

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 05 OF 2013
[LAND DIVISION]

1. ISSAKA SEMAKULA
2. FLAVIA KATENDE ::: APPELLANTS

VERSUS

WILLIAM SETIMBA ::: RESPONDENT

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

This appeal was filed by **ISSAKA SEMAKULA and FLAVIA KATENDE** as Administrators of the Estate of Late Enock Katende (*hereinafter referred to as “the 1st and 2nd Appellants” respectively*) challenging the judgment and orders of **Her Worship Atukwasa Justine**, Chief Magistrate of Nabweru Chief Magistrate’s Court (*hereinafter referred to as the “trial court”*) which was delivered on 22/01/2013. The trial court decided the case in favour of **WILLIAM SETIMBA** (*hereinafter referred to as “the Respondent”*) and declared him the rightful owner of the suit land, and issued an order for specific performance that the 1st Appellant performs to conclusion the transaction between the Respondent and Ibulaimu Kiwanuka, Joyce Namakula and Filmoni Ssemakula. Further, the trial court issued a permanent injunction restraining the 1st and 2nd Appellants from interfering with the Respondent’s quiet possession of the suit land. The Appellants were ordered, jointly and severally, to pay general damages of Shs.15 million to the Respondent, and costs of the suit both attracting interest at court rate from the date of judgment until payment in full. The trial court forwarded the file to High

Court for consequential orders under **Section 177 of the Registration of Titles Act (Cap.230)**.

Background:

The Respondent filed a suit in the trial court against two 1st and 2nd Appellants seeking for the ownership of land which he claimed to have bought in 1974 from the late Ibulaimu Kiwanuka, Joyce Namakula and Filmoni Ssemakula. He averred that from Ibulaimu Kiwanuka he brought 19.85 hectares, from Firimoni Ssemakula, 8.10 hectares, and from Joyce Kiwanuka, 20.02 hectares. All the said land was formerly **Singo Block 56 Plot 3 and 9**; which after the survey became **Singo Block 56 Plot 32** measuring 45.44 hectares, now registered in the names of the 1st Appellant as Administrator of the Estate of his father the Late Ibulaimu Kiwanuka. The Respondent took physical possession from the time of purchase, and sold some plots out of the suit land to other people who are now tenants on the suit land. The Respondent received signed transfer forms from the respective vendors, but could not obtain a survey necessary for mapping and acquisition of a title due to the 1978 – 1986 Liberation Wars.

In 1981, the Respondent lodged two of the transfers by the three vendors in the Land Office. However, the 1st Appellant obtained Letters of Administration for the estate of the Late Ibulaimu Kiwanuka in 1990 did not put in effect the terms of the sale agreement his late father had entered into with the Respondent. Instead he surveyed off 45.44 hectares out of the suit land which produced the current **Singo Block 56 Plot 32** and got registered as administrator of his father's estate on the land which had several tenants on it. He also refused to receive the balance of the purchase price which owing to the late Ibulaimu Kiwanuka by the Respondent. Instead, he sold the land to the late husband of the 2nd Appellant whose estate the 2nd Appellant is now the Administrator. The Respondent averred that the 1st appellant obtained registration on the suit land and that the 2nd Appellant's husband

purchased the suit land when he was well aware of the fraud and hence became privy to the fraud of the 1st Appellant.

The Respondent particularized the fraud as follows;

- 1. Attempting to occupy land which to his knowledge had an owner with a beneficial interest and was in possession.**
- 2. Doing the above while knowing that the registered owners died and had sold their portions.**
- 3. Doing (1) above while not the Administrator of the Estates of his Aunt and Uncle.**
- 4. Causing himself to be registered as owner of portions he had no right to whatsoever.**
- 5. Taking over possession while not caring about the interest of people covered by section 30 – 34 of the Land Act, 1998.**
- 6. Denying the transfer signature of his late father deliberately while knowing the same to be the basis for the Respondent's occupancy on the said land for more than thirty five years.**
- 7. The 2nd Appellant entering the land and attempting to obtain from the 1st Appellant title well knowing that it has come to him through fraud.**

The Respondent contended that the 2nd Appellant's late husband fraudulently entered on the suit land and forced the tenants on the land to succumb to torture and terror by gunmen in utter disregard of their interest, and also ignored the dispute between the Respondent and the 1st Appellant by pretending that the land in issue was different from the one he bought, and went ahead to register himself as the proprietor.

