THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.3/97

(CORAM: JUSTICE M. KATO, JA. JUSTICE A.E. MPAGI-BAHIGEINE, J.A.;

JUSTICE S.G. ENGWAU, J.A.)

DR. ADEODANTA KEKITIINWA & 3 OTHERS ………………….APPELLANT

VERSUS

EDWARD HAUDO WAKIDA …………………………………….RESPONDENT

JUDGMENT OF JUSTICE A.E. MPAGI-BAHIGEINE,J.A.

This is an appeal against the judgment and order of the High Court dated l6th September 1996 at Kampala, whereby Byamugisha, J. made an order for nullification and cancellation of the 1st appellant's certificate of title to land comprised in LRV 1798 folio 11 plot No.16 Upper Naguru East Road, Kampala. The learned Judge also ordered extension of the lease thereto in favor of the respondent.

The four appellants are: 1st Dr. Adeodanta Kekitiinwa; 2nd, the Commissioner of Land Administration; 3rd, the Uganda Land Commission and 4th, the Chief Registrar of Titles.
The facts which were simple and undisputed are briefly as follows.
On 26-11-87, the respondent Mr. Edward Maudo Wakida was allocated Plot No.15 Upper Naguru East Road by the 3rd appellant. The plot became No.16 Upper Naguru East Road after the survey.
The term of the lease was expressly five years from 1st December 1987. By Clause 2(b) of the

lease agreement, the lessee covenanted to erect on the said land a residential house of a value not less than Shs.12 million to be completed on or before 30-11-92, the expiry date of the lease. The Certificate of Title was registered on the 8-11-89 and issued on 14-11-89 as LRV Vol.1798 folio 11. By the expiry date the respondent .had not yet complied with the building covenant. On 16-12-93 a year after the expiry date, the respondent applied for an extension of the lease. On 17-12-93, the 1st appellant. Dr. Adeodante Kekitiinwa was allocated the said plot. This was on the ground that the respondent s five year term had expired without any developments on the plot and that he had failed to apply for any extension before the expiry. The respondent successfully challenged this allocation before the High Court. Hence this appeal.

The memorandum of appeal comprised four grounds namely,

1. That the learned trial Judge having found as a fact that the lease of the respondent had a definite beginning, 26.11.1987, for a period of 5 years, erred in finding that the said lease expired on or about the 30th day of November, 1994.

2. That the learned trial Judge erred in finding that the respondent's land was developed within the meaning Of Statutory instrument no.57/1993

3. That the learned trial Judge erred in finding that the controlling. authority‘s failure to comply with the provisions of sections 32 and 36 of the public Lands Act 13/69 constituted fraud.

4. That the learned trial Judge erred in holding that the 1st Defendant took advantage of the illegalities committed by the 3rd Defendant to get herself registered.

These grounds were all fully argued.

Regarding the first ground, Mr. Barnabas Tumusingize, for the appellants, argued that the learned trial judge ought to or should have found that the lease which was for a fixed period of five years, from 1-12-87, expired on or about 30-11-92. He pointed out that the learned judge erred when she held that time was not of essence and substituted or construed the registration date of 8-11- 89 for or as the effective or commencement date of the lease, and consequently held that the lease expired on 30-11-94. He submitted that the Registration of Titles Act Section 51 relied on by the learned judge, to the effect that an instrument is not effective until registered, was inapplicable under the circumstances, as the lessee had an enforceable equitable interest in the land. He asserted that the terms governing the lease were to be found in the lease agreement itself, Exh.P1 and nowhere else. He prayed the Court to overrule the judge's findings and allow this ground of appeal.

Mr. Paul Byaruhanga who appeared with Mr. Edmund Wakida for the respondent, while agreeing with all the facts, submitted that the judge's findings were correct in that the targeted period of five (5) years should have ended in 1992, other things being equal, but that since they were not, the judge correctly construed the commencement date of the lease to be the date of registration of title on 8-11-89, and therefore the expiry date to fall on 30-11-94. In his view the judge correctly applied S.51 of the Registration of Titles Act which had the same effect as Rule 10 of the Public Lands Rules S.l. 201-1. He said that before registration, the respondent would be at the sufferance of the controlling authority, the 3rd appellant. He argued that because of the delay in registration and approval of the plans, the 3rd appellants conduct was such that time had ceased to be of essence, and that the original expiry date of 30-11-92 had been waived. He prayed Court to dismiss this ground of appeal.

