

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.44 OF 2008

VERONICA NAKIYINGIAPPELLANT

VERSES

MICHAEL NSOBANI RESPONDENT

[An appeal arising from the High Court decision by Hon. Justice Rubby Aweri Opio on the 1st day of February 2008, High Court Civil Suit No. 24 of 2003]

CORAM: HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

The respondent sued the appellant in the High Court of Uganda for a declaration that the suit property comprised in Private Mailo, Kibuga Mengo Block 38 Plot 272 situated at Makerere Kampala (hereinafter referred to as "the suit property") was that of his late grandmother (for whom he acted as legal representative). He further prayed that a special certificate of title which the appellant had obtained in respect of the said land be cancelled. The respondent succeeded in the High Court and hence this appeal. The dispute has a long history, the brief facts of which are the following:

The appellant in 1978 bought a piece of land measuring 50ft X 100ft from her sister-inlaw one, Ethel Samalie Namakula (the grandmother of the respondent)

now deceased. Ethel Samalie Namakula (RIP) was the registered proprietor of Mengo Block 38, Plot 272 at Makerere where she lived and had a permanent place of abode. The agreement was in writing and was dated 25th April 1978. The total cost of the

land was Ug. shs 35,000/= of which the appellant was to be paid Ug. shs 25,000/=. The remaining Ug shs 10,000/= was to be paid after the 50ft x 100ft had been surveyed off and the transfer effected. The appellant's case was that she hired surveyors to demarcate the portion she bought but the seller did not hand over the transfer forms when the time to do so came. The appellant was therefore unable to transfer the land into her names and take possession. The appellant subsequently sued the seller at the High Court in another suit HCCS 1314 of 1978 and obtained a default Judgment transferring the portion of land that the appellant bought into her names. The appellant extracted the High Court Order and proceeded to obtain a Special Certificate of title dated 10th December 1983 and transferred it into her names. The present respondent (as the administrator of his late father's estate which included that of his late grandmother) then sued the appellant in another High Court case which is the subject of this appeal.

At the High Court, the respondent contended that appellant had wrongfully and fraudulently obtained the Special Certificate of Title and transferred the whole piece of land into her names in violation of the decree earlier issued in HCCS No 1314 of 1978. The respondent prayed that that the special certificate of title be cancelled.

At the High Court, the appellant (as defendant) averred that there were no wrong or fraudulent means used to acquire the Special Certificate of Title and that she believed it to be in accordance with the decree granting her ownership over the portion designated. She also made a counter claim alleging trespass of the respondent on the suit land.

The learned trial Judge found in favour of the respondent and ordered that the Special Certificate of Title which was contrary to the specifications set out in the decree be cancelled and the land resurveyed to have the appellant's portion removed. Compensation for the said interest of the land at the current market value would be

made in case the demarcation could not be done without demolishing the residential house on the land.

Dissatisfied with the decision of the learned trial Judge, the appellant filed this appeal with the following grounds;

1. That the learned trial Judge erred in failing to analyze all the evidence presented during the trial which led to a miscarriage of justice through reaching the wrong conclusion.
2. That the suit was time barred and should have therefore been dismissed by the trial Judge accordingly.
3. That the learned Judge erred in law by making a decision which contradicted an earlier High Court decision resulting in the appellant's name being cancelled from the Certificate of title and being replaced with the respondent's name.
4. That the learned Judge erred in law when he failed to find that the respondent was a trespasser thus failing to grant the appellant relief in trespass for example damages, conviction, mesne profits and a permanent injunction.
5. The learned Judge erred in law by failing to order cancellation of the caveats lodged on the appellant's certificate of title in the Lands Office.

Representations

Mr. J.P. Kamyia from J.P. Kamyia & Company Advocates and Mr. Serwanga appeared for the appellants while Mr. Edward Mugogo of Nile Law Chambers Advocates & Solicitors represented the respondents.