For his part the 1st Appellant denied that there was ever any sale of land to the Respondent by Ibulaimu Kiwanuka, Filimoni Ssemakula, and Joyce Namakula. Further that the signatures attributed to them on the sale agreements were complete

forgeries. The 1st Appellant also contended that if the Respondent purported to sell plots of land on the suit land to the other people now occupying the suit land, he did so illegally and fraudulently because he had no interest to pass on to such people.

The 2nd Appellant, for her part, contended that she is in lawful possession of the suit land with full knowledge and consent of the 1st Appellant, and that she has never encroached on the Respondent's land. In the alternative, she contended that if the transfers were signed by the alleged sellers, they are illegal under the *Illiterate Protection Act* as the purported vendors were illiterate in English language, and that the Respondent's prayer for eviction of that the 2nd Appellant is misconceived and that the suit was filed in a wrong court. The parties agreed on the following issues for determination at the trial;

- 1. Whether the plaintiff has interest in the suit land.***
- 2. Whether there was fraud on the part of the 1st and 2nd defendants***
- 3. Whether the transaction between the 1st and 2nd defendants offended the Land Act.***
- 4. Remedies.***

The trial court decided in favour of the Respondent. The Appellants were dissatisfied with the judgment and orders of the trial court and filed this appeal and advanced the following grounds of appeal;

- 1. The learned trial magistrate erred in law when she ordered cancellation of the 2nd Appellant's certificate of title not basing on the evidence on record.***
- 2. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus arriving at wrong conclusion.***
- 3. The learned trial magistrate erred in law and misdirected herself when she delved into speculations and extraneous matters not supported by evidence on record thus arriving at a wrong decision.***

4. The learned trial magistrate failed to properly interpret the law so as to apply it to the facts before her.

M/s. Sendege, Senyondo & Co. Advocates represented the Appellants while M/s. Zagyenda & Co. Advocates represented the Respondent. Both Counsel filed written submissions to argue the appeal. The submissions are on court record and it is not necessary to reproduce them in detail, but I will occasionally revisit them when resolving the grounds of appeal below.

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. See: **Fredrick Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997; Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998.** With this duty in mind, I proceed to consider the grounds of appeal. The grounds are interrelated and the disposal of one leads to partial or complete disposal of the others. I therefore propose to handle the 2nd and 3rd grounds together, the 1st ground next and 4th ground last.

Ground 2: The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus arriving at wrong conclusion.

Ground 3: The learned trial magistrate erred in law and misdirected herself when she delved into speculations and extraneous matters not supported by evidence on record thus arriving at a wrong decision.

In **Ground 2**, the Appellants in general terms fault the trial court's evaluation of the evidence, but do not raise any specific instance in which the trial court erred. Since this court's duty as a first appellate court is to re-evaluate the evidence, this

particular ground is rather redundant. I will hence proceed to the next ground of the appeal

In **Ground 3**, the main complaint is that the trial court delved into speculations and extraneous matters not supported by evidence on record which led to a wrong decision. Counsel for the Appellants submitted that the trial court failed to read, comprehend and properly interpret the sale agreement (*Exhibit PII*) in which Filmoni Ssemakula sold his own land of 100 acres each at Ushs.110/=. That he did mention anywhere that he was not the sole owner of the land he was selling, or that he had power of attorney and was selling on behalf of someone else. Further, that the sale agreement does not refer to Kiwanuka Ibulaimu and Namkula Joyce, as much as it does not refer to **Singo Block 56 Plot 3 and 19**.

Counsel for the Appellants went on to submit that the Respondent did not purchase land comprised in **Singo Block 56 Plot 32**, but that he bought some other land. Counsel opined that the Respondent was just on a fishing expedition because in one breath he stated that he bought 100 acres as per *Exhibit PII*, and in another that he bought **Singo Block 56, Plot 3 and 19**, and in yet again that he bought **Plot 32**. Also, that after the closure of the defence case and long after he had closed his case, the Respondent amended the plaint to indicate that then he was no longer interested in **Plot 3**. Counsel opined that the Respondent was just on a fishing expedition because even **Plot 32** is not 100 acres.

