

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
CIVIL APPEAL NO. 12 OF 2011  
(ARISING FROM CIVIL SUIT NO. 1074 OF 2007)**

**SARAH**

**MPANGA.....APPELLA  
NT**

**VERSUS**

**KIZITO           SULAIMAN.....  
.....RESPONDENT**

**JUDGMENT ON APPEAL**

**BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

**BACKGROUND**

This is an appeal against the judgment of His Worship Phillip Odoki the Chief Magistrate of Mengo Magistrates Court delivered on 4<sup>th</sup> March 2011. The brief facts admitted by the trial court are as follows:-

The respondent purchased property comprised in Block 12 Plot 1018 (hereinafter called the suit land) from one Godfrey Nsubuga then the registered owner on 22/5/2007. The respondent paid Ugx 9,000,000/= and Godfrey Nsubuga signed for him a transfer form and he obtained a land title. In June 2007, the respondent received a notice from the appellant stopping him from surveying the land. The respondent informed the appellant that he bought the property in issue from Godfrey Nsubuga without any encumbrance and Godfrey Nsubuga informed him that the structures on the land belonged to him.

The appellant in her defence stated that she and her family had had an interest in the suit land and developments thereon since 1970. That sometime in 2001, they were approached by Godfrey Nsubuga who sold to them the suit land and a part payment was made. The sale agreement was executed on 16/2/2001. The appellant later discovered that the respondent had bought the same land well aware of her interest.

At the trial, the appellant's own evidence was supported by two witnesses who testified that she was their landlord. On the other hand, the respondent called four witnesses. The trial court found for the respondent giving reasons that the certificate of title he produced was conclusive evidence of his ownership and that no fraud was pleaded by the defendant to have it impeached. The magistrate also found that at the time the respondent procured registration, there was no caveat to impede that registration and also that, it was the appellant's husband and not the appellant herself who had purchased the suit land, for which only part payment was ever made. The respondent was awarded an order for vacant possession, an order to remove the appellant's caveat on the suit land, and costs of the suit. The appellant being dissatisfied with the judgment and orders of the Chief Magistrate appealed to this Honorable Court on seven grounds namely;

1. *The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby coming to a wrong conclusion.*
2. *The learned Chief Magistrate erred in law and fact when he held that the respondent's acquisition of the suit land was not tainted with any fraud.*
3. *The learned Chief Magistrate erred in law and fact when he held that the appellant's equitable interest in the suit land was defeated by the respondent's registered interest in the suit land.*
4. *The learned Chief Magistrate erred in law and fact when he failed to hold that the appellant was in any case a bonafide occupant of the suit land protected by law.*
5. *The learned Chief Magistrate erred in law and fact when he held that the respondent is the owner of the suit land.*
6. *The learned Chief Magistrate erred in law and in fact when he failed to properly record the proceedings and to draw an informative sketch plan at the locus in quo and not referring to them in his judgment.*
7. *The learned Chief Magistrate erred in law and in fact when at the time of writing the judgment, he changed the relevant and agreed issue of "**whether the plaintiff is a bonafide purchaser**" to an irrelevant issue of "**who is the owner of the suit land**", which*

*he resolved against the appellant, without being afforded an opportunity of being heard on the new issue.*

### **Resolution of the grounds of appeal**

As the first appellate court, I have the duty to re-evaluate the evidence and come to my own conclusion. See: **Fredrick Zaabwe Vs. Orient Bank & 5 Others SCCA No. 4/2006.**

Submissions of both counsel were in writing and the grounds of appeal were argued collectively. I did read and understand those submissions which for constraints of space and time, will not be repeated but effectively referred to in this Judgment. I prefer to resolve the appeal in line with the grounds as raised in the memorandum of appeal. However, since the first ground generally attacked the manner in which the evidence was evaluated, by implication, it runs through all the other grounds. I shall thereby pronounce myself on it last.

In the second ground, the appellant found fault with the finding that the respondent's acquisition of the suit land was not tainted with fraud. Counsel protested against the bonafides of the respondent's registration for the reason that, he had notice of the appellant's unregistered interest and only insisted on procuring registration after realizing that the appellant was disputing his purchase, and ignored advice of police to have that dispute resolved in courts of law.