The Role of the Appellate Court and Preliminary matters

This is a first appeal and this Court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under **Section 30 (1) (a) of the Judicature (Court of Appeal Rules Directions SI 13-10)**. This Court also has the duty to caution itself that it has not seen the witnesses who gave testimony firsthand. On the basis of its evaluation, this court must decide whether to support the decision of the High Court or not as illustrated in *Pandya v R [1957] E.A 336* and *Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No 10 of 1997*.

This is an old appeal which originally did not take off because of a change in the Coram. When the matter came up for hearing it was agreed with counsel that the Court rely on the skeleton arguments on record on the grounds of appeal that were provided by the parties during the pre-hearing scheduling conference. We shall address the grounds of appeal following the same order we found in the skeleton arguments.

Ground two

That the suit was time barred and should have therefore been dismissed by the trial Judge accordingly.

Arguments for the Appellant

Counsel for the appellant referred to exhibit D1 as proof of the agreement in which the respondent's late grandmother sold a piece of land measuring 50ft x 100ft on Block 38, Plot 272, at Wandegeya - Kibuga to the appellant. He also submitted that having conducted a survey of the land, the vendor refused to sign the transfer forms which would transfer the land into the names of the vendee. The respondent sued the vendor and judgment was given in her favour. A decree, (exhibit D6), was extracted dated 14th January, 1980 with an order to have the registration of the suit land done in the names of the appellant. The appellant then presented the decree to the Lands Office and she was registered as the proprietor of the suit land. Counsel for the appellant added that

the appellant had no knowledge of the Certificate of Title issued in her names was larger than the area specified in the decree and actually encompassed the whole land originally covered in the vendor's Certificate.

Counsel for the appellant submitted that M/s. Sengendo & Company Advocates wrote a letter, acting on the appellant's behalf, on the 7th of August, 1984 to the vendor's son (one Mr. Gonza) who was staying with her. The letter stated that the appellant had been issued with a special certificate of title and was now the registered proprietor of the suit land; accordingly all assistance should be given to the appellant to take possession of the land. Counsel for the appellant further submitted that M/s. Katende, Ssempebwa & Company Advocates, writing on the instructions of Mr. Gonza, replied the said letter and stated that they would pursue the matter in court.

Counsel for the appellant submitted that neither Mr. Gonza nor his counsel followed up the matter until much later when a suit in respect of the land was filed on 24th of January, 2003. This was roughly 19 years after the appellant had been registered as proprietor of the suit land. He referred Court to **Section 5** of the **Limitation Act** which provides that;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or if it first accrued to some other person through whom he or she claims, to that person".

Counsel for the appellant also submitted that by the time the appellant was registered as the proprietor of the land in dispute, the vendor had already died meaning that the right of action first accrued to Mr. Gonza. That was why a letter was written to him informing him that the suit land had already been registered in the vendee's name. Mr. Gonza and his counsel, Katende Ssempebwa & Company Advocates however took no action. Mr. Gonza's son, the present respondent, did not plead disability as required by the law.

Counsel for the appellant also referred to **Section 16** of the **Limitation Act** which provides that;

"... at the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of the land shall be extinguished."

He also referred to the case of **Iga v Makerere University, C.A. No.51/1971** where it was held that a plaint barred by the law of limitation is barred by the law and

must be rejected. Counsel submitted that the failure of the respondent to plead disability as an exception to the law of limitation and with regard to 0.7 r.6 of the Civil Procedure Rules was fatal to the respondent's claim. It was therefore the case of the appellant that the case at the High Court should have been dismissed

Arguments for the Respondent

Counsel for the respondent submitted that whereas the cause of action did accrue in 1984, the claim against the appellant was based on trespass, fraud and mistake and is therefore not time barred. He further submitted that the appellant, by her own admission, agreed that the special certificate of title issued to her pursuant to the original High Court Decree of 14th January 1980 was for land measuring 50 x 100 ft but the special certificate of title that was issued to her was for whole land owned by the vendor which was a mistake or fault of the Registrar of Titles. Counsel for the respondent submitted that based on these facts the suit cannot be time barred. He further submitted that he would also rely on Art. 126 (2) (e) of the Constitution of Uganda 1995 (as amended) that enjoins the Courts to apply substantive justice without

undue regards to technicalities.