Counsel further submitted that the Respondent did not pay the full purchase price for land he allegedly bought from Filmoni Ssemakula, and that even supposing that **Plot 32** was actually the land he bought, which is denied, the trial court should not have ordered for cancellation of the certificate of title without evidence of full payment of the consideration. That evidence of DW1 to the effect that Filmoni Semakula had his own land at Sekanyonyi, while Kanyogoga and Joyce Namakula

also had their own land too was not challenged, and that *Exhibit PII* executed by Filmoni Ssemakula would have been part of the land he sold to the Respondent.

In reply, Counsel for the Respondent submitted that the court dealt with the evidence and in sufficient detail, and that the dilemma of the Appellants is that all they did was to generally deny the evidence of the Respondent. That the test of proof required of the Respondent at trial was whether his evidence passes the level of proof on the balance of probability, which test was duly satisfied by his evidence. Further, that the trial court based its decision on the fact that if facts given in evidence are not controverted they are deemed to be proved.

Counsel pointed out that the trial court relied on the case of *Katarikawe v. Katuramu (1997) HCB 187* to the effect that if a buyer gives part payment and takes possession of the suit land the buyer acquires equitable interest in the suit land even though a detailed written agreement between the buyer and the seller is not made. Counsel argued that the Appellants did not show the alleged errors by the trial court which led to the alleged wrong judgment, but that the trial court found that there was fraud which led to deprivation of the Respondent of registration on the suit land, and that the title obtained through fraud should be cancelled.

Counsel for Respondent also submitted that that the evidence of PW4, Kajungu Apollo, was never shaken to the effect that the 1st Appellant after receiving a notice to sue by the Respondent, from *M/s Nshimye & Co. Advocates*, went with 2nd Appellant's husband to the Chambers of the said lawyer and intimated that they were not bothered by the notice, and that they will go ahead using the land and also effect transfer of title from the 1st Appellant to the 2nd Appellant's husband. That in fact they later followed upon their word. Counsel argued that this evidence was not challenged and that the trial court found so in its judgment. Counsel maintained that this was not the only evidence of fraud because the Respondent's testimony

also showed the fraud particularly as regards the caveat(s), and the fact that he kept on checking on the 1st Appellant to finalise the transaction which he had entered with the late Ibulaimu Kiwanuka, but that the 1st Appellant refused.

After reappraising the evidence on the trial court's record, I fully concur with the trial court's findings. The evidence and pleadings of the Respondent (in the plaint) and the memorandum of sale (*Exhibit PII*) do not refer to a particular block and plot numbers of the suit land. However, the evidence in the transfer instruments indicates that the measurement of the land is 45.44 hectares. Therefore, the evidence of the Respondent that the plot numbers changed when the Appellants surveyed the land is credible.

I have noted that the 1st Appellant denied that his late father sold the land to the Respondent, and that the other two vendors who are also his relatives signed *Exhibit PII*. He also denied their hand writing. However, he adduced no evidence to controvert the Respondent's evidence that, *Exhibit PII*, the sale agreement was signed by the vendors who included the 1st Appellant's father. After the Respondent adduced evidence of the Scientific Aids laboratory showing that the late Ibulaimu Kiwanuka signed the transfer in favour of the Respondent on 14/01/1977, the burden shifted to the 1st Appellant to rebut it by adducing evidence proving the contrary, but he failed to discharge this burden. This rendered evidence of the Respondent unchallenged that indeed he entered into the sale transaction as per *Exhibit P1 and PII* with Ibulaimu Kiwanuka, Joyce Namakula and Filmoni Ssemakula.

The above findings are further buttressed evidence of the Drawing Officer from Mityana Land Office. He stated that ***Singo Block 56 Plot 3 and 19*** have never been amalgamated, and that ***Block 56 Plot 3*** has an independent title measuring about 81 acres registered in the name of G.W Baale in December, 2003, as per *Exhibit D1*. Further, that after creating ***Plots 20-29*** from the subdivisions ***Plot 19***

ceased to exist and **Plot 29** was created as residue for **Plot 19**, and that **Plot 32** is a creation of **Plot 29** reflected in the Area Schedule (*Exhibit D4*). The witness clarified that **Plot 32** is a smaller part of **Plot 19** created in 1985 as per the *Kalamazoo*, and that the plot changed when the Appellants surveyed the land.

I find that the trial court did not misdirect itself on these findings. *Ground 2* of the appeal accordingly fails. This also disposes of *Ground 3*, which also fails and I find that the trial court properly evaluated the evidence and reached the correct decision based on the evidence before it, and did not import any extraneous matters into the evidence.