Counsel for the respondent on the other hand submitted that the appellant's evidence in the lower court neither demonstrated any fraud on behalf of the respondent, nor proved that the respondent actually knew of the previous transactions between the appellant and her husband, and Nsubuga Godfrey regarding the suit land. He cited the case of **Kristopha Zimbe Vs Tokana Kamanza CA No. 37 of 1952** where it was held that a registered proprietor can only be ousted from the land if it is shown that he obtained registration by fraud; his own fraud and not the sellers fraud. In his view, the respondent did all that was required of him in due diligence of contradicting interests.

I have scrutinized the pleadings in the trial court and confirmed that none of the parties pleaded or proved fraud. The respondent's main claim and evidence in the lower court dwelt on trespass by the appellant onto the suit land. In her written statement of defence, the appellant contended

that she acquired the suit land in the 1970's and has since lived there with her family and developed the same.

It is a cardinal principle of law that fraud must be pleaded and proved; see for example **Kampala Bottler's Ltd Vs Damanico (U) Ltd (1990-1994) EA 144**. Further, **Order 6 rule 7 CPR** stipulates that;

*“in all cases in which the party pleading relies on any misrepresentation, fraud...and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.”*

This is a mandatory provision which and if not followed, is a fundamental defect. The particulars of fraud must be concise and clear in the pleadings and cannot be placed before the court merely through evidence of the witnesses. Therefore, it was not enough for the appellant to articulate what she considered to be fraud through her oral and documentary evidence. She is required as the defendant to have pleaded such fraud by raising a counterclaim, which she did not do.

Accordingly, I concur with the findings of the trial Chief Magistrate that since the appellant did not plead fraud, that deficit could not be curable by the evidence that was led at the trial.

It follows therefore that around two of the appeal fails.

In my view grounds three, four, five and seven covered what the appellant believed to be the magistrate's failure to recognize her unregistered interest in the suit land. I shall therefore handle them together.

The record bears witness that no issue was raised for determination as to whether the appellant is a bonafide occupant of the suit land. This was probably because her pleadings did not specifically present that issue as a counterclaim on her behalf. The closest that the appellant went to plead her interest in the suit land was in paragraph five of the written statement of defence when she stated that;

*“..... the defendant shall contend that she and her family have lived on the suit land and have proprietary interest therein and developments thereon and have never nursed*

*plans of alienating/disposing of the same for she and her family derive sustenance/livelihood there from”. (Emphasis mine).*

In his wise view, the magistrate chose to change the issue that had been framed as “*whether the plaintiff (now appellant) is a bonafide purchaser” to who is the owner of the suit land*”.

It was argued for the appellant firstly that the re-framed issue was irrelevant to the facts and secondly that, court should, from the evidence relaid, have considered whether the appellant was a bonafide occupant on the land.

**Order 15 rule 5 (1)** permits the court at any time before passing a decree to amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy, between the parties shall be so made or framed. Further, in **rule 5 (2)** permits a court at any time before passing a decree to strike out any issues that appear to it to be wrongly framed or introduced. Those provisions grant discretion to court to amend, frame additional or strike out issues at any time before passing a decree.

The magistrate could therefore amend or re-frame that issue before he pronounced himself on the entire case. In my view, he was correct in that regard because since the respondent adduced a certificate of title, and the appellant neither pleaded nor proved fraud, the bonafides of the respondent’s registration onto the suit land title could not be an issue. However, having come up with the new issue, the trial magistrate ought to have proceeded to evaluate all the evidence to confirm who of the two parties the owner of the suit land is. Such ownership in my view, would include ownership of all categories of interests, registered and unregistered. In particular, the fact that the appellant may have been a bonafide occupant on the suit land.

Section 29 (2) (a) of the Land Act defines a bonafide occupant to be “*a person who before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more*.” (Emphasis mine).

The appellant testified that by the time she got married, in February 1978; her late husband already had an interest in the suit land and owned the developments on it. The respondent

himself agreed that at the time he purchased the suit land, there was an old house on it. That he was led to believe by Nsubuga the former owner that, the developments on the land were all his. The respondent did not ascertain from the occupants themselves the truth of that information.