Resolution and decision of the Court

We have perused the record of appeal and have considered the submissions of both counsel for which we are grateful.

It is the case for the appellant that the action at the High Court was time barred under Section 5 of the limitation Act because the action in Court was commenced about 19 years after the sale of the suit land. The respondents disagree on the

grounds that the said transfer of the suit land was as a result of fraud and/or mistake. **Section 5** of the **Limitation Act** (*supra*) provides that no action for the recovery of land will be possible after the expiration of twelve years from the time the action accrues. Section 25 of the Limitation Act provides for the postponement of limitation in the case of fraud and mistake and reads:-

"...25. Postponement of limitation period in case of fraud and mistake

Where, in the case of any action for which the period of limitation is prescribed by this Act

Either-

- (a) The action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;*

(b) The right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or

(c) The action is for relief from the consequence of a mistake,

The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it..."

From the Judgment of the trial Judge (page 46 of the record), only four issues were identified for resolution and these did not include an issue as to whether the suit was time barred. Indeed the trial Judge (page 223 of the record) found that all issues for resolution could be distilled into two namely;

"1. Whether the special certificate of title that the defendant obtained conform(ed) to the specifications decreed in original HCCS 1214/78

2. What remedies are available to the parties..."

However at page 97 of the record of the proceedings the trial Judge stated:

"Issue No 5 added i.e. whether the suit is time barred by limitation..."

Clearly the issue which was originally raised as preliminary objection by the defendant was not addressed. This was an oversight by the trial Judge. The main findings of the Judge were at page 226 of the record and were that;

"... it is very clear that the special certificate of title, which was issued to the defendant, did not conform to the specifications of the decree in the original HCCS1214/1978. That fact was not even disputed by the defence..."

The trial Judge then goes on to decide (page 227 of the record):

"...therefore (the) special certificate of title which was issued in respect of the whole suit land was issued in error and is hereby cancelled. Accordingly it is ordered that the land be resurveyed by a competent valuation surveyor appointed with approval of the court to remove the defendant's interest of 50ft x 100ft

without demolishing the residential house on the whole suit land. Alternatively if the 50ft x 100ft cannot be ascertained the plaintiff should compensate the said interest at the current market value..."

It is clear from section 5 of the Limitation Act that no suit for recovery of land can be brought after the expiration of 12 years from the date on which the cause of action accrued. However, a clear reading of the Plaint in HCCS 24 of 2003 at the High Court shows that the claim was for a declaratory Order and not the recovery of land. The other reliefs were a prayer for cancellation of the special certificate of title, an injunction, damages and costs. There was no specific prayer for recovery of land; after all the evidence shows that the respondent at all material times retained actual possession of the whole suit land. Order 2 Rule 8 of the Civil Procedure Act inter alia provides that:

"...Court may make binding declarations of right whether any consequential relief is or could be claimed or not..."

This action for a declaration where the respondent is still in actual possession of the land clearly falls outside the ambit of Section 5 of the Limitation Act and as a result also falls out of the exceptions under Section 25 of the same Act where time may be postponed for fraud and or mistake. Having made a declaratory order, the Court can then address itself to any consequential order whether prayed for or not.

In light of our findings above, we dismiss this ground of appeal.

Ground three

That the learned Judge erred in law by making a decision which contradicted an earlier High Court decision resulting in the appellant's name being cancelled from the Certificate of Title and the respondent's name replacing it.

Arguments the Appellant

Counsel for the appellant submitted that the parties to the suit were in agreement that the Certificate of Title issued to the appellant did not conform to the decree arising from H.C.C.S No.1314/78. The question, therefore, was who was responsible for this irregularity and lack of conformity. Evidence adduced by DW3, the Principal Registrar of the Land Office in Kampala, and recognized by the Judge in his judgment was to the effect that the appellant was not responsible for being issued with a certificate that contravened the specifications of the decree in H.C.C.S No. 1314/78 and that it was the staff at the Lands Office to blame.

