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THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

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CIVIL APPEAL NO. 17 OF 2014

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CORAM: (KATUREEBE CJ, ARACH-AMOKO, NSHIMYE, OPIO-AWERI
MWONDHA JJ.SC).

BETWEEN

- 15
1. YAKOBO M.N.SENKUNGU
2. JAMES KENJURA
3. JOHN RWAKAMURANGA ::::::::::::::::::::::::::::::: APPELLANTS
4. GIRADESI KATONYA
5. YONAHA RWAKAARO

20
AND

CRESENSIO MUKASA:::::::::::::::::::::::::::::::::::::RESPONDENT

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[Appeal from the judgment and Decree of the Court of Appeal Civil Appeal No. 35 of 2006 before the Justices (Hon. Justice S.G. Egwau JA, Hon. Justice A.Twinomujuni JA and Hon. C.N.B.Kitumba JA) dated 26th July 2000]

JUDGMENT OF A.S NSHIMYE JSC

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This is a second appeal arising from the judgment of the High Court sitting at Masaka delivered by V.F.Musoke- Kibuuka J on 31/1/2006.

The brief background to the appeal as stated in the lead judgment of the Court of Appeal is that:

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The respondent is a holder of Letters of Administration of the estate of the late Guisite Nakaima who is undisputedly claims was his grandfather. Nakaima died on 13th June 1941 leaving behind two pieces of land, the subject of this appeal, situate in Mawogola Block 30, Plot No. 1 at Kabagoma of about 641 acres and Block 31, plot No. 1 at Ntyazo of about 623 acres. In 1986, the respondent on obtaining the letters of administration sought to transfer the land into his names only to discover that it had long been dealt with by other people. The Certificate of Title which was exhibited in court showed that on 3rd August 1978, under instrument No. MSK 54168, a one Peter Ssekasiko became registered proprietor with an alleged transfer from Nakaima. Three
40 months later, on 27th November 1978, Ssekasiko transferred the land to one Eugene Ssonko under instrument No.MSK 54497. On 25th January 1980, under instrument No.MSK 6000, the land was transferred and registered in the names of Yakobo Mutendwa Senkungu, the first

appellant. Finally on 30th August, 1989 the first appellant transferred the land to the other appellants. The respondent brought a suit against the appellants in Masaka High Court for orders that the Certificate of Title be cancelled on ground of fraud.

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Issues at High Court

1. *Whether or not Gusite Nakaima transferred the suit properties to anyone.*
2. *Whether the Plaintiff has a cause of action against the 3rd, 5th and 6th defendants.*
- 10 3. *Whether any fraud was committed if so by who.*
4. *Whether there was a nexus between that fraud and other defendants.*
5. *Whether the plaintiffs are entitled to the reliefs sought.*

The High Court judge answered all the above issues in the negative save for issue 2. He inter alia
15 held:

*“Although not all transfers of land are registered immediately, a period of 37 years appears to be too long for registering a transfer executed by the late Gusite Nakaima before his demise in 1941, to have been kept safely to be used by Peter Ssekasiko in 1987. The probability that the late Gusite Nakaima could have executed a transfer of both suit
20 properties in favour of Peter Ssekasiko after 1941 is even less likely because he was dead.*

Upon the evidence before court and upon the balance of properties, Court finds that the late Nakaima is unlikely to have executed a transfer of the suit properties to anyone”.

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*“The evidence produced by the Plaintiffs does not show that Eugene Ssonko to whom Peter Ssekasiko transferred the suit properties, was privy to Ssekasiko’s alleged fraud, if there was any. Likewise, there’s no evidence of any nexus of fraud between Eugene Ssonko and Yakobo before court. Court is therefore unable to conclude ... that Yakobo
30 Ssenkungu, the 1st defendant obtained registration of the suit properties through fraud. As to the 2nd to the 7th defendants, failure to prove fraud on the part of the 1st defendant*

who transferred title to Mawogola Block 30 plot 1 to them would mean that they could not be privy to unproved fraud”.

Dissatisfied with the High Court decision, the respondent appealed to the Court of Appeal on the following grounds:

Grounds of Appeal at Court of Appeal

1. The learned trial judge erred in law and fact when he answered issue no.1 in the negative, disbelieving the evidence adduced in support of the claim.

