

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 51 OF 2012

BLASIO NSUBUGA.....APPELLANT

5 **VERSUS**

1. **KANABI** }
2. **MATOVU** }**RESPONDENTS**
3. **MULIKA** }

10 *Appeal from the Judgment of the Hon. Lady Justice Faith E. Mwendha in High Court Civil Appeal No. 36/2011 of the High Court Uganda at Nakawa arising from Civil Suit No. 164 of 2008 of the Chief Magistrate’s Court of Nakawa at Nakawa delivered on 21/12/2011.*

15 **CORAM: HON. MR. JUSTICE REMMY KASULE, JA**
HON. MR. JUSTICE KENNETH KAKURU, JA
HON. MR. JUSTICE FMS EGONDA-NTENDE, JA

JUDGMENT OF COURT

20 This is a second appeal. It arises from the Judgment of *The Hon. Lady Justice Faith E. Mwendha J*, (as she then was) in High Court *Civil Appeal No. 36 of 2011 at Nakawa dated 21/12/2011*. The High Court’s decision arose from the Judgment of the Chief Magistrate, Nakawa Court in *Civil Suit No. 164 of 2008 dated 21/12/2011*.

The appellant was the plaintiff at the Chief Magistrates Court.

25 Judgment in that Court was delivered against the plaintiff now appellant in favour of the respondents on 13/4/2011. The appellant appealed to the High Court which dismissed the appeal on 21/12/ 2011 hence this appeal.

The appellant was granted leave to file an amended memorandum of appeal. It is set out as follows;-

Memorandum of appeal

1. That the learned Judge erred in law when she decided that the appellant obtained the certificate of title “in his names” fraudulently.
- 5 2. That the learned Judge erred in law when she held that part of the appellant’s land belonged to the Respondents and that the appellant should surrender the title deed to the defendants to sub-divide it whereas the Appellant’s land is comprised in Block 216 Plot 3105 and that claimed in their pleadings by the Respondents is comprised in Block 216 Plot 3104.
- 10 3. That the learned trial Judge erred in law when she decided that the appellant had trespassed on the respondent’s land.

At hearing the appellant was represented by **Brian Tindyebwa** while the respondents were represented by **Mr. Louis Tumwesigye**.

Mr. Tindyebwa argued grounds 1 and 2 together. He submitted that the learned appellate Judge had
15 erred in law when she upheld the decision of the trial Magistrate that the appellant had fraudulently included the respondents’ land in his own title deed. That she also erred when she ordered the appellant to surrender his title deed for subdivision.

Counsel submitted that the appellate Judge erred when she found that the appellant had fraudulently included in his title deed the land that belonged to the respondents. That there is no evidence to
20 support this finding. That the appellant had purchased part of *mailo* land comprised in Mengo Block 216 Kyadondo Plot 900. That the said land was subdivided into two plots, plot 3104 and 3105.

That Plot No. 3105 was registered in the appellant’s name while plot No.3104 was registered in the name of one Safina.

Counsel contended that there was no evidence of fraud adduced at the trial. That there was no fraud
25 attributed to him. He relied on the authorities of ***Fredrick ZZabwe vs Orient Bank and others, Supreme Court Civil Appeal No. 4 of 2006*** and ***Kampala Bottlers Vs Damanico Uganda Ltd***

Supreme Court Civil Appeal No. 22 of 1992, for proposition that fraud must be attributed to the transferee.

On ground 3 counsel submitted that the learned trial Judge erred in law when she failed to determine the legality of the decree extracted by counsel for the respondent at the trial Court. That the decree
5 was at variance with the pleadings and the decision of the Court and that it bears a date different from that of the Judgment.

On ground 4 counsel contended that the trial Magistrate while conducting court at the *locus in quo* had failed to follow the guidelines as contained in Practice Direction No.1 of 2007. That in the result he reached a wrong conclusion to the prejudice of the appellant.