The learned judge after meticulously directing herself as to the essentials of a valid lease, relying on the relevant authorities of **Marshall v Berridge 19 Ch..D. 233** and **Hervey Vs Pratt (1965) 2 AER 786,** observed.

'I think that there is no dispute that the lease agreement signed by the plaintiff as the lessee and officials of the 3rd defendant met the requirements of the definition which I have stated above. It was in writing. Lt had a definite beginning 26-11-87 for a period of five years….'

The learned judge, however, proceeded to hold:

"....in my view registration was a condition precedent before the plaintiff could legally occupy or use the land in accordance with the terms of the Lease.'

With respect to the learned judge, this approach was erroneous and contrary to the express terms of the agreement. I think it must have been the cause of more difficulties as will be seen later in this judgment.

The Judge then summarized her findings on this issue as follows:

"The parties to the lease agreement conducted themselves in a manner which clearly indicate that time was not of essence. The 3rd defendant should have

at least given notice to the plaintiff before any steps were made to take the land. It is therefore

my finding that the plaintiffs lease ought or should have expired on or about the 30th day of November, 1994 due to the delay in registration and the different terms given by the 3rd defendant."

She cited the case of **Aida Nunes vs. John Mbiyo Njonjo (1962) EA 88** in support of her findings. I shall be referring to this case later.

The learned Judge with due respect, seems to have lost sight of her own definition of a valid lease and glided into a different opinion. I would prefer to quote the dictum of Lord Green M.R in an earlier case of **Lace v Chantler (1944) 1KB 368 at 370,** not referred to by Counsel, but which in my view neatly wraps up the legal
position enunciated later in **Marshall v Berridge** and **Harvey v Pratt** (supra).

"The habendum in a lease must point out the period during which the enjoyment of the premises is to be had, so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain . . . . or capable before the lease takes effect of being rendered so. The important words to observe in that last phrase are the words "before the lease takes effect." (**Added emphasis is mine**)

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The learned trial judge singularly considered the original lease offer Exh.D3, which had stated the initial term to be for 2 years from 1-12--37 with a possible extension of 49 years. This offer which was never signed by the respondent and awaited acceptance was superseded by the lease agreement Exh.P1, which was duly signed by both parties as she correctly observed.

Not surprisingly the respondent acknowledged:

"The terms between me and the controlling authority were incorporated into a lease agreement."

This agreement Exh.P1 stipulated the term of 5 years commencing on 1-12-87 as in the original offer Exh.D3 and with a possible extension to 99 years, instead of 49, on complying with the building covenant and other express or implied conditions. We were told from the Bar that the

figure of 2 years in the lease offer was an error, though it is not clear from the record whether this was ever brought to the attention of the learned judge. Be that as it may, the learned judge seems to have overlooked Section 9O Evidence Act which states:

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, save as mentioned in Section 78, shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. (Section 74 refers to Judicial Proceedings).

In view of the above, it becomes obvious, therefore that the learned judge was not entitled to look anywhere else for the terms of the agreement between the parties except in the lease agreement - the certificate of title itself - Exh.P1, where the habendum (which defines the commencement and duration of the term) provided:

"...Term from 1st December, 1987 for 5 years..."

and where the lessor is indicated as having expressed himself to:

'Hold . . . .unto the lessee:; .for the term of five (5) years from the 1st day of December one thousand nine hundred and eighty seven …."

and whereupon the lessee covenanted to complete the said buildings for occupation and use to the satisfaction of the lessor on or before the 30th day of November, 1992 - Clause 2(c). I should add that the word "Term" means the term which the lessor purports to grant.