2. The learned trial judge erred in law when he failed to evaluate the evidence before him, thus he arrived at a wrong finding. There was no evidence to show how PeteroSsekasiko got registered on the land, of which also the trial judge had made a finding that there was fraud.

The Court of Appeal found in favour of the current respondent. The appellants, being dissatisfied with the Court of Appeal decision, appealed to this Court on the following grounds:

1. The learned Justices of Appeal erred in law and fact when they held that the Appellants acted fraudulently in acquiring the Certificate of title to the suit land.

2. The learned Justices of Appeal erred in law and fact when they held that the Appellants were not bonafide purchasers without notice of fraud for the suit land.

3. The learned Justices of Appeal erred in law and fact when they granted prayers originating from an illegal claim.

4. The learned Justices of Appeal erred in law and fact when they failed to evaluate the evidence and shifted the burden of proof to the Appellants thus arriving at a wrong conclusion.

Representation:

At the hearing of the appeal, the 1st and 2nd appellants were not represented by counsel and none of them appeared in court.

The 3rd, 4th and 5th appellants were represented by Mr. John Mary Mugisha.

5 The respondent was represented by Mr. Fredrick Ntende and Mr. Paul Kuteesa.

Both counsel adopted their written submissions which this court has carefully read and considered in resolving the issues raised in this appeal.

10 The appellants, in their written submissions argued the grounds independently but abandoned ground 3 of the memorandum appeal. The respondent on the other hand argued all the grounds jointly.

The Court shall therefore resolve the remaining 3 grounds independently in the order in which
15 they were raised and argued by the appellants.

Submissions of the appellants.

Ground 1

The appellants faulted the learned Justices of appeal for finding that there was fraud on the part
20 of the 1st Appellant which could be imputed on the 2nd to the 7th appellants.

The appellants, while supporting the findings of the learned trial judge submitted that for fraud to constitute a ground for cancellation of certificate of title, it must not only be proved to reside in the transferee but it must also be proved to have been actual as opposed to mere suspicions. That
25 by the learned Justices inferring from the failure of the 1st appellant to enter appearance in the trial court to constitute a fraudulent intention in absence of specific proven fraud on the part of the appellants (3rd-5th) was mere suspicion and speculation. That the allegation of fraud had to be strictly proved. In support of the foregoing proposition, counsel relied on the authorities of *Fredrick. J.K. Zaabwe vs. Orient Bank Ltd & Others SCCA No. 141 of 2006 and Kampala*
30 *Bottlers ltd vs. Damanico (U) Ltd SCCA No. 22 of 1992.*

Ground 2:

The appellant submitted on this ground that, it was erroneous for the learned Justices of appeal to
5 find that evidence at the trial showed that the appellants became aware of the respondent's claim
and had witnessed his physical occupation of the land. That there having been 3 proceeding
transfers, the appellants had no duty to inquire into the bona fides of those earlier transfers. He
argued that fraud by a person from whom a bona fide purchaser for value obtains title does not
necessarily affect the purchaser. In support of this argument, he relied on the authority of *Imelda*
10 *Ndiwawangi Nakedde vs. Rony Busuulwa Nsereko and another (1997) HCB 73*.

The appellant further argued that the oral evidence from the respondent notifying them of a
pending suit on the said property was not notice to them of any other occupant on the said land.
Secondly there was no court injunction forbidding any transaction on the land. He contended that
15 the appellant had carried out due diligence by visiting the land registry and the land itself. When
they attempted to evict the respondent, the matter was referred to the 1st appellant who obtained a
successful eviction of the respondent through the Magistrate's Court. That therefore the finding
of the learned Justices of Appeal that the appellants' failure to evict the respondent after they had
acquired interest in the land was erroneous in the absence of proof of actual fraud.
20 The appellants prayed this Court to uphold the finding of the trial judge that there was no
evidence to prove that the appellants were not bona fide purchasers for value without notice.

Ground 4:

The appellants argued that the learned Justices of appeal erred in law and fact when they failed to
25 take the evidence on record as a whole and subject it to fresh scrutiny and make their
independent findings. That the learned Justices resorted to making blanket and sweeping
observations and conclusions. These conclusions were that: ordinary prudence and caution in the
circumstances of this case would have informed any reasonable person not to engage in the
transaction as the 2nd to 5th appellants did. That payment was hastily made, followed by a transfer
30 and then settlement on the land. That these were not acts of an honest dealing. Another
conclusion was that the respondents did not seek to evict the appellant well knowing that their

newly acquired interest was in bad faith. The appellants prayed that the appeal be allowed as prayed with costs.