10 On ground 5 and 6 counsel submitted that the learned Judge erred in law when she did not reject version of the agreement written in *Luganda* language which had been admitted in evidence at the trial and instead relied on it to dismiss the appeal. He also faulted the appellate Judge for having failed to properly re-evaluate the evidence adduced at the trial in the result that she arrived at a wrong conclusion.

15 He asked this court to allow the appeal with costs.

Mr. Tumwesigye for the respondent, with leave of court adopted his conferencing notes as submissions. He conceded that the decree that was extracted from the Judgment of the trial court contained an error in respect of the date. That it ought to have been dated 14th April 2011 the date when the Judgment was delivered.

20 He however, contended that the substance of the decree tallied with the decision of the Court. He submitted that the respondents do not have any interest in the land beyond a “*kibanja*” or customary holding. That the appellant did not purchase the *kibanja* interest of the respondents but only the “*mailo*” holding subject to existing interests.

He asked court to uphold the decision of the learned appellate Judge.

25 **Resolution of Issues**

This is a second appeal and as such it is restricted to only issues of law in that regard. **Section 72 (1)** of Civil Procedure Act stipulates as follows;-

“Appeals from appellate decree

5 **72. Second appeal**

(1) *Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-*

a) the decision is contrary to law or to some usage having the force of law;

b) the decision has failed to determine some material issue of law or usage having the force of law;

c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

Being a second appeal this court is not required to re-evaluate the evidence adduced at the trial. That is the duty of a first appellate court. However, if it is found that 1st appellate Court failed in its duty to re-evaluate the evidence then the second appellate Court may proceed to do so. See;- **Henry Kifamunte Vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997)** and **Rule 30(1)** of Rules of this court.

The facts giving rise to this appeal as we understood them to be from the record are as follows;-

The plaintiffs on 16/7/2008 sued the respondents at the Chief Magistrate's Court Nakawa seeking general damages for destruction of his property, *to wit:-* a perimeter wall and a permanent injunction. He contended that he was the registered proprietor of the land comprised in *mailo* register Mengo Block 216 Kyadondo Plot 3105 having been registered as such on 17/2/2003.

- 5 The respondent filed a written statement of defence and counter claim denying the claim and contending that the appellant had been registered as proprietor of the said suit land through fraud. That the land they occupied belonged to their mother Namwandu Katyagaba.

The appellant in his reply to the counterclaim denied having committed any fraud and contended that the defendants had failed to provide in their pleadings and evidence the particulars of the alleged
10 fraud.

At the trial the appellant who testified as PW1 contended that he had bought the suit land in 2001 and thereafter he built a perimeter wall around his house, which wall the respondents demolished. He was seeking compensation in that regard. In cross-examination he stated that he had purchased the suit land in April 2001 from one Faridah Kibira Semakula the registered proprietor at the time. That the
15 agreement was made before Mr. Katongole an advocate, on 28/3/2001. That the land he purchased measures 0.47 hectares and Block 216 plot 3105 which at the time of purchase was part of Block 216 plot 900.

That the LC Chairperson was present when he purchased the land. He said that at the time he purchased the land it was occupied by the respondents and other people also held different interests
20 on the land.

That he had subdivided the suit land, plot 900, into two plots, plot 3104 and plot 3105. That the title for plot 3104 was transferred into his own names.

That the defendants occupy 3 houses on the land he bought. That those houses do not belong to him. That he had bought land occupied by customary tenants. It was up to him to negotiate with them and
25 to compensate them if he desired them to vacate.

PW2 testified that he was not aware that the appellant had tried to evict the respondents. That the respondents had lived on the land much longer than the appellant. That the respondents were

“Kibanja” holders or customary tenants together with their grandmother on that land. Mr. Katongole the advocate who drafted the sale agreement confirmed that indeed the appellant had purchased and paid for part of Block 216 plot 900. That it was the appellant who was to sub-divide the land.

