THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. MR. JUSTICE C.M. KATO, J.A.;
HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE, J.A.; AND HON. MR. JUSTICE S.G. ENGWAU, J.A.

CIVIL APPEAL NO. 40 OF 1997

BETWEEN

ST. MARK EDUCATIONAL CENTRE LIMITED:::::::::::::::::::::::::::::::: APPELLANT

MA.KERERE UNIVERSITY: ::RESPONDENT

(Appeal arising from the judgment and orders of Lugayizi J. in H.C.C.S No. 378/93 dated 4th September, 1996).

JUDGEMENT OF ENGWAU. J.A.

This is an appeal against the judgment and Orders of Lugayizi J. in H.C.C.S. No. 378 of 1993, dated 4th September, 1996 whereby he made an order for eviction of the appellant from the suit land, the appellant and its tenants or agents were permanently restrained from occupying or building on the suit land; the appellant was ordered to pay Shs. 50,000/= in general damages for trespass on the suit land; titles on Plots 397 and 402 on the purported Kibuga Mailo Block 38 cancelled and the appellants ordered to pay costs of the suit.

The brief facts of the original suit are as follows. In 1943, the respondent under a grant by the then Colonial Governor of Uganda, was given the title to a land under Freehold Volume 59 Folio 21, comprising a chunk of land where Makerere University campus is, Mulago and Katanga Valley at Wandegeya in Kampala. In 1990, one George Kalimu also acquired a land title on the same land under Kibuga Block 38, Plot No. 386. George Kalimu then sub-divided that Block 38 into 3 Plots namely: 387, 397 and 402. It was 5 acres in size carved from the respondent's land under Freehold Volume 59 Folio 21.

The appellant wanted to acquire land in the same area to develop 10 for its educational expansion. On seeing an advertisement for proprietors to sell land in the area, George Kalimu offered to sell the 3 plots to the appellant. Before making any development on Plot 386 Block 38 Mulago/Makerere Valley, the appellant on 29/5/91 sought clarification on any interest the respondent might have on Plot 386, Block 38, (See letter Exb. P2 on page 116 of the record). In reply, the respondent in a letter dated 30/5/91, intimated its future expansion of Makerere University on its suit land and pointed out that although Block 38 was zoned in the area but it did not include Plot 386. In the premises, the respondent did not have any objection to the appellant's desire to develop Plot 386 Block 38, (See Exb P3 on page 117 of the record)

In yet another bid, the appellant wrote another letter, exhibit P4, dated 23/5/91 in which they were asking the respondent to confirm to the Chief Town Planner that the appellant's plan did not conflict with the respondent's expansion programmes. The respondent replied vide exhibit PS, dated 17/6/91 that Plot 386 Block 38 Mulago/Makerere Valley was not on the list of Plots zoned for development by the respondent. The respondent,

30 therefore, advised the appellant to take up the matter directly with the Chief Town Planner who after checking zoning plans would advise it accordingly.

The appellant then consulted R.C. officials of the area and its lawyers who gave it a go-ahead. The appellant was then registered on 8/7/91 and 3/10/91 in respect of Plots 402 and 403 respectively. After the registration, the appellant started hearing complaints that they had bought air. The appellant again wrote to the respondent for clarification and the reply exhibit Dl dated 12/2/92 stated clearly that according to record, numerous plots in Block 38 were zoned for the respondent but those did not include Plot 386.

Thereafter, the appellant spent Ug. Shs 300m/= to develop the suit land. In 1993, the respondent sued the appellant three (3) years after the registration. The basis of their claim is that the land was acquired illegally. Fraud had been committed outside the register. The learned trial Judge entered judgment in favour of the respondent because he did not want to encourage conmen to create non-existing land. Hence this appeal.

There are 5 grounds of appeal, namely:

1. "The Learned trial Judge erred when he held that there was fraud in the creation of the mailo plots the subject of this suit.

2. The Learned trial Judge rightly held that the Appellant was not guilty of fraud but erred when he failed to hold that the Appellant was a bona fide purchaser for value.

3. The Learned trial Judge erred when he held that the Appellant had the burden to showing that it was not only a bona fide purchaser for value but also that the fraud which was committed by those from whom it took title,
was committed on the Register.

4. The Learned trial Judge erred when he warded the Respondent damages of U.Shs. 50,000/= (Uganda Shillings Fifty Thousand only) when he found that no loss had

been sustained by it.

5. The Learned trial Judge erred when he condemned the Appellants to costs after finding that the Appellant was not guilty of fraud or wrong doing. 1

Mr. Edmund Wakida, learned Counsel for Appellant, argued grounds 1, 2, and 3 together. Learned Counsel contended that the learned trial Judge erred in finding that the Appellant was not a bona fide purchaser yet he had found that there was no fraud whatsoever attributed to the Appellant. According to Nasani Katungi, PW1, Jonathan Nyakhemura Tibisaasa, **PW3** and Dasani Kiwesi Kiwanuka, PW4, the fraud which was committed in this case, was not the type a purchaser or even his advocate could discover during an ordinary search at the Land Registry, as on the face of things, the respective titles for the plots in issue looked genuine. However, the learned trial Judge found that the appellant did not commit the alleged fraud but the original owners of the plots in issue were responsible for the fraud. Having made that finding repeatedly and exonerating the appellant, learned Counsel for appellant was critical of the learned Judge's holding that the appellant was not a bona fide purchaser. In his view, the holdings of the learned trial Judge are difficult to reconcile.

Nevertheless, learned Counsel maintained that the appellant remains and should remain a bona fide purchaser for value. The appellant looked beyond the register both before and after the registration. Under Section 145 R.T.A. the appellant need not look beyond the register and need not look into how George Kalimu one of the original owners of the plots in question, got his title. It was the contention of the learned Counsel that the appellant's title, therefore, could not be impeached because the appellant was not privy or party to the said fraud. To fortify his line of argument, learned Counsel for appellant relied on the authority of: **Andrea Lwanga vs. Registrar of Titles [19801 HCB 24** in which it was held inter alia that according

to S.189 R.T.A. the title of a bona fide purchaser for value could not be impeached since a person who was registered through fraud could pass a good title to a bona fide purchaser for value unless the purchaser was not a bona fide purchaser or was privy or party to the fraud.

Further, learned Counsel for appellant submitted that the provisions of Sections 145 and 189 R.T.A. do not permit cancellation of title unless fraud is proved but this was not the case here. According to the learned trial Judge fraud was committed outside the register which means in effect that the appellant bought nothing from the purported sellers of Kibuga Mailo Block 38, Plots 387, 397 and 402. Learned Counsel for appellant, however, contended that fraud in the instant case was committed on the register and the register being Freehold Volume 59 Folio 21 from which another register of Kibuga Block 38, Plots 397, 402 and 403 was created and this register still exists. Therefore, according to the learned Counsel, there is no justification on the part of the learned trial Judge to treat the original owners who sold the plots in issue to the appellant as conmen who sold air.

In the alternative and without prejudice to the foregoing, it was also the contention of the learned Counsel for appellant that the respondent having given permissions including one after registration, the doctrine of estoppel comes into play. Even innocent misrepresentation could not help the respondent because their mistake was relied upon by the appellant. See: **Section 113 of the Evidence Act**. Learned Counsel concluded, therefore, that the appellant be declared a bona fide purchaser for value and that grounds 1, 2, and 3 of this appeal should succeed.

Mr. Yusuf Kagumire, learned Counsel for respondent, submitted that the land comprised in Freehold Register Volume 59 Folio 21 belonged to the respondent. Land comprised in Kibuga Block 38, Plots 387, 402 and 403 did not belong to the respondent. The respondent did not have any proprietary interest on the land

comprised in Kibuga Block 38, Plots 387, 402 and 403. Any correspondence from the respondent to the appellant which was desirous of developing those plots clearly pointed out the limit of its interest on the matter. The question of estoppel or innocent misrepresentation did not arise. In his unchallenged evidence, PW3 testified that in Folio 21, Plot 387 was not in the register not even Plot 402. The witness clearly stated that George Kalimu did not own land and whatever he claimed to have owned was bogus. In the Freehold register there was no transfer to the appellant. Those plots were carved from the respondent's land. It could not have been possible to create Mailo in 1990's and it is not possible to create Mailo out of Freehold land. There was no titles out of which these plots were created. The Freehold and the Mailo land cannot in law and fact exist side by side. If there are 2 titles in respect of one piece of land the one which came first prevails.

Learned Counsel for the respondent further pointed out that the 20 evidence of PW4 also supported that of PW3 in that Plots 397 and 402 fall outside Kibuga Block 38. According to PW5, Plots 397 and 402 did not exist as Mailo land because they fall outside Kibuga Block 38. It was the contention of the learned Counsel for respondent that the learned trial Judge rightly found that there was fraud in the creation of the Mailo land. The Mailo Land was carved within the Freehold Volume 59 Folio 21. Those plots were outside the Freehold land and they were also outside Kibuga Block 38. In the premises, the titles allegedly obtained by the appellant did not belong to Kibuga Block 38 nor in the land of the respondent but were bogus and fictitious in between hanging in the air.

In their testimonies PW3 and PW4 said that in 1990 no creation of Mailo land could happen. Last certificates of Mailo land were created in the 1920's. Therefore, fraud was committed when the Mailo land was superimposed on the Freehold land of the respondent. Learned Counsel for the respondent, therefore, submitted that the appellant was a non-starter who was not a bona fide purchaser for nothing. The fact that the learned trial Judge held that the appellant was not guilty of fraud in

itself does not make the appellant a bona fide purchaser on the land of the respondent. The respondent does not own Kibuga Block 38 from which Plots 397, 402 and 403 were created. Even if the learned trial Judge had held that the appellant was bona fide purchaser of those plots that would not interfere with the proprietary interest which the respondent has in Freehold Volume 59 Folio 21 since 1943. The learned Counsel submitted that the appellant cannot invoke the provisions of Section 189 R.T.A. to protect nothing. Conmen should not be allowed to sell or own land parallel to that owned by a registered proprietor. The appellant was dealing with a person not on the register and it was incumbent upon the appellant to prove that that person was a registered proprietor. See: **David Sejaaka Vs Rebecca Musoke, civil Appeal No. 12 of 1985 [1992) 5 KALR 132.**

In conclusion, learned Counsel for the respondent submitted that 20 grounds 1, 2, and 3 must fail.

There is an overwhelming evidence to the effect that the respondent is the registered proprietor of land comprised in Freehold Register Volume 59 Folio 21. His Excellency the Governor of Uganda gave the respondent this land since 1943. The respondent does not own Kibuga Block 38 from which plots 397, 402 and 403 were created in 1990. In that year no creation of Mailo land could happen. Last certificates of Mailo land were created in the 1920s. The learned trial Judge rightly, in my view, held that fraud here was committed when the Mailo land was superimposed on the Freehold land of the respondent in 1990 by the original owners of those plots in question. The fraud committed was not the type a purchaser or even his advocate could discover during an ordinary search at the registry. In the circumstances, the learned trial Judge correctly found that the original owners of Plots 397, 402 and 403 were responsible for the fraud and thereby exonerating the appellant.

Nevertheless, the learned trial Judge rightly, in my view, held that the appellant is not a bona fide purchaser for value of the plots in issue on the ground that those plots fall outside Kibuga Block 38 upon which the respondent has no proprietary interest at all. Those plots were carved from the respondent's Freehold land. The appellant was dealing with a person not on the register and it was the appellant's duty to prove that the person it was dealing with was a registered proprietor. The appellant bought air from the purported sellers of Kibuga Block 38 plots 387, 397 and 402. The appellant cannot invoke the provisions of Section 189 R.T.A. to protect nothing. Fraud in
the instant case was committed on the register and the register being Freehold Register Volume 59 Folio 21 from which another register of Kibuga Block 38 Plots 397, 402 and 403 was purportedly created. In my view the provisions of Section 145 and 189 R.T.A. permit the cancellation of those alleged titles.

It is evident that the respondent does not own Kibuga Block 38 from which Plots 397, 402 and 403 were created. Even if the learned trial Judge had held that the appellant was a bona fide purchaser of the said plots that would not interfere with the proprietary interest which the respondent has in Freehold Volume 59 Folio 21 since 1943. In the premises I would disallow grounds
1, 2 and 3 of this appeal.

In ground 4, learned Counsel for the appellant submitted that the learned trial Judge found as a fact that the appellant committed the alleged trespass innocently and that there was no loss suffered by the respondent. In the circumstances, it was his contention that the learned trial Judge did not exercise his discretion judicially when he awarded a nominal sum of
Shs.50, 000/= to the respondent who suffered no loss for the alleged trespass. Learned Counsel for appellant urged Court to interfere with the award of Shs. 50,000/= as general damages in trespass yet the learned Judge had found as a fact that there was no loss suffered by the respondent. In his view, the learned trial

Judge acted upon wrong principle of law warranting this court to interfere with the said award of general damages for trespass. Learned Counsel relied on the authority of **Associated Architects Vs Christine Nazziwa, Civil Appeal No. 1 of 1981; [1985] HCB 25.**

Mr. Kanyemebwa assisting Yusuf Kagumire for the respondent responded to the above submissions as follows: Learned Counsel submitted that the learned trial Judge awarded only nominal damages vis-avis general damages in trespass. In awarding nominal damages, according to the Counsel, no loss was to be proved but it was an award against a legal right which has been infringed. See: **The Mediana [1900] AC 113, and Harvey McGregor, McGregor on damages, 13th Ed. 1972 at page 297.** In the instant case, the appellant had trespassed on the land of the respondent and in that way the appellant had infringed the respondent's legal right over the Freehold land comprised in Volume 59 Folio 21. Therefore, the learned trial Judge was right in awarding nominal damages. I agree. This ground of appeal should also fail.

Last but not least, in ground 5, learned Counsel for appellant argued that the appellant was condemned to pay costs of the suit and yet it was not guilty of fraud or any wrong doing. There was even an estoppel on the matter, so according to him, the learned trial Judge had exercised his discretion unjudicially. In his view, this is one of those circumstances when each party should have bone his own costs. See: **Uganda Transport Company Limited Vs Outa, Civil Appeal No. 11/81; [1985] HCB 27.** In the alternative, the respondent could have got a remedy of damages against the Uganda Land Commission (TJLC). See: **Section 186 R.T.A** or the original proprietors but unfortunately they were not joined as co-defendants.

Learned Counsel for respondent reacted that the question of whether the appellant was involved in the alleged fraud or not is irrelevant to the award of costs. Under Section 27 Civil Procedure Act, costs should follow the event. It should be noted that the

appellant has not disputed the quantum of costs. The doctrine of estoppel does not arise here the trial Court having found that the respondent was the successful party. Outa's case (supra) is distinguishable in that costs were not awarded because they were not applied for, but on appeal it was held that by reason that the appellant did not apply for costs was not good reason to deny him costs. In the instant case, the respondent was successful and as no reason was given it should not be denied costs.

It is trite law that a successful party should be entitled to costs. In this case, the respondent was the successful party in the High Court and it was granted costs of the suit. I have no justification in law or otherwise to interfere with that exercise of the discretion of the original court. I find no merit in ground 5 of the appeal.

In the result, I would dismiss this appeal with costs here and in the court below to the respondent.

Dated at Kampala this 20th day of November 1998.

S.G. ENGWAU

JUSTICE OF APPEAL

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

I have had the advantage of reading the judgment of Engwau J.A. in draft. I agree with it in total. The learned trial Judge was justified in entering judgment in favour of the respondent.

Since Mpagi-Bahigeine, J.A. also agrees, this appeal is accordingly dismissed with costs of this appeal and in the court below to the respondent.

C .M. KATO

JUSTICE OF APPEAL

20/11/98

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

I agree with the judgment of Engwau, J.A.

Dated at Kampala this 20th day of November.l998.

A.E. Mpagi-Bahigeine
JUSTICE OF APPEAL