Ground 1: The learned trial magistrate erred in law when she ordered cancellation of the 2nd Appellant's certificate of title not basing on the evidence on record.

The trial court held that the 1st and 2nd Appellant obtained registration through fraud and ordered for the cancellation of the 2nd Appellant's certificate of title. The trial court relied on the case of *Katarikawe v. Katuramu (supra)* to the effect that if a purchaser makes part payment and takes possession of the suit land he obtains equitable interest in the land even though a detailed written agreement between the purchaser and vendor is not available or made. The trial court concluded that the Respondent was the equitable owner of the suit land, and that the transaction between the 1st and 2nd Appellant amounted to fraud as it led to deprivation of the Respondent of registration on the suit land. The trial court ordered that the title obtained through fraud be cancelled.

After evaluating evidence on this ground, I entirely agree with the trial court that the transaction between the 1st and 2nd Appellant was tainted with fraud, and that it was intended to defeat or had the effect of defeating the unregistered interest of the Respondent who had equitable interest in the suit land. The Respondent purchased the land in 1974 part of which was from Ibulaimu Kiwanuka. The 1st and 2nd

Appellants knew that he was the owner of the suit land and occupied the same with other tenants. Even when the husband of the 2nd Appellant entered the sale transaction with the 1st Appellant he knew of the interest of the Respondent and the other tenants whom he forced to succumb to torture at the hands of armed gun men so that they may vacate. The 2nd Appellant also in her evidence confirmed the existence of tenants on the suit land prior to her husband purported purchase but claimed that her husband paid them off.

Even if the 2nd Appellant's husband could have paid off the tenants on the suit land, they were tenants of the Respondent who acquired equitable interest at the time of the purchase. In the case of *H.M Kadingidi v. Essence Alphonse, H.C.C.S. No.289of 1986*, Ntabgoba PJ. (as he then was) held that;

“A purchaser who has concluded a sale agreement with the owner, immediately becomes the owner of the land and the vendor becomes his trustee in title. This is because the purchaser is potentially entitled to the equitable remedy of specific performance. He obtains an immediate equitable interest in the property, for he is, or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived. Equity looks upon that as done which ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity . (Lysaght v. Edwards (1876)2 Ch.D.499 at pp.506 – 510).

Similar position as above was confirmed by the Supreme Court in *Ismail Jaffer Allibhai & 2 O'rs v. Nandlal Harjivan Karia & A'nor, S.C.C.A. No. 53 of 1995*, that in a sale of immovable property, upon payment of a deposit, property passes to the purchaser who acquires an equitable interest in the property and the vendor becomes a trustee who holds the property in trust for the purchaser. That the

purchaser becomes the lawful purchaser when he paid the deposit and acquired equitable interest.

Therefore, the 1st and 2nd Appellant dealt in the suit land well knowing of the interest of the Respondent therein. The 1st Appellant simply entered on the suit land and demarcated and surveyed off 44. 45 hectares and sold to the 2nd Appellant's husband. Even if the 1st Appellant was to claim anything, he would only be entitled to the balance of the purchase price owing to the Estate of Late Ibulaimu Kiwanuka from the Respondent, but not recovery of land that was long sold in 1974. In the case of ***Horizon Coaches Ltd v. Edward Rurangaranga & A'nor, SCCA No 14 of 2009***, it was held that a purchaser who obtains registration with the intention of defeating the unregistered interest of the tenants on the land is guilty of fraud and that the registration is obtained through the fraud and is liable to be cancelled. The same holding applies with equal force to facts of this case as regards the acquisition of title by the 1st Appellant, and the sale transaction between the 1st and 2nd Appellant's husband.

I have also evaluated the evidence at the *locus in quo* visit by the trial court. It confirmed that the Respondent occupied part of the suit land while the other part was occupied by other tenants. The trial court found that the other part of the suit land had old trees and shrubs and some other parts were unutilised. It was hence untrue of the 2nd Appellant to state in her evidence that she saw nothing on the suit land when she visited it. In fact in a turn of events she shifted positions and stated that there were tenants whom her late husband paid off. This confirmed the Respondent's version that indeed there were people on the suit land and that after making part payment and taking possession thereof he found some tenants on the suit land while others came on later upon him selling to them. It meant that by the time the 2nd Appellant's husband purchased from the 1st Appellant the suit land was

in effective occupation of tenants and could only be lawfully available for sale and or purchase subject to equities and interests existing therein.