For the defence Faridah Kibira Semakula testified that she had sold the suit land to the appellant with whom she had gone to Mr. Katongole the Advocates’ office on 28th March 2001 to have the agreement drafted. That she was accompanied by LC1 Chairman one, Salongo and also with one Nakibuka Faith. That an agreement had been made between the appellant and herself for part of Block 216 plot 900 which she had sold to the appellant. That the part she sold was hers. That the remaining part of the plot had been given to Katyangaba in 1999. That this part was later sold to one Safina after the sub-division had been completed. That the rest of the land was given to the respondents.

That the demarcations indicating the different plots was made by the local council authorities.

Dw3 Salongo Nsohya Festo testified as follow;-

“I am the L.C.I of Kulambiro. I have been the LCI Chairman since 1996. I know Bulasio Nsubuga. I have known him since 2001-2002. He was brought by Hajati Semakula. He was brought to my home in the morning about 7.00 a.m. He was introduced as person who had bought a Plot in the area. He was introduced as a person who had bought a plot in the area. After introducing him to m we went to the Plot he had bought. The Plot is in the form of letter L. The space alongside the L was for late Katyangaba. All his children also died and now there are grand children. The widow of Katyangaba is still living. Katyangaba's plot was a kibanja and land sold the Plaintiff had a title.

After looking at the demarcations, I left and went to my home. I know one late Wabwire. Patrick Wabwire is the builder of the Plaintiffs home. I am aware the Plaintiff has a house in a wall / fence. The first fence built in 2005 had a problem. The one that was built in 2008 was blocking way and City Council came and removed it. I am not aware of any other person who broke the wall fence.”

The second respondent herein Mr. Matovu testified as Dw3. In his examination in chief he stated that:-

“I know the plaintiff. He resides in Kulambiro. He is our neighbour. He became our neighbour in 2011.

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We never broke his wall. His wall was broken by KCC. He tried to chase us away together with our grandmother. The land is owned by Hajati Kibira Semakula. Hajati Kibira Semakula gave our grandmother the land. Kanabi was also around. That was in the year 1999.

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Bulasio wrote to us a letter offering a sum of 1.5 million requesting us to leave the land. When we refused to leave, he came to court charging us with demolishing of his wall, yet it's KCC that demolished the wall.

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I know Wabwire. He has never been on the L.C. Committee. He builds for the Plaintiff. He told court a lie that we demolished the wall. We want court to assist us get out title from Bulasio and pay us costs of the suit. The kibanja at the moment belongs to the widow Katyagaba and Kanabi.”

20 The learned Chief Magistrate made the following observations and findings in Judgment;-

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“With regard to the first issue, as to whether the plaintiff obtained the title deed to the land fraudulently, Evidence available on record is that the Plaintiff bought part of the land comprised in Kyadondo Block 216 Plot 900. That instead of the Plaintiff carrying out mutation of this portion he bought, he transferred the entire plot 900 into his names. This is the basis of the defendants' claim of fraud against the Plaintiff.

According to one Kibira Faridah Semakula (DW1), she sold her interest in Plot 900 to the Plaintiff. At the time she sold her interest, the defendants were already living on another

part of the same plot 900 that portion having been given to one Katyagaba in the year (1991). That to date, Katyagaba's widow still lives on that portion with her grand children (the defendants),

5 *Interestingly, part of the same plot (900) had been sold off by DWI's sister to a lady called Safina. When the plaintiff bought the land. He was handed the original title deed.*

10 *I have examined the title deed and also went to Kisasi and shown the structures on the said land (Plot 900 as it was). On the title it's clear that Plot 900 was divided into two portions to create Plot 31 04 belonging to Safina and Plot 3105 belonging to the Plaintiff. This means therefore that the interest of the defendants on the land was ignored and yet, on the land, the defendants are well established living in an old building with their grandmother which shows how long they have been in occupation of the land. It seems the Plaintiff after buying part of the land saw the old woman and the defendants as people who could easily be bought and then he combined the land he had bought with portion that was given to Katyagaba's surveyed them off and made one title in his own names. No wonder, even in his plaintiff stated that he tried in vain to compensate the defendants so that they can leave.*