Counsel for the appellant made reference to **Section 59 of the Registration of Titles Act** which provides for every Certificate of Title issued under the Act to be received in all courts as evidence of the particulars set forth in the Certificate. It shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the Certificate is seized or possessed of that estate or interest or has that power.

Counsel for the appellant also made reference to the lead judgment of His Lordship **S.W.W. Wambuzi C.J** in the case of **Kampala Bottlers Ltd v Damanico (U) Ltd, Civil Appeal No.22/92** where the provision above was cited as hereunder:

"According to those provisions, it would appear to me that production of the Certificate of Title of the appellant is sufficient proof of ownership of the land in question unless the case falls within the provisions of Section 184 (now 178) of the Registration of Titles Act. It provides that;

"No action of ejectment or either action for the recovery of any land shall be or be sustained against the person registered as proprietor under the provisions of this act except...

(c) The case of a person deprived of any land by fraud as against that person registered as proprietor of such land through fraud or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

Counsel for the appellant further submitted that the purported cancellation of the certificate of title through the issuance of the consequential order was erroneous since it amounted to a reversal of the court's decree in H.C.C.S No. 1314/78 that could only be done on appeal but not by a court with the concurrent jurisdiction. The appellant's claim to the whole suit land was based on the special certificate that was issued to her without any fraud on her part and by virtue of **Section 5** of the **Limitation Act** and sections **59** and **178** of the **Registration of Titles Act** she could not be ejected without proof of fraud. In this regard, Counsel referred Court to the case of **Kampala Bottlers V Damanico (U) Ltd, CA No 22 of 1992** for the authority that proof of fraud must be shown on the transferee.

Counsel for the appellant further submitted that the decision in HCCS 1314 of 1978 was a final decision for which there was no appeal.

Arguments for the Respondent

Counsel for the respondent submitted that exhibit DI (the special certificate of title issued on 15th May 1984 which was later transferred into the names of the respondent under instrument number KLA 109002 dated 11th May 1984) reflects the total area in hectares for the whole suit land as 0.06Ha or 0.15 Acres; and not the 50ft x 100ft referred to in HCCS No 1314 of 1978. He further submitted that this evidence was not disputed.

Counsel for the respondent further referred Court to the testimony of DWIII, the Principal Registrar of Titles at the Land Office, on the process of sub division of the land title that should have been followed by the respondent. He submitted that there was a fault in the transaction as the decree of Court only transferred part of the land and not the whole of it as occurred eventually. In light of the decree, the Registrar should have ordered for a survey of the land with the view of sub division/mutation of the land as opposed to transferring the whole land.

Counsel for the respondent, further submitted that the appellant should have taken measures to see the correct survey to its conclusion.

Resolution of the Court

We have perused the record and taken the submissions and authorities of both counsel into consideration.

From the record and the submissions, we find that both parties are in agreement that the special certificate of title which was issued does not conform to the terms contained in the decree in H.C.C.S. No. 1314/78. It is the case for the appellant that the party responsible for this anomaly was the Registrar of Titles who handled the file. This was also the testimony of Mr George Mpaka (Principal Registrar of Titles - DW III). We find, therefore, that it cannot be said that the trial Judge made orders which contradicted the earlier High Court decision in HCCS 1314 of 1978.

We also cannot agree with the arguments of the respondent that since the special certificate of title was now in the names of the appellant through no fault of hers then that was sufficient proof of ownership under Sections 59 of the Registration of Titles Act and that no action for ejection or recovery of the suit land could take place under Section 178 of the Registration of Titles Act unless fraud was proved. We consider that the decision of *Kampala Bottlers Ltd V Damanico (U) Ltd* CA No **22 of 1992** on proof of fraud is distinguishable from this case, given its peculiar circumstances.