5 **Respondent's submissions:-**

In reply, counsel for the respondent supported the findings and conclusions of the Court of Appeal. He argued that the learned justices of Appeal rightly carried out their duty of re-evaluating the evidence on record and arrived at the right inference that the transfers of the various parcels of land to the appellants was tainted with fraud, to which fraud the appellants
10 were fully aware and took advantage of.

The respondent further argued that it was not enough to say that they purchased the land after conducting a mere search on the title. The evidence showed that the appellants had also visited the locus and found it in occupation of the respondent and his brother and this put the appellants
15 on notice of the respondent's interest on the suit land and were bound by it. For this proposition, counsel relied on the authority of **Uganda Posts & Telecommunications vs. A.K.P.M Lutaaya SCCA NO. 36 of 1995** wherein Court inter alia held that: *if a person purchases an estate which he knows to be in occupation of another other than the vendor, he is bound by all the equities which the parties in such occupation may have in the land.*

20

In reply to the appellant's submission that the Court of Appeal erroneously shifted the burden of proof to them, counsel submitted that the High Court having found that the transfer to Peter Ssekasiko was as a result of fraud, the burden of proof shifted to the appellants to show that their purchase and transfer was bonafide and without notice of the fraud. The appellants did not
25 adduce any facts to prove that they were bona fide purchasers for value without notice.

Analysis and consideration by Court.

In resolving the appeal before us, I am alive to our duty as a second appellate court. This duty entails us to consider and determine whether or not the Court of Appeal adequately re-evaluated
30 the evidence on record before coming to its conclusions and findings. See **Avect Sam vs Uganda Criminal Appeal No.2015.**

(SC).

The Court of Appeal came to the conclusion that there was fraud on the part of the 1st appellant which could be imputed on the 2nd to 5th appellants. In this court's earlier decision of **Kampala Bottlers Ltd vs. Damanico (U) Ltd SCCA No. 22 of 1992**, Wambuzi CJ (as he then was) stated
5 that fraud must be attributable to the transferee either directly or by necessary implication. The question which then follows is: *Was the fraud of the 1st appellant imputed to the 2nd – 5th appellants?*

The Court of Appeal stated that under Section 106 of the Evidence Act, the burden of proof in
10 civil proceedings rests upon the person with any fact within his or her knowledge and who desires court to give judgment as to any legal right or liability. Therefore, the authenticity of the transfers to the 1st appellant was a fact within the knowledge of the 1st appellant but he adamantly refused to appear in court to give his testimony to this effect. The Court found that in absence of
15 this evidence, and the fact that there was no occupation of the land by the appellants for 11 years after the purported transfer from the original proprietor (Gusite Nakaima), irresistibly pointed to an inference of a fraudulent transfer that affected the subsequent transfers to the 2nd-5th appellants who had actual notice that the suit land was subject to court proceedings.

Section 92 (2) of the Registration of Titles Act provides that:

20 *Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument which he is entitled to transfer or dispose of shall pass to the transferee and the transferee shall thereupon become the proprietor thereof.*

The transfer thus becomes paramount over any other interest on the land save for fraud. **Section**
25 **64 (1) of the Registration of Titles Act** provides that:

Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in the case of fraud,
30 *hold the land or estate or interest in land subject to such encumbrances as are*

***notified on the folium of the Register Book constituted by the certificate of title,
but absolutely free from all other encumbrances***

Fraud has been defined in a numerous legal authorities. ***Kerr on the Law of Fraud and Mistake***
5 ***5th edition part 1 page 1:*** states that civil courts of justice have always avoided hampering
themselves by defining or laying down as a general proposition what constitutes fraud. Fraud is
infinite in variety with the ever dynamic operations of mankind. Thus Kerr defined fraud in the
contemplation of a civil court of justice to include all acts, omissions, and concealments which
involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious
10 to another, or by which an undue or unconscientiously advantage is taken of another. All
surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone. Fraud in
all cases implies a willful act on the part of anyone, whereby another is sought to be deprived, by
illegal or inequitable means, of what he is entitled to. Also see ***Fredrick JK Zaabwe v Orient
Bank and Others (Supra)***