20 *In view of the evidence I have attempted to analyse above, I think the Plaintiff acted wrongly and indeed fraudulently when he ignored the interest of the defendants on part of the defendants on part of plot 900, and combined their portion with his to form one piece registered under one title deed in his own names. I find that the plaintiff indeed acted fraudulently.”*

25 With all due respect to the learned Chief Magistrate we are unable to agree his conclusion as it is not based on evidence.

30 It is indeed true that the appellant upon purchasing part of the land formally comprised in Block 216 Plot 900 was tasked with the duty of sub-dividing the land in order to obtain a separate title deed for

the portion he had purchased. The seller in the presence of LC's had shown him his portion. The appellant instructed the surveys to carry out the sub-division.

5 It is also true that the whole of Mengo Block 216 Kyadondo plot 900 was first transferred into the names of the appellant before it was sub-divided into the two plots 3014 and 3015. Plot 3014 was then transferred into names of Safina and plot 3015 remained in the appellant's names. This according to the Chief Magistrate, is what constituted fraud attributable to the appellant.

10 We have found no evidence to suggest that the appellant transferred the whole of plot 900 into his names before the sub-division in order to defraud the respondents. Fraud has to be strictly pleaded and proved. In this case the particulars of fraud were set out in the counter-claim as follows;-

“PARTICULARS OF FRAUD

(1) Knowingly and willfully inducing the Registrar of Titles to make an entry on the title as the registered proprietor of all the suit land.

(2) Deliberate refusal to release the suit title deed to enable the defendants sub-divide and register their portion.”

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The particulars of fraud as set out above do not state that the appellant transferred the whole Plot 900 into his names in order to defraud the respondent or that the sub-division contravened the sale agreement. The evidence on record is that subsequent to the transfer of Plot 900 into the names of the appellant he went ahead to sub-divide the land into two separate Plots namely plot 3014 and plot 20 3015. He then transferred plot 3014 Safina as instructed by the seller and Plot 3015 remained in his name.

There is nothing in the agreement of sale that required him to sub-divide the land into three portions as suggested by the respondents. There is no evidence that the respondents ever acquired any interest on that land beyond being *kibanja* / or customary tenants, on Block 216, Plot 900.

5 The learned appellate Judge on her part found as follows at Page 6 of her Judgment.

“Upon careful examination and evaluation of that evidence from both the plaintiff and having considered the submissions of both counsel, the evidence is overwhelming that the plaintiff obtained the title deed in his names fraudulently. He was aware that he only bought part of the land, not the whole land as per the title deed (original) he was given. PW3 was very clear on this and he is the one I who wrote the sale agreement. DWI testified that they have been demanding for their title and the plaintiff was saying that he had not completed the transfer. The title was given to him for purposes of transfer so that mutation ensues and the plots are registered in the right owners' names since 2001, but up to the time the suit was filed and disposed of, he had not returned the title to the owners. So No1 is resolved in the affirmative. There was no merit at all in the submissions by counsel for the appellant as the evidence could not support them.”

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We are unable to find evidence in support of the learned appellate Judge’s conclusion. It is not in dispute that the land in issue Block 216 Plot 3015 now registered in the name of the appellant was originally part of Block 216 Plot 900. That Faridah Kibira Semakula was the registered proprietor of Plot 900 and she sold part of it to the appellant. That the appellant was to sub-divide the land into parts.

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However, although Faridah Kibira Semakula was the registered proprietor of the whole of plot 900 she did in fact owned the land together with her sister.