In *Nabanoba Desiranta & A'nor v. Kayiwa Joseph & A'nor*, H.C.C.S. No. 496 of 2005, court relied on the decision in the case of *UP&TC v. Abraham Katumba [1997]IV KALR 103*, and held that a person who purchases an estate which he knows to be in occupation of another person other than the vendor is not a *bona fide* purchaser without notice. Further citing the case of *Taylor v. Stibbert [1803 – 13] ALL ER 432*, the court held that if the defendant failed to make reasonable inquiries of the persons in possession and as such his ignorance or negligence formed particulars of fraud.

I would adopt similar position in this case. The position of the Respondent is one of a *bona fide* occupant within the meaning of **Section 29(2) of the Land Act (Cap. 227)**. He had settled and utilised and /or developed the suit land unchallenged since 1974 when he purchased it, which is more that twelve years before the coming into force of the **Constitution** in 1995. The Respondent enjoyed quiet and uninterrupted possession until 2003. Therefore, his security of occupancy on the suit land is guaranteed under **Article 237 (8) of the Constitution** and **Section 31 of the Land Act (supra)**.

In addition, **Section 64 (2) of the Registration of Titles Act (Cap.230)** makes any land included in any certificate of title subject to the interest of any tenant of the land, though it may not be specially notified as an encumbrance on the certificate. This point was further emphasised in the case of **Kampala District Land Board, & A' nor v. National Housing & Construction Corporation, S.C.C.A.No.02 of 2004** which held, *inter alia*, that a *bona fide* occupant was given security of tenure and his or her interest could not be alienated except as provided by the law.

Given the above stated position of the law, I find that the transaction between the 1st and 2nd Appellant's husband in the suit land offended against the law, and that

the 2nd appellant's husband was privy to the fraud for which the 2nd Appellant's title is impeachable. **Section 177 of the Registration of Titles Act (supra)** provides that;

“Upon the recovery if any land, estate or interest by any proceedings from the person registered as proprietor thereof, the High Court may in any case in which the proceedings is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require and the registrar shall effect to that order.”

I find that the trial court was justified ordering for cancellation of the 2nd Appellant's certificate of title consequent upon the finding of fraud on part of the 1st and 2nd Appellants. Since the trial court was acutely aware that it has no jurisdiction to cancel the certificate of title of a registered owner, it forwarded the case to this court for consequential orders. This is perfectly in order and it renders untenable the 2nd Appellant's contention that the trial court had no jurisdiction to entertain the matter.

Similarly, the argument that the sale agreements offended against provisions of the ***Illiterates Protection Act (Cap.78)*** is baseless. The agreement dated 28/07/1974 between Filmoni Ssemakula, and the Respondent is in Luganda language stating that he sold each acre of land to the Respondent at Shs 110/= . It is not a requirement of the law that vernacular documents written by or for and or on behalf of illiterate persons must bear a certification that the parties have understood the language in which the documents are written. Certification under **Section 3** of the ***Illiterates Protection Act (supra)*** is required only where the document is written in English language for or on behalf of an illiterate person who does not understand the English language. The other documents in this case are the transfer

form signed by Filmoni Ssemakula, Ibulaimu Kiwanuka and Joyce Namakula to the Respondent. They are in English language, and there is no provision for certification thereon. *Ground 1* of the appeal has no merit and it is dismissed.

Ground 4: The learned trial magistrate failed to properly interpret the law so as to apply it to the facts before her.

Having found for a fact that the Respondent is the rightful owner of the suit land, and that the Appellants committed fraud, and since fraud goes to the root of the case, and it would be unnecessary, if not just academic, to attempt to resolve the this ground of appeal. Whatever the outcome, it would not bestow any legitimacy on the Appellants as regards the suit land. *Ground 4* also fails.

The net effect is that;

- 1. The appeal fails in its entirety and it is dismissed.***
- 2. The trial court's judgment and orders are upheld and confirmed.***
- 3. The Respondent is awarded costs of this appeal and in the court below.***

***BASHAIJA K.ANDREW
JUDGE
23/10/2014***

Mr. Zagyenda Joseph Counsel for the Respondent present.

Mr. Mutyaaba Counsel for the Appellants absent (reportedly indisposed).

Appellants absent.

Ms. Justine namusoake Court Clerk present.

Court: Judgment read in open court.

***BASHAIJA K.ANDREW
JUDGE
23/10/2014***