In our opinion, categories of fraud are never closed. Some frauds may also induce mistake which would result into cancellation of a certificate of title. The learned trial Judge instead found that the mistake in the special certificate of title resulted from the

Lands office and not the appellant who simply tried to enforce it as was given to her. However, we find that the appellant was involved in passive fraud

since she sought to benefit from the mistake made by the Lands Office in the certificate of title. In light of the case of ***Makula International Ltd -VS- His Eminence Cardinal Nsubuga & Another, [1982] HCB 11***, we cannot depart from the principle that:

"A court of law cannot sanction what is illegal, and illegality once brought to the attention of the court overrides all questions of pleading, including admission made thereon."

As cited in the book of ***D.J Bakibinga, Equity & Trusts (Law Africa, 2011)*** at pages 232 and 233, the case of ***Ajani v Okusaga (Keaton & Sheridan)*** at page 119 is instructive in distinguishing fraud at common law and at equity. ***Fakayode, J*** held thus:

*"Fraud or deceit at common law is a misrepresentation of fact made either knowingly, or without belief in its truth, or reckless not caring whether it was true or false. Fraud at common law is often referred to as actual fraud but fraud in equity is referred to as constructive fraud. Whilst actual fraud or common law fraud relates to statements or misrepresentation of fact, **constructive fraud or fraud in equity relates to conduct or transactions in respect of which the court is of the opinion that it is unconscientious of a person to avail himself of the legal advantage he has obtained** (Emphasis added)*

Furthermore, Halsbury's Laws of England, Vol. 16, para 666 at page 618 states

that:

*""Fraud" in its equitable context does not mean, or is not confined to deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimization, which can consist either of the active extortion of a benefit or **of the passive acceptance of a benefit in***

unconscionable circumstances. The general principle is that if a party is in a situation in which he is not a free agent and is not equal to protecting himself a court of equity will protect him. In all these cases, there might also be circumstances of contrivance or undue advantage implying actual fraud" (Emphasis added)

It is also our finding that there was no need for the respondent to appeal the decision in HCCS 1314 of 1978 as it did not confer on the appellant the entire suit land. The appellant was aware of this and had been cautioned by counsel for the respondent through a letter written as far back as 14th March 1984 which in her wisdom she chose to ignore, preferring no doubt to benefit from the error in the land office that gave her more land than she paid for. She too had an opportunity to remedy and, or mitigate this anomaly by bringing it to the attention of the concerned parties, but instead decided to not to. Amazingly the appellant knowingly, on the basis of the faulty special certificate of title, went on to try to survey the entire land for her benefit and destroyed some structures in the process. This in our view was fraudulent conduct on the part of the appellant which makes her culpable in trying to take more than was due to her (undue advantage).

Given our findings above, we dismiss this ground as well.

Ground four

That the learned Judge erred in law when he failed to find that the respondent was a trespasser thus failing to grant the appellant relief in trespass for example damages, conviction, mesne profits and a permanent injunction.

Arguments for the Appellant

Counsel for the appellant submitted that the appellant had on a number of occasions attempted to exercise her proprietary rights over the land after getting the special certificate of title, but was met with resistance. He further submitted that the appellant, having secured registered proprietorship over the suit land, gained possession over it making the respondent a trespasser from there on.

Counsel for the appellant referred Court to the case of ***Hemmings and Wife v The Stokes Pages Golf Club Ltd KB at P.720***, where it was held that:

"as soon as a person is entitled to possession, and enters in assertion of that possession, or which exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests that actual possession in the person who has so entered"

Counsel also referred to the case of Moya Drift Farm Ltd V Theuri (1973) E.A 114

and submitted that those facts were very similar to this case. In that case, the appellant having been found to be the absolute and indefeasible owner of the land was therefore entitled to file proceedings in trespass.

Counsel for the appellant reiterated that the suit land was transferred to the appellant by reason of the decree in H.C.C.S No.1314 of 1978 and therefore the registration of the suit land by the land office was done without fraud on the part of the appellant.