25 It appears clearly from the evidence that Faridah had sold her part to the appellant. But since the whole title was in her name, her instructions to the appellant were to demarcate off part of the land that belonged to her and transfer it to his name and to transfer the rest of the land to Safina, who had purchased the remaining part which had belonged to her sister.

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In cross examination Faridah Kibira stated as follows;-

- ***“I didn't know when the Plaintiff transferred title into his own names.***
- 5 - ***Bilasio was registered on the 17/2/03 as on the title.***
- ***We asked Nsubuga to return the title but he said he had not completed transfer.***
- ***The Plot No. for this title is NO. 3105.***
- ***I am aware that Plot 900 was subdivided. Part of Plot 900 was sold by my sister to a lady called Safina.***
- 10 - ***I remember that my sister sold to Safina so plot 900 was subdivided***
- ***When the sub-division took place, the certificate of title was with Blasio as he was supposed to transfer his part.***
- ***Safina bought part of the land, Nsubuga also bought part of it. The certificate of title was with Nsubuga. The rest of the land was for the defendants. My own part I had sold to the***
- 15 ***plaintiff.***
- ***I don't know if Safina has got her title.”***

Her above testimony in cross examination appears to contradict her earlier testimony in examination in chief. Whereas in examination in chief she stated that one part was sold to the appellant and the other part was left for Katyagaba, in cross examination she said that one part which was hers was sold to the appellant and the other part which was for her sister was sold to Safina. It does not appear that the land was to be sub-divided into three parts.

This confusion is clarified by the evidence of PW2 who states that whereas the appellant had bought *mailo* interest the respondents were *kibanja* holders or customary tenants occupying part of the Plot 900. DW3 Joseph Matovu also testified that Katyagaba was a *kibanja* holder.

There is no evidence at all from the record that indicates the respondents purchased the *mailo* interest. The agreement of sale between Faridah Kibira and the family of Katyagaba dated 14th April 1999 refers to sale of *kibanja* on the *mailo* land. It does not refer to the sale of *mailo* interest.

With all due respect we find that the holding of both the trial Magistrate and the learned appellate Judge held that the respondents had *mailo* interest on land that was formerly Block 216 Plot 900 was not supported by any evidence.

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We find and hold that the respondents have at all material times been *kibanja* holders or customary tenants on that land. That the acquisition of the *mailo* interest on the land by the appellant did not affect their tenure and or occupancy.

10 That the appellant recognises the respondents as customary tenants and that is why he attempted to compensate them. There is no evidence that at any one time the appellant attempted to evict the respondents from the part of the land they occupy as customary tenants.

15 The respondent's tenure and occupancy is firmly protected by law, however, it does not extend to the *mailo* interest which is held by the appellant. We find that fraud was not sufficiently pleaded or proved. We also find that fraud could not have arisen in the circumstances of this case, as both parties held separate and distinct interests on the same land and none had attempted to interfere with the interest of the other.

20 We have found no evidence that the appellant's parameter wall had been demolished by the respondents. It appears to have collapsed on its own as held by the learned appellate Judge. We find no evidence that the respondents had suffered any damages or inconvenience as held by the appellate Judge.

25 We therefore find merit in this appeal, which is hereby allowed. We set aside the Judgment of the appellate court and that of the trial Court and substitute them with the Judgment of this court.

We make the following orders and declarations;-

1) That the appellant is the registered proprietor of Mengo Block 216 Kyadondo Plot 3015 and that his registration was not tainted with fraud.

2) That the respondents are customary tenants on the part land they effectively occupy on what was formerly Mengo Block 216 Kyadondo Plot 900.

3) That the claim by the appellant that the respondents had demolished his wall on the suit land has not been proved and is hereby dismissed.

4) The respondent's counter claim is hereby dismissed.

5) The respondents shall pay the costs at this Court and at the Courts below.

Dated at Kampala this 5th day of August 2015.

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HON. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE FMS EGONDA-NTENDE
JUSTICE OF APPEAL