On the other hand, the strength of the appellant's defence was that she and her late husband were in charge of the tenants on the suit land for as far back as 1978. DW1 testified that he had been their tenant since 1984 (which, I note however, would be two years beyond the period that one can claim to be a bonafide occupant). However, an attempt to adduce rent receipts by the appellant was rejected by the court which seriously vitiated the evidence of the appellant's possession and control over the suit land with respect of the period in issue. Further, Nsubuga the original owner was deceased and could not support or contradict the appellant's evidence of her occupancy since 1978, or the fact that she had attempted to complete the purchase of the reversion by making periodical payments to the late Nsubuga. Even the LC Chairman (who was never named) who could have verified the appellant's story was never called to testify.

Again I noted that nothing was mentioned in the agreement of sale between the appellant and Godfrey Nsubuga of their previous relationship (or with her late husband) for the period preceding 2001 when the agreement was made. On the face of it, the agreement depicts a direct sale to the appellant which fact was confirmed by the appellant in 2001 in paragraph 2 of her affidavit in support of the caveat dated 22/6/07. It is strange that the appellant chose to leave out the important facts of hers and/or late husband's previous interest in the suit land especially in her affidavit in support of the caveat when she was by then contesting the parrel interest of the respondent.

In addition, I also note that the appellant's pleadings did not support her strong arguments that she was a bonafide occupant. According to paragraph 5 of her written statement of defence, she claimed to have a proprietary interest in the suit land and developments and insisted that Godfrey Nsubuga had nothing to sell to the respondent when he did on 6/6/07. The agreement of sale between her and Nsubuga depicts a sale of a reversion of the suit land for which part payment has been made. This at the very least would make the appellant a lawful but not bonafide occupant of the suit land. However, it was never shown that the full purchase was ever paid. That notwithstanding, the sale to the appellant, and that particular sale happening four years after the sale of the reversion to the respondent would make the latter's interest first in time, and

therefore superior to that of the appellant. Thus, although the magistrate may have wrongly evaluated the evidence on that point, he was correct to make a finding that the appellant's equitable interest in the suit land was defeated by the respondent's registered interest.

In my view, the appellant fell short in putting before court, sufficient evidence of her occupancy since 1978 that would qualify her to be a bonafide occupant. Therefore, although the trial magistrate did not traverse that fact, this court finds no evidence to support it. If at all there was an equitable interest to protect, no fraud was proved against the respondent and his registered interests would thus be superior. Again, it would be correct for the trial magistrate to have held that the respondent is the owner of the suit land since a duplicate certificate of title was adduced and never contested. The appellant herself testified that she lodged a caveat on that same title in 2007.

Under those circumstances grounds three, four, five and seven also fail.

With respect to the objections raised against the visit of the *locus in quo*, the record shows that the trial magistrate visited the locus on 15/11/2010. Both parties and their advocates were present, and the appellant and respondent testified. The trial magistrate recorded the brief proceedings at the *locus in quo* and drew a sketch map of the suit land and those of an adjoining plot. The proceedings may have been brief and the sketch map not informative, but the magistrate followed the procedure laid down in **Practice Direction No. 1 of 2007** and the case of **Yeseri Waibi Vs Edsa Lusi Byandala [1982] HCB 28**. Failing to mention his findings at the *locus* in his judgment did not occasion a miscarriage of justice to the appellant. This is because going by the sketch map, the findings at the locus dealt mainly on the fact that the suit land had houses with occupants which were facts that were never in dispute at the hearing. In essence, ground 6 also fails.

Having traversed the six grounds and substantially found for the respondent on all of them, it follows that I find no fault with the trial magistrate in the manner in which he evaluated the evidence with regard to the ownership of the suit land by the respondent, the absence of fraud, and the fact that the respondent would be entitled to ownership and possession of the suit land.

Therefore, ground one also fails.

This appeal is thereby dismissed. The appellant is ordered to pay the costs of the appeal. She will in addition pay the full costs of the court below.

I so order.

**EVA K. LUSWATA**

**JUDGE**

1/06/2015