60 days’ notice began to run. The appellant, therefore, had until 14th February, 1988, within which to obtain an order from the

Court extending the life of his caveat.

What happened next was that the appellant's motion seeking extension of the caveat was filed in Court on 15th April, 1988. This was about two months after the caveat which the application sought to extend had lapsed. The application apparently did not seek an injunction to restrain the Registrar from registration of the respondent's transfer until the disposal of the main suit which had been filed on 29th March, 1988; but he sought an order extending the caveat until the disposal of the suit. The motion was heard on 18th April, 1988, by Okello, J, who apparently refused the application. An order dated 3rd May, 1988, purportedly extracted from the ruling refusing the application was tendered in evidence by the Acting Registrar of the High Court, Peter Onega (PW2). It reads as follows:—

"ORDER
This suit coming before Mr. Ag. Justice Okello for an order that the Chief Registrar of Titles delays the registering the transfer with the land comprised in Kyadondo Block 261 Plot 234, Lukuli Makindye until the disposal of the main suit, it is ordered and decreed that the application must fail."

It was the basis of that order that the CRT (PW3) and DW2 said that they removed the appellant's caveat and completed the registration of the respondent's transfer on 6th May, 1988. But since the caveat had already lapsed long before the appellant made this application to the Court and before the Court Order of 3rd May, 1988 was made, it follows that the caveat was no longer in a position to be extended or removed by a Court Order. The Court no longer had jurisdiction in the matter. The consequences of this, in my view, are that the purported removal of the caveat as a result of the Court order of 3rd May, 1988, on the basis of which the RTA purported to act on 6th May, 1988, was irrelevant. After 16th February, 1988, the appellant's caveat no longer constituted a legal impediment to the registration of the appellant's transfer and title. It was registerable any time thereafter. Consequently, I think, the registration of 6th May, 1988, did not have to be found on the purported Court Order 3rd May, 1988.

I will now proceed to consider the rest of the grounds of appeal to the alleged mistake of fact and the validity and effects of the appellant's caveat which I have expressed above in this Judgment.

First, ground two. The learned trial Judge's finding in this regard appears to be that the respondent was a bonafide purchaser for value notwithstanding that he was aware of the existence of the plaintiff's caveat because the alleged sale to the appellant, which the caveat was registered to protect was not shown to exist. There was no evidence about the sale of support the caveat.

I think that in view of what I have already said to the effect that the transfer was not vitiated by mistake and about the lapse of the appellant's caveat, the criticism of the learned trial Judge under this ground, with respect, does not appear to have any merit. It should, therefore fail.

Ground three: The appellant submitted that he did not appeal against the ruling of Okello, J dated 3rd May, 1988, because it formed part of the main case, and he did not want to duplicate by appealing separately against that Ruling. He contended that the Court Order was

not extracted in accordance with 0.18 r.7 of the Civil Procedure Rules, according to which, a decree of order is required to be submitted by the successful party to the other party for approval; if contented then the same is settled by the Judge who pronounced the judgment. It was not, therefore, a valid order, on the basis of which the appellant's caveat could have been removed. The finding of the learned trial Judge on the issue was in the following words:

"As herein before indicated, the defendant (respondent in the application) did not submit the order to the plaintiff (application in the motion) for approval. I am conscious of the importance of observing rules of procedure. However, in the case before the Court, the order as approved by the Dy. Chief Registrar did not in any way misrepresent or depart from the ruling of the Court. The irregularity hence was not fatal as no miscarriage of justice could have been occasioned thereby. Evidently after the caveat lapsed and the Court's Order indicated that the plaintiff's application was unsuccessful there appeared to be nothing to bar the Registrar from proceeding with the registration of the defendant's application".

To my mind, the learned trial Judge appears there to be saying that since the caveat had lapsed any way, and the Registrar was at liberty to register the transfer, the Court Order complained of by the appellant did not cause any miscarriage of justice. It is the same as saying that the Court Order was unnecessary for the registration of the transfer. So the consequences of the fact that it was not extracted in accordance with 0.18, r.7 of the CPR, was I think, neither her nor there. I therefore agree with the learned trial Judge that non-compliance with 0.18 r.7 in drawing up the Court Order in question did not cause a miscarriage of justice. Ground three of the appeal should, therefore, fail.

Ground five: - I have already held that the appellant was served with the notice on 16th December, 1987, and that the appellant's caveat, therefore lapsed sixty days thereafter, which was 14th February, 1988. Consequently, it is evident that the learned trial Judge erred by holding that the appellant's caveat lapsed on 12th December, 1987. Ground five of the appeal should therefore, succeed. However, in view of what I have found that the appellant's caveat lapsed because he did not comply with the conditions of the notice, the success of ground five does not, in my view, alter the result of this appeal.

Ground six and seven can be considered together since they relate to registration of the respondent's title during the pendency of the suit. The appellant's submissions in this regard fall into two main categories. Firstly that as the suit filed on 29th March, 1988, was still pending in this case, the purported registration of the respondent's title on 6th May, 1988, should not have been done. Secondly that the purported registration of the respondent's title on 12th October, 1987, 12th January, 1987 and 12th January, 1988, indicated that there was fraud. I will consider the effect of pendency of the suit first.

The evidence of the CRT (PW3) was that once a matter was before Court they would not register a transaction concerning the land unless there was a Court Order. DW2 also said that they did not allow transactions which prejudiced High Court cases. In the instant case PW3 was not aware when the caveat was lodged; nor was she aware that the suit had been filed, but she became aware the suit before the Court Order of 3rd May, 1988. Consequently by 6th May, 1988, when the order was served on her she was already aware of the existence of the suit. She, nevertheless, registered the transfer, because the Court Order was to the effect that the application for extension of the caveat must fail. The CRT (PW3) and DW2 did not refer to any legal provision which prohibited registration of a transfer of land regarding which a Court suit was pending. They appear to have spoken of an administration practice not based on any law.

In his submission, the appellant referred to the letter dated 15th May, 1989, from the respondent's Advocates to the CRT criticising the CRT for accepting another caveat by the appellant after the first one had lapsed. The appellant contended that the letter was written when it was known that there was an application to extend the appellant's caveat in Court and that there was already a suit pending in Court. Since the respondent was in possession, the appellant does not see why there was such a hurry to register the transfer. I think that I need to make only brief remarks on these submissions. Firstly by 15th May, 1989, the appellant's application to extend his caveat had already been disposed of, albeit unsuccessfully for him. Secondly, there does not appear to be in existence any pendency legal rule to the effect that transfers or other dealings in land should not be registered before a suit contesting such a transfer or dealing is disposed of. The appellant conceded as much. In the instant case, the appellant chose not to seek an injunction for such a purpose, but to seek an extension of the caveat, which had already lapsed. Consequently, with respect, I do not think that his complaint that the respondent's transfer should not have been registered while the suit in this case was pending has any merit.

Next, the allegation of fraud with regard to the purported various dates of registration or the respondent's title. According to the evidence available, the respondent's title was apparently registered on 12th October, 1987, as the document on page 103 of the record shows. But this date appears to have an alteration from 12th January, 1987. Then the document on page 104 indicates that the respondent's title was registered on 12th January, 1987. In addition to this the respondent has in his possession a duplicate certificate of title showing that he was registered on 1st January, 1988. This last document was not exhibited in Court, but was shown to us by the learned Counsel for the respondent with the consent of the appellant.

These various dates, the appellant contends, show that the registration of the respondent's transfer was fraudulently made. The fraud was unknown to him. For instance, he was unaware that the certificate of title dated 12th January, 1988, was in existence until the day of the hearing of this appeal. The respondent did not produce it at the trial although the appellant had asked in writing for its production. The appellant submitted that since he could not have known of the fraud, he could not have pleaded it. He then urged us to invoke rule 1(3) of the Rules of this Court; which relates to the inherent powers of the Court in the same manner as Section 101 of the Civil Procedure Act (Cap.65), and hold that the whole transaction was a nullity.

The evidence obviously shows, in my opinion, that there were some-irregularities in the registration of the respondent's title on the various dates, namely: 12th October, 1987, 12th January, 1987 12th January, 1988. The purported registration of 12th October, 1987, and 12th January, 1987, could not have been possible because the transfer was executed on 11th September, 1987. They are therefore a nullity. But since fraud was not pleaded and still less proved, against the respondent or any
official in the Lands Registry who, in any case, were not parties to the suit, I am unable to accept the contention that the various dates are indicative of fraud. In view of the Law requiring that fraud should be pleaded and proved to which I have referred elsewhere in this judgment, I do not think, either, that this is a case for invoking the inherent powers of this Court and for holding that the whole transaction under consideration was nullified by fraud. However, I think, too, that since the purported registration of 12th January, 1988, was purportedly done before the appellant's caveat had lapsed on 14th February, 1988, it was not valid as being contrary to section 150 of the RTA, which states as follows:—

“150: So long as any caveat remains in force, prohibiting any registration or dealing, the Registrar, shall not, except in according with some provision of such caveat, or with consent in writing of the caveat, enter in the Register Book any change in proprietorship of any transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat is ledged.”

In the circumstances it would appear that the only registration which was validly done was that of 6th May, 1988, since it was effected after the appellant’s caveat had lapsed on 14th February, 1988. In the circumstances, I think that ground
6 should succeed in so far as it relates to the purported registration of the transfer on 12th January, 1987, 12th October, 1987, or 12th January, 1988; but it should fail in so far as it relates to the registration of 6th May, 1988. Grounds seven and nine should also fail for the same reasons.

Ground Twelve: The appellant submitted that two such contradictions appear in the evidence of the respondent. The first one is that the respondent said that he did not know the vendor, Masengere, but the latter said that he did. Secondly, the respondent said that Mukasa (DWI) was not acting for him but DWI said that he was. This ground may be disposed of briefly. First, the apparent contradictions in the evidence of the respondent were not apparently raised at the trial. Secondly, even if they were, I think that they are so minor that I do not think that they indicate the respondent as a witness of deliberate untruth. See the case of: Alfred Tajar v. Uganda, East African Court of Appeal - Criminal Appeal No. 167 of 1969 (unreported). Consequently, I think that ground twelve should fail.

Ground Thirteen: - This ground, having been couched in such general terms offends rule 84(1) of the Rules of this Court. Nevertheless, the appellant was allowed to argue it. The main points of criticism of the learned trial Judge which the appellant made were that the learned trial Judge made the wrong assumptions that the facts in the case were not disputed; and that since the late Lubega had sold Plot 235 to the appellant and Masengere knew about it, it was improbable that the late Lubega sold the next Plot 234 (the suit property) to the appellant without Masengere knowing about it. The appellant contended that the learned trial Judge did not have to decide whether Masengere’s late father had sold the suit property to the appellant or not.

With regard to the point whether or not the facts in this case were in dispute, I think, with respect, that the learned trial Judge did not make any assumptions. This is what he said (on page 112):—
“This case has some unusual features but in my opinion, on the whole, issues can be ascertained and clearly defined. From the evidence for both parties, these arise in connection with the manner in which the plaintiff and the defendant acquired interest or estate if any, in the land in question. Fortunately, most aspects of the case concerning facts are, substantially, not disputed. What appears to be more crucial is the interpretation that must be attached to fact (sic) situation and the legal consequences that ensue therefrom.”

I do not think that the learned Judge was saying here that the facts in the case were not disputed. I think he was saying that the essential facts in the case, save with regard to the appellant’s claim of having bought the suit property from the late lubega, were not disputed, an opinion with which I agree. It was, of course, an error for the learned trial Judge to have assumed that because Masengere had known that the appellant had bought Plot No. 235 next

door to the suit property, therefore, he should have known also if the latter had been sold to the appellant. Further, while it is correct that the issue of whether the suit property had been bought by the appellant from the late Lubega was not an issue for decision by the learned trial Judge, the main issue before him, as he rightly said, was whether or not there was a caveat and whether it was properly removed. But in view of the issue of mistake raised by the appellant in his pleading and submission in the lower Court it was necessary, I think, for the learned trial Judge to look at the evidence before him concerning the appellant's claims in that regard in order for him to decide whether or not there was, in fact, such a mistake which vitiated the subsequent sale of the suit property to the respondent.

With regard to the caveat and the proceedings before Okello, J., I think that I have already said enough elsewhere in this judgement. In the circumstances, I think that ground thirteen should fail.

Ground Fourteen: Concerns the appellant's application for extension of his caveat, which I have already considered under grounds five, six, seven and nine.

Ground Fifteen: I have already held that the Court Order of 3rd May, 1988, was unnecessary for removal of the appellant's caveat which had already lapsed before the order made. Consequently whether it was extracted in accordance with the 0.18 r.7 of the Civil Procedure Rules or it was not the issue to, my mind, appears to be irrelevant and does not call for a decision. This also, I think, disposes of ground sixteen.

Ground Seventeen: Both parts of this ground have already been considered.

Ground Eighteen: The appellant's arguments under this ground have already been partly covered by my consideration of grounds ***six*** and seven except the argument relating to the second caveat, the evidence about the second caveat came fro Jonathan Tibisasa, Deputy Chief Registrar of Titles (DW2). He said that the Appellant's second caveat was lodged as instrument No. KLA 13095 of 15th July, 1988. The caveat was cancelled due to a complaint from the respondent's Advocates, M/s Hunter & Greig, which was that the Lands Registry had accepted a caveat protecting the same interest as the first caveat, contrary to section 149(3) of the R.T.A. Consequently it was removed from the Register Book. According to DW2 it was thought that the second caveat was illegal and did not deserve protection. .It was therefore, cancelled by him. An attempt, however, was later made to restore it by an endorsement on Instrument No. 130953, but apparently the endorsement was not registered. A caveator cannot lodge the same caveat as had been removed, under S.149(3) of the RTA.,, according to DW2. For the purpose of this case, section 149(3) provides as follows:—

"(.3) A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest but if, before the expiration of the said period as is specified in any order made under this Section, the caveator or his agent appears before the Court and gives such undertaking or security, or lodges such sum in Court as such Court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed than and in such case the Court may direct the Registrar to delay registering any dealing with the land for a further period to be specified in such order……………."

About the appellant's second caveat, the learned trial Judge said this — (on page 119)-

"Mr. Kazzora contended that the second caveat should have been retained to protect his chose in action in the present suit. Of course ii the contention is that the second caveat is in substance different from the caveat lodged on 25th November, 1986, I think this argument cannot in law be maintained. He would be departing from his pleadings in the plaint and this is not permissible without amendment - 0.6, R.6CPR. I also think it would be superfluous to lodge a caveat to protect any interest in chose in the case since it must abide the outcome of the proceedings anyway."

The second caveat in question was in exactly the same terms as the first one, except for mentioning High Court Civil Suit No. 320 of 1988, which the first caveat did not. The first paragraph reads as follows:—

"**TAKE NOTICE** that I, Wycliffe Rutagyemwa Kazzora of P.O. Box 4595 — Kampala, claims an interest in land and property herein-above described as a claimant of an equitable proprietary interest by virtue of a verbal agreement of sale, and a pending High Court Suit No. 320 of 1988" J.W.R. KAZZORA vs. M.L.S. RUKUBA."

The Appellant submitted that the second caveat was different from the first one in that it was lodged on the basis of the suit he had filed. It was intended to protect a chose in action, which is a personal right to property which can only be enforced by an action and not by taking physical possession. He contended that because there was a pending case, the subject matter of which was the suit property and which the respondent could have disposed of to a bonafide purchaser for value without notice, the second caveat was intended to maintain the status quo till the suit was disposed of. The appellant relied on the case of Kington Vs. Magee (1902) 2 KB. 427.

That was a case in which the defendant contracted to sell his reversionary interest in property to one Rayner, who by deed assigned his interest under the contract to the plaintiff, and notice in writing was duly given to the defendant. The defendant after the assignment to the plaintiff refused to perform his contract. It was held that the assignment was an assignment of a legal chose in action within section 25 sub-section 6 of the Judicature Act, 1873, and that the plaintiff was entitled to sue the defendant for damages for breach of contract.

I agree with the appellant that the benefit of a contract is a chose in action which can be assigned and enforced by Court action.

In the instant case the second caveat was purported to protect such a chose in action, namely, the benefit of the verbal agreement for sale of land which the appellant claimed was made between him and the late Lubega. In my view that was the same interest which the first caveat was registered to protect. That would be equivalent to renewing the same caveat, which would be contrary to the provisions of Section 149(3) of the RTA.

As regards the contention that the second caveat was different because it mentioned the suit, I am not aware of any lis pendens rule in our jurisdiction which forbids dealings in land which is the subject matter of a pending suit. I have already said elsewhere in this judgement that the evidence of PW3 and DW2 to that effect does not appear to have any legal support. I do not think, with respect, therefore, that their evidence in that regard can advance the cause of the appellant very far.

Moreover, under section 148 of the RTA, which sets out the circumstances in which a caveat may be lodged, the appellant could only have lodged the second caveat because he had

interest in land, namely the suit property. That is the same interest that the first caveat was registered to protect. So, even if there was a us pendens rule the second caveat might still have fallen victim to section 149(3) of the RTA. In the circumstances I think that ground eighteen should fail.

Ground nineteen: Criticises the learned trial Judge for allegedly misconstruing the ratio of the case of — Kristofa Tokana Kamanza, 7 U.L.R., 68.

The ratio decidendi of that case, according to the head notes, is that the first person to register land takes better rights than a person to whom the land was first sold but failed to register it, providing that there has been no fraud in the registration. That I think is still the law. It is on the basis of the ratio of that cause that the respondent in the instant case issued a notice under Rule 91 of the rules of this Court for affirming the decision of the learned trial Judge on grounds other than those relied upon by the trial Court. The notice partly stated as follows: —

"Even if the appellant had bought the property in dispute before the respondent in so far as the respondent was the first to be registered as a proprietor thereof, the respondent gets a better title."

In the instant case, the learned trial Judge considered the irregularities in the purported registration of the appellant's interest and conclusion that there was no evidence to suggest that the respondent was fraudulently involved in the irregularities, such as alteration of dates, and that after the appellant's caveat had lapsed the respondent's title was validly registered. The learned trial Judge also said that since the appellant did not plead fraud, he thought that it was necessary to delve into the standard of proof required to establish it.

I have already commented on the issue of fraud to the same effect and about the irregularities in the dates of the purported registration of the appellant's transfer. I have also held that in view of the time when the appellant's caveat was deemed to have lapsed, only the registration effected subsequent to the lapse would be valid. According to the evidence of PW3 and DW2 such registration was completed on 6th May 1988. In the circumstances, I find that the appellant's transfer was validly registered on that date. Applying the ratio decidendi of that case to the present case, I think that the respondent having been the first person to register his interest in the suit property and not having been shown to have committed fraud in registration, he had better rights to suit property than the appellant. In so far as his title is taken to have been validly registered on 6th May, 1988, (which I think should have been the case) then the respondent was the first person to have registered his interest in relation to the appellant, who, in any case has not registered his interest. Apart therefore, from the other reasons which I have said render his registration on that date valid, the respondent having registered his interest before the appellant, even if the appellant did, in fact, purchase the suit property from the late Lubega, the respondent is entitled to be the legally registered proprietor of the suit property. In the circumstances, I think that this ground nineteen of the appeal should fail.

Ground Twenty: I think that this ground and the appellants's submissions on it has been covered by my consideration of the other grounds, especially my finding that no fraud has been pleaded and proved against the respondent and the Land Office officials, consequently I think that this ground should also fail.

For the reasons given in this judgement I think that this appeal should fail. I would, therefore, dismiss it with costs to the respondent.

Consequent to dismissal of the appeal for the reasons given, I would order that in accordance with the provisions of section 185 of the R.T.A., the Registrar of Titles should cancel the purported registration of the transfer in favour of the respondent on 12th January, 1988, and substitute such entry or certificate of title one deemed to have been made or registered on 6th May, 1988.

Dated at Mengo………. this day of January 1993.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF PLATT, J.S.C_..

I have read in draft the judgement of Oder, J.S.C., with which I agree and I would further agree to the orders proposed.

Mr. Kazzora the appellant claimed to be a prior purchaser of property, later sold to the respondent. The appellant protected his interest by placing a caveat on the title. The respondent gave notice to remove the caveat. Unfortunately Mr. Kazzora failed to gain an extension of time beyond the sixty days during which the caveat would remain on the title. If no extension were granted the caveat would cease to have effect. Moreover, the appellant caveator could not seek a second caveat. The Registrar is bound to remove the caveat in these circumstances and note the date of its removal. (See section 149 — 153 of the Registration of Titles Act). Once the caveat was removed, registration of the Respondent’s title could proceed.

There is no lis pendens rule in Uganda. A purchaser either protects himself by a caveat or a Court injunction. Unfortunately the appellant did not seek an injunction. In these circumstances, despite the various errors which the Registry committed, the registration of the Respondent’s title on 6th May, 1988, cannot be assailed. There was nothing to prevent the Registrar from carrying out that duty at that date and correct the other improper entries.

There were many interesting and difficult aspects of the argument which my Lord had dealt with and with which I would, with respect, seek to be associated. I would however, wish to comment that it does seem that a first agreement to sell land can easily be overtaken by a second purchaser who can offer more money. Whether that should remain the rule may possibly be open to doubt. At least in this case, an attempt has been made to make sure that the caveator has real notice that the caveator has emended the removal of the caveat. After that the Caveator must protect himself.

Sgd: 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 MANYINDO,D.C.J.

I have read the judgement of Oder J.S.C. in draft and I agree with it. As Platt J.S.C. also agrees the appeal is dismissed with costs to the respondent.

Dated at Mengo this 12th day of January, 1993

Sdg: S.T.MANYINDO
DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL

B.F.B BABIGUMIRA
REGISTRAR SUPREME COURT