THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0031 OF 2017

(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 035 of 2009)

LAMWAKA LUCY …… APPELLANT

VERSUS

1. LALOYO JALON }
2. BONGOMIN JOSEPH } …… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The appellant sued the respondents jointly and severally for a declaration that she is the owner of land under customary tenure, measuring approximately 30 x 30 metres, situated at Key "A" Sub-ward, Kasubi Parish, Bar-Dege Division, Gulu Municipality in Gulu District, an order of vacant possession, a permanent injunction, general damages for trespass to land, interest and costs. Her case was that she was employed by M/s Middle North Cooperative Society Union Limited as an office messenger by virtue of which she was given official accommodation in respect of which she was required to pay a monthly rent from 1991 until 30th July, 2007 when she received an offer from her employer to purchase the property as a sitting tenant at the price of shs. 1,500,000/= Pursuant to that offer, on 25th May, 2008 she paid shs. 1,000,000/= leaving a balance of shs. 500,000/= a demand for which was made on 6th June, 2008. Before she could pay the balance, the first respondent and second respondents in quick succession each fenced off part of the land claiming t have purchased it from M/s Middle North Cooperative Society Union Limited. Her efforts to pay off the balance were fruitless and the seller refused to receive the money. She has since been denied access to the property.

In his written statement of defence, the first respondent contended that he purchased the property in issue from M/s Middle North Cooperative Society Union Limited and therefore the appellant is his tenant in occupation. He paid a sum of shs. 10,000,000/= to M/s Middle North Cooperative

Society Union Limited on 23rd October, 2008. He thereafter sued M/s Middle North Cooperative Society Union Limited and the appellant before the Chief Magistrate's Court seeking quiet possession of the property. By consent, the appellant was struck off the proceedings as having no claim to the land in dispute wherefore a consent judgment was entered as between him and M/s Middle North Cooperative Society Union Limited declaring him rightful owner of the land. The property was handed over to him on 16th February, 2009. He therefore counterclaimed for unpaid rent from the appellant at the rate of shs. 25,000/= per month, accruing from 22rd December, 2008, the date of that judgment.

Similarly In his written statement of defence, the second respondent refuted the averments in the plaint and opted to put her to strict proof of her claim. He also indicated that he would raise a preliminary objection on account of *res judicata*, the dispute having been the subject of prior litigation before the L.CII Court of Kasubi Parish in a decision delivered on 6th September, 2009.

In her defence to the first respondent's counterclaim and reply to the defence of the second respondent, the appellant contended that she was not a party to the decision in the suit between the first respondent and M/s Middle North Cooperative Society Union Limited and therefore she is not bound by the decision and her claim is not *res judicata*. The alleged hand over of the premises to the first respondent is a fabrication and she is not the first respondent's tenant but occupies the premises in her own right as purchaser.

The appellant, Lamwaka Lucy testified as P.W.1 and stated that in 1991, she occupied a three roomed boys quarter as employee of M/s Middle North Cooperative Society Union Limited. The first respondent occupied the garage on the same premises. At a meeting of the Board convened on 18th May, 2007, M/s Middle North Cooperative Society Union Limited decided to sell her the property. On 30th June, 2007 she received an offer to purchase the property, measuring approximately 22 x 29 meters including the building she occupied, at a price of shs 1,500,000/= and she paid shs. 1,000,000/= on 25th May, 2008 in cash to the Cashier of the Union, a one Christine Atek whereupon she was issued with a receipt. Five months later, after a formal demand of 6th June, 2008 she attempted to pay the balance but it was rejected by the new management of M/s Middle North Cooperative Society Union Limited. They attempted to evict

her without success. The first respondent then on 11th June, 2011 forcefully evicted her tenants by then occupying one of the three rooms and paying her a monthly rent of shs. 20,000/= It has since been occupied by the first respondent's children. Later the second respondent in 2012 claimed to have purchased the same property from M/s Middle North Cooperative Society Union Limited and began harassing her. the first respondent then fenced off the land.