Counsel for the appellant also pointed out that the learned trial Judge did not consider the reliefs sought for by the appellant arising out of the counter claim in which the appellant alleged trespass by the respondent on to the suit land.

Arguments for the Respondent

Counsel for the respondent submitted that the respondent is an Administrator of the estate of his late grandmother and his family members are beneficiaries under the said estate and are therefore entitled to possession. This being the case, the respondent cannot be regarded as a trespasser.

Counsel for the respondent referred Court to the decision in the case of ***Sheik Muhammed Lubowa V Kitara Enterprises Limited [1992] KLR 127*** where it was held that trespass to land is constituted where there is entry onto the land by a person without consent of the owner. He also submitted that the only person who could sue for trespass was the one in possession, constructive and or actual of the land.

Counsel for the respondent also submitted that according to the Court Decree in HCCS 1314 of 1978, the appellant's interest in the suit land was limited to 50ft x 100ft which was small and therefore at variance to the size of land shown in the special certificate. Counsel for the respondent further submitted that it was the appellant who had a special certificate of title which was made in contravention of the order issued by court and thus could not rely on trespass as a cause of action.

Resolution by the Court

We have had the opportunity to peruse through the record. We have also taken the submissions of both counsel into consideration for which we are grateful.

We shall begin by looking at what amounts to trespass. In the case of Justine E.M.N Lutaaya Vs Sterling Civil Engineering Company Limited Civil Appeal No. 11 of 2002 (SC), Justice Mulenga (J.S.C as he then was) held:

“trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes, or portends to interfere, with another person's lawful possession of that land.”

The learned Justice further held that the only person who has the capacity to sue in trespass is one who has possession over it. The person in possession does not have to take drastic steps to show that they are in possession and the methods that they choose to adopt will essentially depend on the kind of land they are dealing with. Even the slightest amount of possession would suffice as was held in ***Wuta-Ofei v Danquah (1961)3 All ER 596, at p.600***. Furthermore, it was held in the case of ***Moya Drift Farm Ltd v Theuri [1973] EA 114*** that in absence of any other person having lawful possession, a person holding a certificate of title to land has sufficient legal possession of that land to support an action of trespass against a trespasser wrongly on the land.

The respondent during cross-examination on page 91-92 of the record testified that the appellant *"had been coming claiming the land... trying to bring surveyors."* The surveyors were rejected by the Local Council members (LCs) because they did not know the appellant as the owner of the suit land. This to us shows that the respondent and his family retained actual possession of the suit land throughout this dispute. The respondent at page 82 of the record stated that his grandmother who owned the land

had it since 1901 and that he has lived on the said land since birth in 1969. Indeed the respondent testified that there is a family house on the land covering most of the suit land. The trial Judge at page

228 of the record also found that the respondent and his relatives were in possession of the suit land.

Both parties claim that they are in possession of the suit land. The appellant claims possession by virtue of a Court Decree in HCCS 1314 of 1978 and a special certificate of title while on the other hand, the respondent also claims possession by virtue of physical possession and an original certificate of title. We have already found and agree with the trial Judge that the special certificate of title was issued in error as it covers more than the land size decreed in HCCS 1314 of 1978. We therefore find that the appellant cannot be regarded to be the absolute and indefeasible owner of the suit land. It is our finding therefore that the appellant cannot rely on the special certificate of title to claim possession of the suit land and thereby assert as she has that the respondent is a trespasser on her land.

It is true that the trial Judge did not specifically address the counter claim in the written statement of defence. Having found that there was an error in the special certificate of title given to the appellant and that it should be cancelled and the suit land resurveyed, he left the matters there. In our view, he should have proceeded to use those findings to resolve the issues in the Counter claim. A Counter claim is a separate suit from the main suit and should be addressed specifically which was not done. Having re-evaluated the evidence of the lower court, we have come to our own conclusion that there is no merit in the counter claim and thus dismiss it with costs.