The learned judge in her initial observation referred to the date of offer made on 27-11-87 as the definite beginning which was an error. It is noteworthy that the lease agreement was expressed to have been made on 11-1-89, but the commencement date throughout

remained 1-12-87. It is most important to appreciate that a valid lease might commence either immediately or from **a** past or future date, only that the date must be certain. The date of offer, 27- 11-87, had no relevance in the matter. The principles stated in the authorities referred to by the learned judge were conveniently summarized by Lord Green M.R. in **Lace v Chantler (supra)**. In Harvey v Pratt (supra), an agreement was made for a lease for 21 years but no commencement date was indicated. It was held to be no agreement for want of clarity. It was affirmed that in order that an agreement for a lease shall be valid, there must be among other

essentials, agreement on the date of commencement of the term, and that in absence of this date, validity will not be given to the agreement, either by implication that the term shall begin within a reasonable term, or by taking the date of the agreement as the date of commencement.

In Marshall v Berridge (supra) Lush L.J. said:

"There must he a certain beginning and a certain ending, otherwise it is not a perfect lease**..."**

As pointed out above the learned judge relied heavily on the case of Aida Nunes v John Mbiyo Njojo and Charles Kigwe (1962) EA 88, where under an agreement in writing to purchase business, the purchase was conditional on grant of a sub-lease. The purchaser was in possession of the premises. No time was stipulated within which to complete the sub-lease. The sub-lease was however not granted, through delay. The purchaser gave notice repudiating the agreement of sale. It was held inter alia that when time has not been made the essence of a contract it is clear that, at least in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time of essence. Mr. Byaruhanga agreed with the Judge that time was not of essence and that the date was conditional. This argument was attractive but unacceptable. I confess that I have difficulty in finding the relevance of this authority. To hold as the learned Judge did was tantamount to declaring the lease agreement void for uncertainty. While the judge correctly reasoned that an instrument is not effective until registered (S.51 of the R.T.A.), she ought to have gone further to say that an unregistered lease is a contract inter-parties and that the covenants therein are enforceable. City Council of Kampala v Mukiibi (1967) [A 368 following Popatlal Hirji vs. I.H. Lakhani & Co. (EA) Ltd (1960) EA

437. The respondent did not have to wait for registration which date was uncertain, before commencing developments. He had an enforceable equitable interest in the plot. The position would however have been different if the respondent was purporting to transfer title, for then he would have to be a registered proprietor.

The learned judge further relied on Rule 10 Public Lands Rules S.I 201-1 which echoes S.51 of the R.T.A. It reads:

"Any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee"

As I have said above, and it is quite clear, this provision does not derogate from the lessee's

equitable interest as long as there is compliance with the covenants and conditions therein expressed or implied. The position is further clarified by Rule 2 which interprets "registered or 'registration' as appearing in the Rules to mean "registered or "registration under the provisions of the Registration of Titles Act. The Registration of Titles Act does not prescribe any time limit for registering an instrument. It is at large. Therefore, the registration date should not have been taken as the commencement date of the lease, which has to be certain from the inception of the lease.

I conclude therefore that the authorities of Marshall v Berridge, and Harvey v Pratt cited by the learned judge leave no room for doubt and would have obliged her to find that the lease term had a definite beginning of 1-12-87 and a certain ending on 30-12-92.

The law is settled beyond question.

I would allow this ground of appeal.

I now turn to ground No.2 which stated that the learned judge erred in finding that the respondents land was developed within the meaning of Statutory Instrument No.57/1993.

Mr. Tumusingize submitted that the learned judge found there was some development on the land despite clear evidence to the contrary. He pointed out that what constitutes development is defined by S. I. No.57/93. He said that the projected development was Shs.75 million and that the figure of Shs.6.5 million so far expended did not constitute even a 1/3 (a third) of Shs.75 million. He submitted that Regulation No.7 of the Public Lands (Misc) Regulations (S.I. No.57/1993) prohibits extension or renewal of a lease in respect of undeveloped land. He prayed court to allow this ground of appeal.

Mr. Paul Byaruhanga denied that there was any agreement between the respondent and 2nd, 3rd and 4th appellants as to the figure of Shs.75 million for the projected development. He contended that the figure was unilaterally set by the appellants and that the only contractual figure between the parties which the 3rd appellant could enforce was Shs.12 million which is the object of the law as can be evidenced by the lease offer. He prayed court to reject this ground of appeal.

The learned judge construed the covenant in this way:

…...the lease agreement which the plaintiff signed required him to construct a residential house, whose value does not exceed Shs.12 million in a period of five years"

This is not born out by clause 2(b) which enjoins the lessee

(.to erect on the said land buildings (hereinafter called) the said buildings" of a value of not less than twelve million (Shs.12m.) in accordance with plans and specifications which shall be approved by the lessor).

Clearly Shs.12 million should be the minimum value below which the structure erected should not go, while the maximum was left to the respondent to set. Once estimated this would be the projected development value which the lessee would be bound by law to fulfill or comply with. In his letter to the 1st appellant, dated 24-3-94, demanding compensation Exh.P8, the respondent clearly indicated his projected development to have been Shs.75 million. In as far as enforcement of this covenant is concerned; the controlling authority is bolstered in its duties by the Public Lands **(Misc)** Regulations S.I No.57.1993 which set the guidelines on development. In order to determine whether the lessee has any serious intention of complying with the covenant (clause 2(b)) and therefore entitled to extension, there must be what is termed as 'reasonable development' on the land. Regulation No.2 defines "reasonable development" to mean "at least one third of the projected development". This is complemented by Regulation No.7, which prohibits extension or renewal of a lease in respect of undeveloped land. Undeveloped land is land where development thereon does not constitute one-third of the projected development.

In this respect, the Building Covenant (clause 2(b) would enable the authority to ensure proper development with modern building standards and in accordance with town planning zoning as stipulated by S.36 of Public Lands Act 13/69. l am therefore unable to agree with the learned judge's construction of the covenant.

I now come to the pivotal aspect of the matter - was the plot developed at. the time of the allocation to the 1st appellant?

The evidence on record indicates the 1st appellant having visited the plot twice in November 1993, after her nephew Komakech had interested her in it, and had found it overgrown with bush, with a few old bricks also covered with grass. Komakech himself, who had spotted it, had found it overgrown with tall grass while all the neighboring plots were developed. He carried out a search in the Land Registry. He inquired from DW2, Ms. Laker, a senior Land officer, who traced the plot on the map and together with Komakech visited it to ascertain its position. On checking the file, DW2 found that the 5 year lease grant had expired a year earlier, without the

building covenant having been complied with. DW2 therefore recommended allocation to Komakech, on 17-9-93. As Komakech was leaving the country for further studies, he interested his aunt, the 1st appellant, in the plot, and introduced her to DW2. It should be noted, however, that before the allocation to the 1st appellant on 17-12-93, the 3rd appellant claimed to have twice checked the plot to satisfy itself that it was undeveloped - (Exh.D2 dated 21-2-94 addressed to the respondent).

On 23-1-94 the 1st appellant was startled to find the Boys-Quarters built up to wall plate, and some building materials around. This evidence is lent credence by that of PW2, who was the respondent's engineer, and who told the court that he had built the Boys- Quarters in 1993, within only 21 days. This was well after the expiry date of the lease on 30-11-92. This brings me to the vital letter to the 3rd appellant, dated 15-2-94, Exh.P7 where the respondent said:

"...It therefore expired in December, 1992. Within the 5 years, I had fenced, graded and excavated the foundation in preparation for construction of a residential building on the plot. The architectural plans and drawings made were approved by KCC on 25th February, 1992 and recently, I put up a boys quarters.

'I have plenty of various building materials which were deposited and are currently on the site. All these works and items have now been costed by the Century Consulting Engineers and Associates at the value or Shs.8.4 million without the transportation element (see copy attached). This value is 69% of the value of the plot i.e. *Shs.12m/* more than 1/3 of the legal requirement necessary to qualify for an extension of time on the lease'

This construction of clause 2(b) and the regulations can only be explained as a mistake. I have already dealt with Regulation No.2 above.

The learned judge, in my view, seems to have been generally indifferent as to the contents of the lease agreement. She remarked:

"The lease agreement was silent as to what happens if the lessee fails to develop the land to the satisfaction of the lessor".

It is clear this is not correct, in view of the proviso to the covenants which stipulates:

"When the lessee shall have complied with the building covenant herein and if there shall not at the time be any existing breach or non-observance on the part of the lessee of any of the covenants and conditions in the lease whether expressed or implied the said term shall be

enlarged to 99 years from 1-12-87 automatically.”

Quite naturally in my view the converse should hold in case of noncompliance with the covenants. However, the learned judge continued:

“It was also silent as to what happens if the lessee does not apply for the renewal of the lease or its extension to 99 years as agreed.”

Under such circumstances, extension to 99 would be automatic once there was compliance with all the covenants and conditions. The agreement expressly says so, though this would be very rare in the life time of the contracting lessee. I think the conclusion emerges that the learned judge did not give sufficient attention to the terms of the lease agreement Exh.P1 much less to 1993 S. I. No.57. Had she done so, a different finding would have been reached. The essence of these legal requirements is that the

controlling authority representing the State and the Public has an interest to see that vacant plots in urban areas are promptly and properly developed. In view of the evidence on record, I am of the opinion that at the time the 1st appellant was allocated the plot, it was not developed. I would allow this ground of appeal.

Ground No.3 averred that the learned judge erred in finding that the controlling authority’s failure to comply with the provisions of sections 32 and 36 of the Public Lands Act No.13/1969 constituted fraud.

Mr. Tumusingize submitted that the judge cancelled the 1st appellant’s title on the basis of fraud, under section 184 of t Registration of Titles Act. He argued that this was an error as actual fraud had. to be attributed to the transferee which was not done in this case. He asserted that even where fraud was found to be attributable to the agents which was not done, the transferees title would not be defeated. He pointed out that sections 32 and 36 of the P.L.A. were only applicable to a running lease where notice would be essential before forfeiture. He submitted that the lease before Court was for a fixed term and that the respondent was not entitled to notice.

Mr. Edmund Wakida for the respondent maintained that the lease in question was a running lease and notice was essential. He submitted that the learned judge rightly found that no notice was served on the respondent before the allocation to the 1st appellant, which contravened the Public Lands Act, sections 32 and 36. He argued that these sections were a codification of the rule of natural justice. In his view it was mandatory that the respondent be heard before his land could be taken away.

The learned judge reasoned:

"The third defendant in this case did not comply with the provisions of the above sections alleging that the lease had expired and therefore it were under no obligation to notify the plaintiff whom they allege was in breach of the building covenant. But even I accept that the plaintiff was in breach the third defendant should have observed its part of the obligations since two wrongs do not make a right..."(sic)

The learned judge then reasoned:

"...failure to comply with the clear and mandatory legal provisions would in my view amount to actual fraud."

I do not propose to reproduce these sections. Suffice it to state that the learned judge was correct in as far as she held that they were applicable to a running lease. However she advanced another argument and said:

"There is also authority which indicate that failure to comply with the building covenant even after the lease has expired, the lessee can obtain relief against forfeiture. This was decided in the case of the Commissioner of Lands v Sheikh Mohamed Bashir (1960)EA 818

With respect, this statement is decisively incorrect. When the lease expires without compliance with the building covenant, it automatically reverts to the owner as will be seen later. The learned judge correctly summarized the facts of the case which were to the effect that a 99 year lease term was granted in Nairobi City, from 1st September, 1952. Subject to covenant that a building with specifications should be erected by a specified time, within 66 months of the commencement of the term. Relief against re-entry and forfeiture was granted, on the respondent demonstrating his ability and readiness to comply with the building covenant. After reciting the above facts, the learned judge applied them to the case before her in this way;

(In the instant case the third defendant was under a legal obligation to comply with the provisions of the above section by giving notice to the plaintiff remedy the breach and affording him as the registered proprietor an opportunity of seeking relief against forfeiture.)

I cannot agree with this analysis. The authority cited is clearly distinguishable in that the lease was running up to 99 years and the covenant was to be performed within the first 66 months i.e. the first 5 years, whereas the lease before Court was for 5 years and had expired a year earlier, with no developments. I think therefore, with respect, the wrong facts were applied to wrong

reasons. The ratio of the authority cited was that equity leans against forfeiture, where the lease is running and there is an earnest intention of compliance with the covenants. In the case before Court the respondent had not bothered to apply for an extension prior to expiry, giving any grounds he might have had up his sleeve.

The learned judge then made a radical argument that:

"when a lease expires, the land does not automatically revert to the controlling authority, and more importantly that time is not of essence since grants for leases appear to be standard and governed by the same law."

This statement is, in my view, irreconcilable with the position at law, as already pointed out above. It is well established that when a lease for a definite term has been terminated by effluxion of time (as was the lease before court), it means the stage has been reached when the lessee or tenant has no longer any legal right on the property and is merely a trespasser. In such a case, the right to possession is clear and unarguable. It follows therefore, that, the lessor or controlling authority must not thereafter seek to enforce its right to possession, for it is automatic. Consequently the question of notice would be superfluous. See Broach v Ahmed (1965) 2 GB 02, and Popatlal Hirji v 1.1-I. Lakhari & Co. (E.A) Ltd (1960)E.A 437 - The learned judge further remarked that no entry had been made in the Register to show that land had reverted to the controlling authority. The position is that even before the Registrar makes an entry in the Register Book, the lessor would have an equitable title.

The latter part of the same argument seems to indicate that the learned judge was taking judicial notice of lack of strict enforcement of the building covenants; it might well be true that late performance is sometimes condoned, but I am almost certain that this is always founded on demonstrated bona fide intention to comply in due course. Nonetheless once the matter comes before court, I would not consider it the duty of the court to effect a cure when the respondent has been dilatory and a contrary to the express terms of his agreement with no justifiable reason or excuse, In this case the court is bound to take a stricter view.

I conclude that S.32 is inapplicable to a definite lease term. Equally inapplicable is S.36 in as far as it talks of forfeiture of public land in urban areas which has not been properly developed in accordance with town planning zoning for the area.

The learned judge equated non-compliance with these two sections to fraud.

I prefer to deal with the issue of fraud when examining ground 4 which stated that the learned trial judge erred in holding that the 1st defendant took advantage of the illegalities committed by the 3rd defendant to get herself registered.

Mr. Tumusingize referred to the learned judges finding which reads:

"The allocation of the land was to say the least a nullity. The first defendant should not have relied on what she saw or what she was told about the expiry of the plaintiffs lease since she was herself not privy to the lease agreement. She should have searched for
land which had been gazetted. She took advantage of the illegalities which were committed by the 3rd defendant to get herself registered. She has no legal protection in my view."

Mr. Tumusingize argued that the above approach was wrong; fraud must be attributable directly or indirectly to the transferee. He pointed out that in the particulars of fraud which had been attributed to the 1st appellant, it had to be proved that the fraud was known to her and that she knowingly took advantage of it. This was not done. He submitted that in land matters the notion of constructive fraud is irrelevant and inapplicable.

Mr. Edmund Wakida contended that .there was fraud on part of everybody but that they were not challenging fraud of the 2nd, 3rd, and 4th appellants. He argued that the 1st appellant should not have visited the plot but should have conducted a search in the land office.

I must say, I have found this argument unimpressive. I have been unable to find fault with a prospective lessee who visits the plot on being tipped it was abandoned and thereafter checks with the land registry which confirms the story. The learned judge was of the view that the 1st appellant should have waited for gazetted plots. I think, with respect, this attitude was not proper. The purpose of the gazette is to give authentic official notification of something, nothing more. By visiting the plot and double checking with the land registry, the information the 1st appellant got would be deemed to have been authentic. She did not, in my view, have to wait for the gazette, since the plot was public land, had been confirmed abandoned, and was therefore available. Rather significantly the respondent acknowledged:

"If the controlling authority allocates land and it is not developed within the period given, it reverts to the controlling authority."

It was therefore available for re-al location.

In the amended plaint, the particulars of fraud were:

(a) Acting contrary to the law and government policy.

(b) Refusal to consider the plaintiffs developments and treating the land as undeveloped.

(c) Speedy processing of the 1st defendants papers inspite of the plaintiff's protests.

(d) Refusal to process the plaintiff's application in 7(k) above and responding to it only after the 1st defendant's tie was issued as in Annexture "P10'.

(e) Refusal to endorse the plaintiff's developments on the 1st defendant's title as an encumbrance.

(f) Recording the 1st defendant's title in a different register.

As already pointed out, Mr. Wakida told the Court that they were not challenging the fraud of the 2nd, 3rd, and 4th appellants. This would seem a little strange since the 1st appellant technically derives title from them. Section 56 of the Registration of Titles Act provides that anyone impeaching a registered title must prove actual fraud on part of the registered proprietor, dishonesty of some sort, and not what is called constructive or equitable fraud. Alternatively, it had to be proved that the 1st appellant knowingly took advantage of the Ilegalities committed by the 2nd, 3rd and 4th appellants. It the respondent is exonerating them, then he bottom falls out of his case. See David Sekajja Nalima v Rebecca Musoke - Civil Appeal No.12 ot 1985; Assets Co. Ltd. v Mere Rojhi i Urs L1905) AC 176 at 210. Also see Kampala Bottlers v Damanico (U) Ltd - S.C. C/A No.22/92. The charges of fraud set down in the plaint were supported by vague and wholly unfounded grounds, like failing to resurvey the plot; a plot does not have to he resurveyed every time a transfer is made, and obtaining title faster than the respondent which I think depends more on ones diligence than anything else. I think the learned judge merely dwelt on peripheral matters to impute fraud. It is a cardinal principal that fraud cannot be presumed. It has to be proved strictly, the burden being heavier than on a balance of probabilities, and the fraud must reside in the transferee - see Kampala BottIçrs l td-v Damanico (U) Ltd. I am unable to fault the 1st appellant with any impropriety, the evidence on record having failed even remotely to come close to the required standard of proving fraud. As Kato,J.A. and Engwau,J.A,

both agree the appeal therefore succeeds. The judgment and orders of the Court below are hereby set aside. The respondent is to pay the costs here and below.

Dated at Kampala this 2nd day of November, 1998

A.E. Mpagi-Bahigeine
JUSTICE OF APPEAL

JUDGMENT OF ENGWAU, J.A.

I have had the benefit of reading the judgment of Mpagi Bahigeine J.A. in draft and I agree with it entirely.

The lease of the respondent had a definite beginning date for a period of 5 years w.e.f. 26.11.87. In my own calculation that lease would have expired on or about 25.11.92. During that period the respondent had not developed the suit land within the meaning of Statutory Instrument No.57 of 1993.

On the allegation of fraud, the cardinal principle is that it must not be presumed but strictly pleaded and proved with the burden of proof higher than on the balance of probabilities normally required in civil cases. However, the learned trial Judge was in error when she held that the Controlling Authority's failure to comply with the provisions of Sections 32 and 36 of the Public Lands Act 13/69 constituted fraud. The burden of proof was on the respondent which he did not discharge effectively. Similarly, the first appellant's failure to search the Land Registry in the absence of proof did not amount to fraud.

In the result, I would allow the appeal with costs here and in the court below.

Dated at Kampala this 2nd day of November, 1998

S, G. Engwau
JUSTICE OF APPEAL

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JUDGMENT OF C. M. KATO. J. A..

I have had the advantage of reading the judgment of Bahigeine. J.A. in draft. I agree with it.

Since Engwau J.A also agrees, this appeal is allowed with costs in this court and the court below to the appellant.

The judgment and orders of the court below are accordingly set aside.

Dated at Kampala this 2nd day of November, 1998

C. M KATO
JUSTICE OF APPEAL