P.W.2 Onono John, the former caretaker Secretary Manager of M/s Middle North Cooperative Society Union Limited; the appellant bought the property in dispute from the Union. When it was resolved to sell the property in question, the purchase price was to be shs. 5,000,000/= but in her case, having served the union for long, it was reduced to shs. 1,500,000/= The appellant made part payment of shs. 1,000,000/= On 6th June, 2008 he wrote her a demand note for the balance but he left employment of the Union that year and he did not know whether the appellant paid the balance. The new management later sold the same property to the second appellant. She then closed her case.

In his defence as D.W.1 the first respondent Laloyo Jalon testified that in the year 2007, he learnt of the available plot for sale from the then Union Chairman, at the price of shs. 7,500,000/= Before that, he had been a tenant on the premises since the year 2000. He had with the permission of the landlord modified the garage he was renting, into a main residential house. The appellant and the second respondent occupied the boys quarters as tenants of M/s Middle North Cooperative Society Union Limited. He was informed that the price for the "garage" and the boys quarters was shs. 10,000,000/= which he paid on that day 28th June, 2007 into the Union's account with Stanbic Bank. To his surprise, the Union Officials subdivided the land he bad purchased into three plots, offering the two other plots to the appellant and the second respondent, prompting him to sue M/s Middle North Cooperative Society Union Limited and the two. The two renounced any claim to the land and sought to be struck off the proceedings. A consent judgment was entered declaring him lawful owner of the property and it was handed over to him. The appellant refused to pay rent at the rate of shs. 10,000/= per month from February to May, 2009 and thereafter at the rate of shs. 25,000/= per month, hence a total of shs. 2,090,000/= as at that date. It was on 23rd October, 2008 that he received a receipt for the purchase price he paid on 28th June, 2007.

D.W.2 Okot Christopher, Chairman Board of Directors of M/s Middle North Cooperative Society Union Limited, testified that the appellant initially occupied the premises as an employee of the Union and later as a tenant when she left the employment if the Union. On 18th May, 2007, the Union's Board resolved to subdivide it land comprised in LRV 3772 Folio 24 plots 10 - 16 Alur Road, Gulu, being 8.09 hectares of land, and sell off part of it to enable it pay off outstanding debts. The price of plots was fixed at shs. 7,500,000/= for non-Union staff and shs. 5,000,000/= for Union staff. An additional negotiated sum would be paid in respect of buildings existing on any such plots. The appellant being a non-union staff, could not have purchased the plot at a price below shs. 7,500,000/= more especially since it has a building on it. Receipts would be issued to purchasers after presenting bank slips since all payments were to be made into the Union's bank account. The two plots purchased by the second respondent are different from the subject matter of this case.

The second respondent, Bongomin Joseph, testified as D.W.3 and he stated that he purchased two plots from M/s Middle North Cooperative Society Union Limited, constituting the residue of what was left of the land following sales that took place in the year 2007, pursuant to the Union's Board resolution of 18th May, 2007. He bought the two plots on 15th December 2008 and 22nd June, 2009 respectively at the price of shs. 12,000,000/= and shs. 8,000,000/= respectively. He renegotiated the Union's management because by 2009, the value of the plots had appreciated. Upon paying for the plots, he fenced them off but the appellant destroyed the fence and began cultivating the land. He sued her before the L.C.II Court which decided in his favour on 6th September, 2009. He applied to the Chief Magistrate's court for execution of that decision and the application was granted on 1st June, 2010. Instead the appellant filed the suit (from which the appeal now arises) on 22nd September, 2009. The respondents closed their case at that point.

The court then visited the *locus in quo* on 7th March, 2017. It recorded evidence from two "independent witnesses," i.e.; (i) Pauline Kilama, the L.C.1 Chairperson who stated that the land in dispute belongs to M/s Middle North Cooperative Society Union Limited. The area in dispute belongs to the two respondents and the plaintiff lost the suit before the L.C.II; (ii) Simon Okwi the former Union Manager, who stated that the land once belonged to M/s Middle North

Cooperative Society Union Limited but it was sold off. The court then prepared a sketch map of the features it observed present on the land in dispute and in the neighbourhood.