As a consequence, ground number four also stands dismissed.

Ground five

The learned Judge erred in law by failing to order cancellation of the caveats lodged on the appellant's certificate of title in the Lands Office.

Arguments for the appellants

Counsel for the appellant submitted that the appellant, at the High Court, prayed that the Land Registrar removes the caveats made on behalf of the respondent. Counsel submitted that the trial Judge instead ordered for the cancellation of the appellant's certificate of title.

Counsel for the appellant submitted that the trial Judge had no powers to cancel the certificate that was issued upon orders of a sister court with concurrent jurisdiction. Cancellation of such a certificate could only be done by a court with appellate jurisdiction.

Arguments for the Respondent

Counsel for the respondent made a submission that in accordance with the finding made by the lower Court to the effect that the Special Certificate of Title did not conform to the decree issued by the High Court, cancellation by way of rectification of the Registrar's Book and all subsequent entries made in memorial was to be made.

Counsel further submitted that the result of the action above was a lapse of the issue of caveats.

Resolution by the Court

We have perused through the record and taken into the account the submissions of both counsel for which we are grateful.

We have already found that the trial Judge did not go against the Decree in HCCS 1314 of 1978. He found and then made a declaration that the special certificate of title issue to the appellant did not conform to the Decree in HCCS 1314 of 1978. To our mind the Decree in HCCS 1314 of 1978 was left intact so there was nothing to appeal on. It was the interpretation and use of that Decree that was both erroneous and fraudulent which cannot be allowed to stand.

The learned Trial Judge's order of cancellation of the special certificate title with orders for the land to be resurveyed to demarcate the 50ft x 100 ft in effect lifted the caveats. After rectification of the Register, the caveats would be redundant and of no use.

We dismiss this ground accordingly.

Ground one

That the Judge erred in law when he failed to analyze all the evidence presented during the trial which led to miscarriage of justice through reaching the wrong conclusion.

Arguments for the Appellants

Counsel for the appellants submitted that the learned trial Judge had avoided correctly applying the evidence and law to issues identified as proper and necessary for the ends of justice in the case which were:

- i. Going ahead to order the cancellation of the appellant's Certificate of Title even after repeatedly finding that she was not in any way directly or by necessary implication fraudulent in being the registered proprietor of the suit land, contrary to the provisions of the Registration of Titles Act and decided cases.
- ii. Failure, in the face of clear evidence, to find the suit time barred.

Counsel for the appellant submitted that the judgment and orders had thus led to a miscarriage of justice.

Arguments for the Respondents

Counsel for the respondent maintained the trial Judge properly evaluated the evidence and reached the correct conclusions.

Resolution of the Court

We find this ground to be omnibus, covering issues which we have sufficiently addressed in the previous grounds. Since none of the previous grounds has been upheld, it follows that this ground too stands dismissed.

Conclusion

In light of our findings above, we uphold the order given by the Judge in the lower court to have the land resurveyed by a competent surveyor appointed with the approval of Court and the portion decreed to the appellant of 50ft x 100ft demarcated off without demolishing the residential household situate on the whole of the suit land. We also order that the certificate of title be rectified to reflect the area belonging to the appellant. We further uphold the alternative order of the Judge that if the 50ft x 100ft cannot be ascertained, then the respondent compensate the appellant for the said interest at the current market value.

As to costs the trial Judge found at page 228 of the record that costs in this case would not follow the events because the same were not created by the defendant. We have found that even though the error of non- sub division of the land was said to have been occasioned by the land office, the appellant clearly sought for many years to benefit from that error and did nothing to mitigate these circumstances hence this dispute. We find therefore that the appellant is fraudulent and equally culpable. We therefore order costs against the appellant both here and in the lower Court, in the main suit. We further award costs of the Counter claim in the lower court to the respondent as we have dismissed the appellant's counter claim.

We so order.

Dated at Kampala, this ..28TH Day of SEPTEMBER 2015

HON. JUSTICE. REMMY KASULE, J.A

HON. JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA