THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, .C.J, TSEKOOKO, KAROKORA, KANYEIHAMBA, KATUREEBE, JJ.S.C.)

CIVIL APPEAL NO. 01 OF 2006

BETWEEN

NAZMUDIN GULAM HUSSEIN VIRAM :::::::::::::::: APPELLANT

AND

NICHOLAS ROUSSOS :::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the judgment and orders of the Court of Appeal, (Mukasa-Kikonyogo, D.C.J, Kitumba & Kavuma, J.J.A) dated 11th November 2005, in Civil Appeal No.70 of 2002].

JUDGMENT OF KANYEIHAMBA, J.S.C

The facts of and background to this appeal may be summarized as follows:

No. 30 Windsor Crescent, Kampala which is registered as lease No. 37670 on Leasehold Register Volume 240 Folio 3 is the suit property. The suit property was originally owned by one De Souza who sold it to the late Mrs. Eugenia Genovefa Roussos whose surviving son is the respondent. Mrs. Roussos was the acknowledged registered proprietor of the suit property from 19th July, 1961 to 22nd April 1969. In August 1972, the respondent's family was expelled from Uganda by the military regime of Idi Amin. Before then however, on 22nd April 1969, the 1st appellant, now deceased and his son, the second appellant came to be registered as tenants in common of the suit property under a deed of transfer. On that same day they were registered as tenants, they mortgaged the suit property to the Registrar of the Trustees of the Vithaldas Hindas Lohana Vidyarth Bhava. In the same month, on 25th April 1969, the two joint tenants took yet another mortgage in favour of one D. Pradhar. A year later, on 13th March 1970, the appellants mortgaged the suit property to the Housing Finance Company of Uganda. In 1972, during the expulsion of Asians from Uganda by the military regime, the appellants left Uganda. The suit property, like so many other abandoned property after the expulsion of the Asians, was placed under the management of the Departed Asians Property Custodian Board. The Custodian Board allocated the suit property to the Prisons Department of Uganda and came to be occupied by the staff of that department. The Roussos family returned to Uganda in 1980. On discovering what had happened to the suit property, the late Mrs. Genovefa Roussos filed a suit in the High Court against the appellants for the recovery of the suit property. Her major contention was that the transfer of the suit property to the appellants had been effected through fraud. She asserted that the signature on the transfer document (exhbt. P2), though purporting to be hers, was in actual fact, a forgery.

On 18th August, 1982, Kantiti J (R.I.P) believed her evidence and entered an *ex parte* judgment in her favour. He ordered the Registrar of Titles to cancel the appellants' names from the certificate title and to substitute hers as the registered tenant. The Prisons Department complied with the court's order and gave her vacant possession.

Later, on their return to Uganda, the appellants successfully contested the *ex parte* judgment and decree. On 12th October 1995, Berko J., as he then was, set aside the *ex parte* judgment and ordered that the suit between the parties be heard *inter-partes.* Mrs. Genovefa Roussos died before the commencement of the new proceedings. The present respondent stepped in as the administrator of her estate and was substituted as plaintiff in the suit and filed an amended plaint in court.

In the High Court, the appellants filed written submissions in defence and a counter claim. In their defence, the appellants claimed that they had bought the suit property from the late Mrs. Roussos. In the counterclaim they prayed for vacant possession of the suit property, mesnes profits with interest from the date they could have got the repossession certificate. They also prayed for costs of the suit and the counter claim.

Evidence was adduced and presented by the parties before Tabaro, J. The crucial issue upon which the whole case eventually hinged was whether or not the transfer from Mrs. Genovefa Roussos to the appellant was genuine or forged. After careful analysis of the signatures of Mrs. Roussos which were availed to him and her purported signature on the transfer forms of the suit property. Mr. John Baptist Muguzi, P.W.I a handwriting expert, concluded that the signature on the transfer

document was not that of Mrs. Roussos but a forgery. The appellants and their witnesses also gave evidence both oral and documentary.

The learned trial judge found that the signature of Mrs. Roussos had been forged on the transfer deed. Consequently, the judge held that since the purported transfer to the appellants was a result of fraud, they did not validly acquire the title deeds. He ordered that the Registrar of Titles cancel the names of the appellants from the certificate of title of the suit property and substitute it with that of the respondent. He granted a permanent injunction preventing the appellants from purporting to be the owners of the suit property or trying to take possession of the same. He dismissed the counterclaim by the appellants. The appellants were dissatisfied with the decisions of the trial court. They appealed to the Court of Appeal which found no merit in their appeal and dismissed it with costs to the respondent. Hence this appeal.

It appears that by the time this appeal came to be filed in this court, the first appellant in the Court of Appeal had died. Hence his son is the sole appellant in this court. The Memorandum of Appeal contains seven grounds framed as follows:

1. *The learned Justices of Appeal erred in confirming the finding of the trial judge that the transaction in the suit property was fraudulent.*
2. *The learned Justices of Appeal failed to properly evaluate the evidence and hence erred in law by holding that Pattni and his superiors, Patel and Metha were the appellants' agents.*
3. *The learned Justices of Appeal erred in law in holding that the appellants were privy to the alleged fraudulent sale.*
4. *The learned Justices of Appeal erred in law in holding that the appellant and his deceased father were not bona fide purchasers.*

5. *The learned Justices of Appeal erred in holding that the transfer deed in respect of the suit property was not properly attested.*
6. *The learned Justices of Appeal improperly rejected the defence evidence and hence erred in holding that the appellant and his deceased father did not take possession of the suit property.*
7. *The learned Justices of Appeal erred in holding that the suit property did not vest in Government.*

In his prayers, the appellant further claims mense profits in respect of the suit property, from the time of repossession till the time of handing over vacant possession.

The appellant is represented by M/S Nangwala, Rezida & Co, Advocates who chose to file written submissions under Rule 93 of the Rules of this Court. The respondent is represented by M/S Didas Nkurunziza & Co. Advocates who, likewise, filed written submissions in opposition to the appeal. Counsel for the appellants argued grounds 1, 2, 3 and 4 together. The thrust of their submissions is that the appellants were *bona fide* purchasers for value without notice.

In the Court of Appeal, also by written submissions, Counsel for the appellants went to great lengths to show that both the appellants and their agents had been meticulous and diligent and had properly and transparently dealt with the original registered owner, Mrs. Roussos and especially her children, Nicholas, her son and respondent and Elizabeth, his sister, and for that reason, they could not be anything else other than *bona fide* purchasers for value without notice. However, this contention of innocence and diligence is answered correctly, in my opinion, by the learned trial judge in his judgment when after reviewing the evidence, he remarks:

> "*P.J. Pattri was an agent for both Elizabeth Roussos and the defendants (now appellants) and therefore the notice or*

knowledge he had is inevitably ascribed to the parties to the fraud - both Elizabeth Roussos and the defendants (appellants). Although the defendants (appellants) most likely furnished consideration in form of money for the property to which they could have paid Elizabeth Roussos, they cannot be said to be bona fide purchases for value without notice."

Although Counsel protests about the presence of Elizabeth Roussos in the passage cited above, there is no doubt from the rest of the evidence that Elizabeth Roussos was a significant participant in the transfer of the suit property to the appellant and his late father. In the first instance, Mr. Pattni, the agent of the appellants in the suit property, is the same Pattni, DW1, who acted for the mother of the respondent when she bought the suit property from Mr. De Souza. At the trial, Mr. Pattni testified thus;

"*At the time of getting instructions for sale of the property from Elizabeth, Gulamhussein Virani, and Nazimudin Virani were present. I explained to Elizabeth at the time of giving her the documents about who should witness the documents since they were going to be signed outside Uganda. After a few weeks, Elizabeth came back with the documents bearing the name of Mrs. Roussos as having signed. I was satisfied with the signature and the witnessing of the documents. Then we prepared a mortgage for the Lohana Community and Mrs. Pradhan. They took them to Viranis for mortgages. I think I witnessed the signatures. After that, we lodged the documents for registration. From the purchase price, we paid off the mortgages made by Mrs. Roussos from C. Kanji Ltd. and Tejani. After paying the mortgages, the balance was drawn in form of a cheque in favour of Mrs. Roussos and given to Elizabeth.*"

In my view, it is inexplicable that the appellants should not have called Elizabeth Roussos as a material witness to testify whether she had

indeed sent the transfer forms to her mother in Cyprus and whether she (Mrs. Roussos) had received the purchase money entrusted to her (Elizabeth). I am not persuaded by the arguments of Counsel for the appellants that it should have been the respondent to call Elizabeth Roussos as a witness.

For the respondent, Counsel also combined grounds 1,2,3 and 4 and argued them together. In Counsel's view, the learned Justices of Appeal and the trial judge put emphasis on the salient principles in the concept of fraud. In this regard the learned trial judge
observed;

> "*I accept his (the handwriting expert) findings that the person who signed the land transfer in favour of the defendants forged the signature of E.G.Roussos. With this finding, it follows that the transfer of the land to the defendants was a result of a fraud since it was a result of dishonesty.*"

The learned Justice of Appeal who wrote the lead judgment reevaluated the evidence herself and concluded, "*I am unable to fault the learned judge on that finding.*" *T h e* other learned Justices of Appeal confirmed the findings of the trial judge and agreed with the lead judgment of their colleague. The two courts also found overwhelming evidence that Pattni and his superiors, Patel and
Metha, Advocates were the appellants' agents in the fraudulent transaction.

I agree with the concurrent findings of the two courts below that the appellants failed to prove that they were *bona fide* purchasers for value without notice. Once fraud has been proved, and the defence of a *bone fide* purchaser for value without notice ruled out, no transaction can pass title to anyone under such circumstances. In my view therefore, grounds 1, 2, 3 and 4 of this appeal ought to fail. The disposal of these

grounds also disposes of this appeal. I can see no further need to deal with grounds 5, 6 and 7 nor is there any necessity to consider the prayers advanced by the appellants.

All in all, I would dismiss this appeal. I would award the costs of this appeal and the costs in the courts below to the respondent.

JUDGMENT OF ODOKI, CJ:

I have had the advantage of reading in draft the judgment prepared by my learned brother Kanyeihamba, JSC, and I agree with his judgment and the orders he has proposed.

As the other members of the ***Court*** also agree with the judgment and orders proposed by Kanyeihamba, JSC, this appeal is dismissed with costs in this Court and the Courts below.

JUDGMENT OF TSEKOOKO, JSC.

I have had the benefit of reading in advance judgments prepared by my learned brothers, Kanyeihamba, JSC and Katureeba, JSC, and I respectfully agree with both of them that this appeal has no merit and the same should be dismissed.

Tabaro, J, the learned trial judge, framed the basic issue at the start of the interpartes hearing of the suit in the High Court as whether or not the defendants validly acquired the title registered in their names from the (previous proprietor) Eugenia Genoveva Roussos. The present appellant was the first defendant in the suit.

After a full trial, the learned trial judge found that the present appellant was a liar as was his codefendant, who died later. In the result the learned judge gave judgment in favour of the plaintiff represented now by the present respondent. The learned trial judge was of the view that the appellant was aware of the fraudulent transaction which led to the transfer of land into their names on basis of forgery.

In the Court of Appeal, Kitumba, JA with whom the other members of the court agreed, confirmed the findings of the trial judge after she had reevaluated the evidence on the record, that the two defendants were liars.

I have gone through the record and I have not been persuaded that any of the two courts erred in the evaluation of the evidence and the application of the law.

I therefore agree that this appeal has no merit and it ought to be dismissed with costs to the respondents here and in the courts below.

JUDGMENT OF KAROKORA:

I have had the advantage of reading in draft the judgment prepared by my learned brother Dr. Kanyeihamba, JSC, and do agree that the appeal has no merit. It should therefore be dismissed as the appellants failed to prove that they were bona fide purchasers from the seller, the seller having had no legal authority to sell the suit property.

I also agree with the orders that the appellants should pay costs here and in the courts below.

JUDGMENT OF KATUREEBE, JSC,

I have had the benefit of reading, in draft, the judgment of my learned brother, Kanyeihamba, JSC, and I agree with him that this appeal has no merit and should be dismissed.

The facts have already been stated in that Judgment and I need not repeat them here. The appeal raises the issue of how and when this court as a second Appellate Court may re-evaluate evidence and depart from the concurrent findings as to facts by the High Court and the Court of Appeal.

The law governing consideration of second appeals has been stated in a number of cases by this court. In ***MADDUMBA - Vs- WILBERFORCE KULUSE, Civil Appeal No.9 of 2002,*** this court laid down the law that a second appellate court will depart from the concurrent findings of fact by the lower courts only if special circumstances justified it in doing so.

Oder, JSC, (RIP) stated this in that case at page 4:-

> ***"The Court of Appeal was the second appellate court in this matter. As such, it could only depart from the concurrent findings of fact by the trial Magistrate's Court and the appellate High Court if special circumstances justified it doing so. This is trite law on the role of a second appellate court regarding findings of fact."***

In the case of ***PETERS -Vs- SUNDAY POST LTD [1958] EA 424, Sir Kenneth O'Connor, P,*** cited with approval the following passage from the judgment of Viscourt Simon, L.C, in the English case of ***WATT -Vs-THINAS [1947] A.C 484:***

> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge..... An appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the***

conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to court of Appeal) of having the witnesses before him and observing the manner in which their evidence is given, "(emphasis added).

This court has also decided on this matter in ***MILLY MASEMBE - Vs- SUGAR CORPORATION AND ANOTHER CIVIL APPEAL NO. 1 OF 2000,*** where it decided that the appellate court's exercise of the power to review the evidence depends on whether the trial judge failed to take into account any particular circumstances or probabilities or whether the demeanor of the witness whose evidence was accepted was inconsistent with the evidence generally. Mulenga,JSC stated as follows:-

> "***In a line of decided cases, this court has settled two guiding principles at its exercise of this power. The first is that is that failure of the appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as a second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to do, <u>except where it is clearly necessary</u>***" (emphasis added).

In this case, the appellant should have shown that there were special circumstances necessitating this court to re-evaluate the evidence to depart from the concurrent findings of fact of the lower courts. In my view, none has been shown. In fact the Court of Appeal went to great length to re-evaluate the evidence. The court fully reviewed the evidence of Mr. Pattni, the chief witness for the appellants. The court also expressed surprise that two possible witnesses that could have thrown more light on Mr. Pattni's evidence were not called by the Appellants, as indeed the trial judge had also expressed surprise. In her lead judgment, Kitumba, JA, states as follows (at page 18):

> "***It is appreciated that Pattni on a number of occasions saw members of the Roussos family together while Mrs. Roussos was effecting some transactions in connection with the suit property. However, it is obvious that Pattni knew well that Elizabeth has no legal authority to sell the suit property. That is the reason why he instructed her to get a power of attorney from her mother. For the aforesaid reasons, the appellants' counsel's argument that Elizabeth was her mother's agent is not tenable.***

***The duty was upon the appellants to prove that they were bona fide purchasers. However, they failed to do so. As rightly pointed out by counsel for the respondent, the appellants did not produce any sale agreement to enlighten court about the terms of the sale. They did not also call as their witness the alleged agent Nandia Karia to testify about the sale of the suit property. They should also have called Elizabeth as their witness as she was very crucial to prove that they were bona fide purchasers from Mrs. Rossos.*"**

Looking at the evidence as a whole and taking into account the submissions of both counsel, I am satisfied that the Court of Appeal did re- evaluate the evidence and was justified to concur with the findings and decision of the trial judge. I see no reason whatsoever to depart from their concurrent findings.

In the result I concur fully with Kanyeihamba, JSC that the appeal be dismissed with costs.

Dated at Mengo this 23rd day of November 2006.