In his judgement, the trial magistrate found that in the suit between the first respondent and M/s Middle North Cooperative Society Union Limited, the appellant expressly agreed to be struck off the proceedings because she lay no claim of ownership to the property in dispute. she could not turn around and claim the same property in the current suit. the suit by the appellant against the first respondent was therefore *res judicata*. Her claim to the property was finally determined when she agreed that her name be struck off those proceedings. The appellant had in 1991 received an offer from M/s Middle North Cooperative Society Union Limited for sale to her of that property. The first respondent paid for it on 23rd October, 2008 after the appellant had been struck off the proceedings on 13th March, 2008. The appellant could not have paid on 25th May, 2008. The second respondent claimed to have purchased the same property from M/s Middle North Cooperative Society Union Limited on 15th December, 2008 when it had already sold the land to the first respondent on 23rd October, 2008. By that time the property belonged to the first respondent, hence that sale was invalid. The appellant and the second respondent acted fraudulently and in bad faith to defeat the interests of the first respondent. The suit was dismissed with costs. Judgment was entered in favour of the first respondent on the counterclaim but no award of special or general damages was made since none were proved. The first respondent was awarded the costs of the counterclaim.

Being dissatisfied with the decision, the appellant appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he decided that Civil Suit No. 35 of 2009 was *res judicata*.
2. The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence before him thereby reaching a wrong decision.
3. The learned trial Magistrate erred in law and fact when he held that the plaintiff acted fraudulently with M/s Middle North Cooperative Society Union Limited to defeat the first respondent's interest.

4. The learned trial Magistrate erred in law and fact when he dismissed the appellant's suit and upheld the first respondent's counterclaim.

In his submissions, Mr. Ocorobiya Lloyd counsel for the appellant argued grounds 1, 3 and 4 together stating that it was wrong for the trial magistrate to have dismissed the appellant's case on grounds that the matter was *res judicata*. The reason the trial magistrate gave was that in an earlier proceeding in civil suit No. 31 of 2007, the appellant who was the defendant had asked to be struck off. When the appellant who was the plaintiff filed her case in the court below, she was seeking declaratory orders of ownership of the land in dispute 30 m x 30 m. She also alleged trespass against the 1st and 2nd respondents. The appellant's claim to the land in dispute was premised on a document showing that she was given an offer by Middle North co-operative union Ltd. The appellant accepted the offer on 25th May, 2008 by paying shs. 1,000,000/= The balance of shs. 500,000/= was demanded from her by Middle North on 6th June 2008.

For the first respondent, the trial court found that the date of purchase was on 23rd October, 2008. That being the case, the appellant had already made part payment on 25th May, 2008, there is no way the same piece of land could be sold to the first respondent five months after. The ruling of the trial court that the matter was *res judicata* because of the appellant asked her name to be struck off the proceedings of 2007, 27th November, 2007 that matter could not have been *res judicata* because on that date the first respondent had no interest in the land in dispute. His interest accrued 11 months afterwards. The first respondent when testifying before the lower court stated that he was made a verbal offer by the authorities of Middle North. There is no independent evidence to corroborate the evidence given that the first respondent was actually given a verbal offer. To the contrary a letter was written by Middle North to the effect that the 1st Respondent had no offer. By that deposit he was forcing an offer on Middle North and they rejected it. There is no way civil suit No. 39 could be *res judicata*.

The trial magistrate further held that there was fraud by the 1st respondent. There was no such claim by the 1st respondent. Even if there had been such a claim, since the appellant had already made part payment, Middle North became a trustee, see *Hagumya Godfrey v. Ntale Deo, CS 298 2004*; land once sold and part payment is made the seller can only claim for the balance. There

was no independent evidence to corroborate a verbal offers, see *Tarama Ahmed Trama v. Issa Gule, H.C.CS. No.85 2010*; in that case the written trumped the verbal. In as far as the appellant and the 1st Respondent are concerned, there was insufficient evidence on the part of the 1st respondent to prove a contract with Middle North.

As regards the second respondent, he adduced evidence of purchase of purported agreements of sale. There is no legal interest created. He made the first payment on 15th December, 2008. The second on 22nd June, 2009 and they relate to the same land. The two respondents colluded to evict the appellant. The seller ganged up with the 1st and second respondent to evict the appellant off the land. The third respondent decided to fence off the appellant's toilet from her house. Photographs were submitted. The appellant was battling the respondents since 2009, 8 years of torment, sleepless nights and debasement. The lower court erred in law when it found the respondents had a claim to the land when they did not. The first purchase was by the appellant. The finding that civil 35 of 2009 was *res judicata* was wrong. The court had said that if Middle North later purported to sell to the plaintiff, that it was evidence of fraud, yet no issue of fraud was framed. The second respondent was represented and no particulars of fraud were alleged. That finding was erroneous. The court should find that there was no fraud as between the seller and the appellant. The appellant should be found the rightful owner, set aside the judgment of the court below allow damages and the costs.

Counsel for the first respondent, Ms. Shamim Amola of Hallmark Advocates, submitted in reply that failure to join the registered proprietor of the land, M/s Middle North Cooperative Society Union Limited to the proceedings rendered the possible outcome moot since it could not be enforced against a registered proprietor who is not a party to the proceedings. In the alternative, she argued that the appellant's suit was correctly found to have been *res judicata* as against the first respondent in so far as the decision to strike her off as defendant to Gulu Chief Magistrate's Court Civil Suit No. 31 of 2007 was based on her concession that she had no interest in the land. It is the same land that was in dispute in those proceedings that forms the subject matter of this appeal and the decision of the court below. Although the final consent judgment was between the first respondent and M/s Middle North Cooperative Society Union Limited, it was binding on the appellant. The first respondent was declared owner of the land in dispute and that question could

not be re-adjudicated in a subsequent suit. She submitted further that the trial court found the appellant not to have been credible. Since her claim is based in equity, hers was not only subsequent to that of the first respondent but also was tainted with fraud. Although she purported to have purchased the land on 25th May, 2008 she never disclosed that on 27th November, 2008 at the time her name was struck off the proceedings filed by the first respondent as buyer of the same property. She prayed that the appeal be dismissed with costs.

Similarly, counsel for the second respondent Ms. Oyet and Company Advocates submitted that the suit against the second respondent was rightly found to have been barred by *res judicata*. The subject matter of the suit between him and the appellant in the suit before the L.C.II Court of Kasubi Parish Bar Dege Division is the same subject matter in these proceedings. In addition, whereas M/s Middle North Cooperative Society Union Limited had at its meeting of 18th May, 2007 resolved that plots would be sold to at the price of shs. 7,500,000/= to non-members, the appellant purported to purchase it at shs. 1,500,000/= a price which is even lower than that of shs. 5,000,000/= reserved for its participating members and staff. They prayed that the appeal be dismissed with costs.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence, this court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). This court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. This duty may be discharged with or without the submissions of the parties as the court proceeds to do now.

In the first ground, it is argued that the suit was *res judicata*. According to section 7 of *The Civil Procedure Act* and section 210 of *The Magistrates Courts Act*, no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court. The plea of "*res judicata*" is in its nature an "*estoppel*" against the losing party from again litigating matters involved in previous action but does not have that effect as to matters transpiring subsequently.

The judgment in first action operates as an "*estoppel*" only as to those matters which were in issue and actually or substantially litigated. It is matter of public concern that solemn adjudications of the courts should not be disturbed. Therefore, where a point, question or subject-matter which was in controversy or dispute has been authoritatively and finally settled by the decision of a court, the decision is conclusive as between parties in same action or their privies in subsequent proceedings. A final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. In short, once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh (see *In the Matter of Mwariki Farmers Company Limited v. Companies Act Section 339 and others [2007] 2 EA 185*). By *res judicata*, the subsequent court does not have jurisdiction.

For the doctrine to apply, it must be shown that; a) there was a former suit between the same parties or their privies, b) a final decision on the merits was made in that suit, c) by a court of competent jurisdiction and, d) the fresh suit concerns the same subject matter and parties or their privies (see *Ganatra v. Ganatra [2007] 1 EA 76* and *Karia and another v. Attorney-General and others [2005] 1 EA* 83 at 93 -94). The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit; the former suit must have been a suit between the same parties or between parties under whom they or any of them claim; the parties must have been litigating under the same title in the former suit; the court which decided the former suit must be

a court that was competent to try the former suit or the suit in which such issue is subsequently raised; and the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit.

A suit therefore will not be *res judicata* where it is determined that the subject matter is different from that which was considered in the former suit, or the judgment in the former suit was not pronounced by a court of competent jurisdiction, or where it was not a decision given on the merits of the case, or where the parties are different and not privy to those in the earlier suit or if they are not litigating under the same title. Similarly, dismissal of a suit on a preliminary point, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties (see *Isaac Bob Busulwa v. Ibrahim Kakinda [1979] HCB 179*; *Bukondo Yeremiya v E. Rwananenyere [1978] HCB 96* and *Kerchand v. Jan Mohamed (1919 – 21) EACA 64*). There will be a decision on merit where it is demonstrated that the decision was arrived at after consideration of materials submitted to the court in order to substantiate the claim made in the suit rather than on grounds or error, defect or default in the pleadings or procedure.

In the instant case, the first respondent had by way of Gulu Chief Magistrate's Court Civil Suit No. 31 of 2007 jointly and severally sued M/s Middle North Cooperative Society Union Limited, the appellant and a one Okumu Peter. Upon her declaration that she had no interest in the subject matter of the suit, the appellant was on 27th November, 2008 struck off the proceedings as a co-defendant. That decision was not arrived at after consideration of materials submitted to the court in order to substantiate the claim made in the suit but rather than on grounds of defect in the pleadings to the extent that a suit had been filed against a person in respect of whom the first respondent could not maintain a suit for lack of a cause of action since she had no declared interest in the land. That the appellant was struck off these proceedings as a defendant at the preliminary stage, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties.

On the other hand, the second respondent had by a suit filed before the L.C.II Court of Kasubi Parish Bar Dege Division, sued the appellant for possession of the same land. The subject matter of that suit was substantially the same as in the current suit. That suit culminated in a decision

delivered in favour of the second respondent on 6th September, 2009. The subject matter in this suit is the same as that which was considered in that former suit; the judgment in the former suit was pronounced by a court of competent jurisdiction; the decision was given on the merits of the case; and the parties to that earlier suit are the same as in the current suit in so far as that part of the land is concerned; and they are litigating under the same title. For all intents and purposes, the appellant's claim against the second respondent in the subsequent suit was barred by *res judicata*. This ground of appeal succeeds in part.

Grounds 2, 3, and 4 will be considered concurrently in so far as they relate to the manner in which the trial court went about the task of evaluation and the decisions it arrived at. In the first place, it was erroneous of the trial court while at the *locus in quo* to have recorded evidence from a one Pauline Kilama, the L.C.1 Chairperson and Simon Okwi the former Union Manager of M/s Middle North Cooperative Society Union Limited. Visiting the *locus in quo* is essentially for purposes of enabling the trial court understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony and therefore must be limited to an inspection of the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the *locus in quo* is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see *Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784*, *Yeseri Waibi v. Edisa Byandala [1982] HCB 28* and *Nsibambi v. Nankya [1980] HCB 81*).

That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the two additional witnesses, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those two witnesses.

The dispute between the parties in the case arise from the fact of a double sale of the property in dispute by M/s Middle North Cooperative Society Union Limited. In cases of a double sale of immovable property, the general rule is that interests in property take priority according to the order in which they are created. Ownership in the following order belongs to; (1) the first to register title in good faith; (2) then, the first possessor in good faith; and (3) finally, the buyer who in good faith presents the oldest title. However, mere registration is not enough to confer ownership. The law requires that the second buyer must have acquired and registered the immovable property in good faith.

Prior equitable interest in land can only be defeated by a subsequent bonafide purchaser for value without notice of the prior interest. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation (see Hanbury & Martin: *Modern Equity*, 20th Edition, Sweet and Maxwell Ltd (2015). He or she who is earlier in time is stronger in law and when equities are equal and neither claimant has a legal estate, the first in time prevails.

In order for the second buyer to displace the first buyer, the following must be shown:- (1) the second buyer must show that he or she acted in good faith (i.e., in ignorance of the first sale and of the first buyer's rights) from the time of acquisition until title was transferred to him or her by

registration or failing registration, by delivery of possession; and (2) the second buyer must show continuing good faith and innocence or lack of knowledge of the first sale until his or her contract ripens into full ownership through prior registration as provided by law.

One is considered a purchaser in good faith if he or she buys the property without notice that some other person has a right to or interest in such property and pays its fair price before he or she has notice of the adverse claims and interest of another person in the same property. One who buys a property with knowledge of facts which should put him or her upon inquiry or investigation as to a possible defect in the title of the seller, acts in bad faith. The equitable claim is defeated by *mala fides*.

In the instant case, the first respondent paid for the property in dispute on 28th June, 2007 by depositing the purchase price of shs. 10,000,000/= into the Union's account (see annexure "U" to the first respondent's witness statement). He was issued with a receipt on 23rd October, 2008. The appellant purported to have purchased the same property on 25th May, 2008 at a price of shs 1,500,000/= when she paid shs. 1,000,000/= in cash to the Cashier of the Union, a one Christine Atek whereupon she was issued with a receipt bearing that date. The first respondent's payment have been made earlier than that of the appellant, his equitable interest in the property is earlier in time and can only be displaced by that of the appellant if the appellant were a bona fide purchaser for value without notice of that equitable interest.

Unfortunately for the appellant, the evidence suggests otherwise. This is because at the time the appellant had been struck off as a defendant to the proceedings in Gulu Chief Magistrate's Court Civil Suit No. 31 of 2007on 27th November, 2008, by the pleadings served upon her she obtained notice of the fact that the first respondent claimed the property as purchaser on basis of a cash deposit he had made onto the bank account of M/s Middle North Cooperative Society Union Limited on 28th June, 2007 whereupon he had been issued with a receipt on 23rd October, 2008. Hence the first respondent filed the suit after he had paid the purchase price. The appellant's purported payment of 25th May, 2008 is inconsistent with her conduct in court on 27th November, 2008, when she could have presented her receipt of 25th May, 2008 and demand letter of 6th June,

2008 to assert her claim. The consent judgment was entered on 12th December, 2008 and yet she filed the suit from which this appeal arises, almost a year later on 22nd September, 2009.

That aside, it is common ground between the parties that these sales were sparked off by a resolution of M/s Middle North Cooperative Society Union Limited of 18th May, 2007 fixed a reserve price of shs. 7,500,000/= per plot to non-members, and shs. 5,000,000/= for its participating members and staff. Additional sums would be negotiated in respect of those plots that had buildings on them. The property in dispute had buildings on it and the price paid by both respondents is consistent with that resolution. In comparison, that of shs. 1,500,000/= claimed by the appellant as the a price offered to her for a plot on which there is a building, is even lower than the shs. 5,000,000/= reserved for participating members and staff. the appellant's explanation is most unconvincing.

When a subsequent purchaser has actual knowledge of facts and circumstances that would impel a reasonably cautious person to make such inquiry or when the purchaser has knowledge of a defect or the lack of title in the vendor or of sufficient facts to induce a reasonably prudent person to inquire into the status of the title of the property in litigation, his or her mere refusal to believe that such defect exists, or his or her wilful closing of his or her eyes to the possibility of the existence of a defect in the vendor's title will not make the purchaser an innocent purchaser for value if it later develops that the title was in fact defective, and it appears that he or she would have had such notice of the defect had he or she acted with that measure of precaution which may reasonably be required of a prudent person in a like situation (see *Assets Company v. Mere Roihi [1905] AC 176*).

Constructive notice applies when a purchaser knows facts which made "it imperative to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper" (see *Macmillan v. Bishopsgate Investment Trust (No. 3) [1995] 1 WLR 978*). This occurs when it is shown that a purchaser acquired knowledge of circumstances which would put an honest and reasonable man on inquiry (see *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA, [1993] 1 WLR 509*), and yet he or she did not undertake the necessary inquires. When a person wilfully abstains from inquiry to

avoid notice, such person cannot claim to have acted in good faith (see *The Zamora [1921] AC; Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378 at 812* and *English and Scottish Mercantile Investment Co v. Brunton 1982] 2 QB 700*).

The appellant in the instant case not only had actual notice of the first respondent's purchase, but her subsequent conduct is not that of a bona fide purchaser. If even if she did not, she became privy to circumstances that would impel a reasonably cautious person to make inquiry into the status of the title of the property. She chose not to. Her claim thus could not displace the first respondent's prior equity. The trial court therefore came to the right conclusion. Consequently the appeal is dismissed with costs to the respondents.

Dated at Gulu this 25th day of October, 2018

Stephen Mubiru
Judge,