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The appellants argued that the term fraud as appears in the Registration of Titles Act meant
actual fraud. However, we think that is a narrow argument. In the American authority of ***Husky
International Electronics, Inc vs. RitzNo. 15–145of 2016*** the Supreme Court of United States of
America expanded the meaning of actual fraud as encompassing fraudulent conveyance schemes
20 that can be affected without a false representation. Such fraudulent conveyances typically
involve a transfer to a close relative, a secret transfer, a transfer of title without transfer of
possession or grossly inadequate consideration. We are persuaded by this latter argument.

Whether or not fraud which was imputable on the 2nd-5th appellants was committed in the present
25 matter is a fact-specific question. We will therefore look at all the facts and circumstances of the
transaction through which the appellants obtained title. We shall thus consider the evidence on
record that the Court of Appeal considered and evaluated before reaching its conclusion.

The Court of appeal considered the following facts to come to the conclusion that the 1st
30 appellant's transfer and the subsequent transfers he made were fraudulent:

The 1st appellants failure to appear in the court of appeal and in the High Court without sound explanation and yet he opened a suit in the Chief Magistrates court having known of a High Court suit had been instituted against him, the absence of proper evidence to show how the land was transferred from the original proprietor (Gusite Nakaima) to the 1st appellant, pointed to a
5 guilty mind.

On this premise, we are unable to fault the Court of Appeal's findings that the evidence on record did show that the 1st appellant was dishonest in his dealings.

10 The effect of a certificate of title obtained by fraud according to Section 77 of the Registration of Titles Act is that the certificate is considered void against all parties to the fraud. In other words, the title of transferees guilty of some fraudulent act or who came to know of such act by somebody else and took advantage of such act, are void. [*See judgment of Wambuzi CJ(as he then was) in Kampala Bottlers vs. Damanico (U) ltd (supra)*].

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The only instance where the subsequent transfers/transferees can be protected is under **Section 181 of the Registration of Titles Act**; that is if they were bonafide purchasers for value without notice. Section 181 provides:

20 ***“Nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or to an action for recovery of damages as aforesaid or for deprivation of the estate or interest in respect to which he or she is registered as proprietor any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he or she claims was registered as***
25 ***proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this applies whether the fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever”.***

30 This leads us to answer the second ground of appeal whether the 3rd, 4th and 5th appellants were bona fide purchasers for value without notice.

Ground 2

In order for one to seek the protection of Section 181 (supra), he/she must prove that he/she is a bona- fide purchaser. The purchaser must act in good faith, ought to have given due
5 consideration and purchased the land without notice of the fraud. Such notice covers both actual knowledge and constructive notice of the fraud. In **Jones vs. Smith (1841) 1 Hore** the Chancery Court held that: *a purchaser has constructive notice of a fraud if he had actual notice that there was some encumbrance and a proper inquiry would have revealed what it was, has abstained either deliberately carelessly from making those inquiries which a prudent purchaser would have*
10 *made.*

To answer ground 2 appropriately, we need to trace the chronology of the transfers presented on record.

15 The transfer forms presented on record in which the suit land was transferred to the appellants reveal the following information:

On 18.11.1978, Peter Ssekasiko transferred the suit land to Eugene Ssonko for a consideration in the sum of Ushs. 300,000/=. Eugene Ssonko's interest was registered on the Certificate of title under Instrument No. Msk 54497 on 27/11/1978 at 3 pm.

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On 18.1.1979, Eugene Ssonko for a consideration of Ushs. 300,000/=. transferred the land to Yakobo Mukaku Mutendwa

Ssenkungu- (the 1st appellant.) The 1st appellant's interest was registered on the certificate of title under Instrument No. Msk 60006 on 25/1/1980 at 10.15 am.

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On 21.8.1989, the 1st appellant transferred the said land to the 2nd, 3rd, 4th and 5th appellants as tenants in common. Their interest was registered under instrument no. Msk 71229 on 30/8/1989.

The information on the Certificates of title for the suit land i.e Block 30 and Block 31 shows that
30 Gusite Nakaima was the original proprietor of the land having obtained the same from the Buganda government. His interest on the certificates of title for Blocks 30 and 31 were registered

on 22.9.1932 and 23.9.1932 respectively. A copy of a certificate issued by His Majesty's government to Gusite Nakaima showed that he was the absolute owner pending payment of shs.137/= and 177/= respectively. This pending payment was entered as an encumbrance on the titles which was later cancelled upon Nakaima making the payment of the requisite fees.

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I note that on the certificate for Block 31, it shows that two interests in the suit property were registered in 1978. The first interest being that of Peter Ssekasiko and the second being that of Eugene Ssonko.

10 However, the transfer forms show disconnected information with that recorded on the Certificate of title. The transfer forms reveal that only one transfer was made in 1978. This was the transfer made by Peter Ssekasiko to Eugene Ssonko on 18th November 1978. The next transfer was made in 1979 from Eugene Ssonko to Yakobo- the 1st appellant.

15 I also note that on the Certificate of title for Block 30, the encumbrance page differs from that of Block 31. Whereas an encumbrance was entered on Block 30 by the government of Buganda in whom the land vested which encumbrance was cancelled upon the original proprietor (Nakaima) paying the requisite fee, the encumbrance page on Block 31 is blank.

20 I find that the mismatch of information on the certificate of title and the transfer forms casts doubt on the truthfulness that the appellants are bona fide purchasers for value without notice of the suit property. The record also shows that the 2nd – 5th appellants as transferees had visited the locus and found it to be in occupation by the respondent and his brother. Further, the appellants went ahead to negotiate with the respondent to have the suit land sold to them however the
25 respondent informed them that there was already a pending case in court against the 1st appellant for fraudulently transferring the said land. This was sufficient to put the 2nd-5th appellants on notice. I find therefore that the appellants were not bona fide purchasers for value without notice. I agree with the finding of the Court of Appeal that the plea behind the making of multiple transfers on the law was to disguise fraud as a bona fide. As correctly found by the Court of
30 Appeal on 2nd to 6th respondents on receiving the notice and ignoring it tainted their otherwise bona fide title.

In the premise, I am unable to fault the learned Justices of the Court of Appeal for finding that evidence led at the trial showed that the appellants had become aware of the respondent's claim and witnessed the physical occupation of the land by the respondent thus they were not bona fide purchasers for value without notice.

Therefore, Ground 2 fails.

Ground 4

The appellants' main contention in regard to this ground was that the learned Justices of Appeal erred in law and fact when they shifted the burden of proof borne by the respondent on to the Appellants. That the learned Justices erred when they found that, the 1st appellant's proprietorship could only be proved by his testimony. That since it was the respondent who had appealed he had the burden to bring the relevant witnesses to establish his claim. The appellants argued that the respondent had failed to discharge the oscillating burden of proof of his claim to necessitate a rebuttal from the appellants.

The relevant law on the burden of proof in civil matters is found the Evidence Act.

Section 101 provides:

Burden of proof:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 provides:

On who the burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103 states:

Burden of proof as to particular fact.

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Section 106 provides:

Burden of proving, in civil proceedings, fact especially within knowledge.

In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.

In civil trials, the burden of proof is the obligation to present evidence on the subject of the law suit; that is, to prove or disprove a disputed fact. Various burdens of proofs are associated with varying matters; in matters of fraud, the burden lies first on the claimant or party who asserts that the transaction was tainted with fraud to adduce evidence to that effect. In the present appeal, the respondent did state on a preponderance of probabilities that the transfer made to the appellants was fraudulent. The registered proprietor having died in 1941 could not have been one and the same person who effected the transfer of the suit land in 1978- 37 years after his demise. This fact was enough on a preponderance of probabilities to shift the burden on the appellants to rebut this fact. However, as the Court of Appeal found, the fact that the 1st appellant from whom the rest of the appellants claim to have derived title did not put in a defence both at the trial court and in the Court of Appeal which cast doubt as to the authenticity of the transfers affected by him.

I thus find the argument of appellant in this regard very flimsy. The Court of Appeal did not shift the burden of proof as alleged by the appellants.

Ground 4 also fails.

Decision.

All the grounds of the appeal having failed, I would dismiss the appeal with costs to the respondent

Dated at Kampala this ...06th day ofApril..... 2017.

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AUGUSTINE S NSHIMYE
JUSTICE OF THE SUPREME COURT

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