IN THE SUPREME COURT OF UGNDA

AT MENGO

(CORAM: WAMBUZI, C.J., LUBOGO AG.J.S.C. ODOKI J.S.C.)

CIVIL APPEAL NO. 12/87

BETWEEN

J.L. OKELLO :::APPELLANT

AND

UGANDA NATIONAL EXAMINATION BOARD:::::::::::::::::::::::: RESPONDENT

(Appeal from the Judgement and Decree of the lion. Justice A.E. Mpagi Bahigeine dated 21st October, 1987

in

Civil Suit 674 of 1987

JUDGEMENT OF WAMBUZI, CJ.

The appellant filed an action in the High Court against the respondent for trespass over the property comprised in Volume 1255 Folio 9 plot 4 207 in Kampala of which the appellant claimed to the registered proprietor. The appellant prayed for a declaration that he was the registered proprietor, an injuction to restrain the respondent, its servants or agents from interfering with the appellant's quiet possession of the property and for general damages.

The respondent in its written statement of defence claimed that the registered proprietor of the property in question was the East African Examination Council and that the purported transfer of the property to the appellant was fraudulent.

At the trial the respondent did not appear although served with a hearing notice. The appellant proceeded exparte and the action was dismissed. He has now appealed to this court against the dismissal on a number of grounds.

I would have allowed the appeal on the basis of ground 3 alone. Section 56 of the registration of Titles act is clear in its terms that a certificate of title shall be conclusive evidence that the person named in such certificate as the proprietor is seized or possessed of such interest. In his evidence the appellant testified that he was the registered proprietor of the property in

question. He produced the certificate of title or a copy thereof which was marked Exhibit P1. There being no evidence whatsoever to contradict the appellant's evidence he was, with respect to the learned trial Judge, entitled to judgement. The learned trial Judge does not refer to the evidence of the title in her judgement. She stated, quite correctly in my view, that a party who avers a title must prove it. She, however reviewed the appellant's evidence as to how he was granted a lease after re-entry by the Uganda Land commission, In the process, the learned trial Judge found the appellant to have been deliberately untruthful because of contradictions and omissions in his evidence. That may be so but, with respect; there is no finding that the certificate of title, Exhibit P1, is not a valid certificate. In point of face the respondent by its pleading in paragraph 3 of the written statement of defence admitted that the appellant was the registered proprietor of the property in question but alleged that he had obtained registration by fraud. It follows, in my view; that in the absence of fraud the appellant's title cannot be impugned.

In this connection the learned trial Jude said in her judgement that she felt constrained to mention that it was perplexing for the appellant to try to establish his rightful title without recourse to any authenticated document from the registry of Titles. With respect, this is a misdirection. First, as already pointed out in this judgement, exhibit P1 which is a copy of the certificate of title was admitted in evidence and the appellant explained that the original certificate of title had been deposited with a bank to secure a loan. Secondly, again as already pointed out in this judgement, it is not denied that the appellant had title to the property. The case for the respondent on the pleadings was that the appellant's title was void for fraud. In my view, therefore, the only issue before the court was whether or not the appellant was properly registered as proprietor.

I find that grounds 4, 5 and 6 of this appeal are different manifestations of ground 3 and question findings of the learned trial judge on matters strictly not in issue or example whether there were any extensions to the lease granted to the East African Examination Council or whether the Uganda National examination Board was a successor to the East African Examination Council.

I agree with the observations of my learned brother Lubogo, Ag. JSC on the second ground of appeal. With respect the issues as framed appear to be matters in controversy, particularly the first issue whether the appellant obtained his registration as proprietor fraudulently.

I would like to make 1 or 2 observations on the first ground of appeal complaining about the refusal to strike out the pleadings of fraud due to absence of particulars. I agree that the relevant pleadings are paragraphs 3 and 4 of the written statement of defence and not 2 and 3. It would appear that the reference to paragraph 2 by the learned trial Judge must save been in error.

In paragraph three are 4 facts pleaded,

1. that the proprietor of the property in question is the East African Examination Council;

2. that Instrument N 215162 purporting to re-enter was fraudulent;

3. that Instrument No. 215386 purporting to effect registration of the appellant as proprietor was fraudulent and illegal and

4. that there was a re-entry and registration of another party before lawful termination of the original lease.

Wording apart as regards the last fact normally re-entry would determine the lease, it being a different matter whether the determination was or was not lawful. It may well be that this is a matter of language and that what was being pleaded was that there was no re-entry. In fact in paragraph 4 of the written statement of defence the respondent alleges that the registration was obtained by fraud and accordingly the appellant was not a bona fid purchaser. I must admit that the pleadings could have been worded better but in my View some particulars of

fraud are given what the respondent was saying is that the Land Commission leased the property to the East African examination Council and that during the currency of that lease they also purported to lease the same property to the appellants. Both the lessor and the appellant are being accused of fraud, the lessor in respect of the re-entry and grant of the lease to another party and the appellant in effecting registration during the currency of an existing term. A further particular relating to knowledge of the existing term by the appellant would probably have put the matter beyond question but I would not have regarded the omission as fat 1. AS worded it is arguable that knowledge could be implied on the part of both the lessor and the appellant. It is true no dates were supplied in the defence regarding the alleged particulars but in my view noting much turns on the omission. The relevant numbers of the instruments were given and the instruments are therefore identifiable.

I am persuaded by the judgement of Sir Udo Udoma, C.J. in the case of Musa Misango vs. Musigire Others 1966 EA 390 where he cited the speech of Fletcher Moulten, LJ in an English case at page 395 to the effect that a party will not be "driven from the judgement seat" without the Court having considered his right to be heard except in cases where the cause of action was "obviously and almost incontestably bad"

In my view, the first ground of appeal would fail.
As Odoki, J.S.C., agrees with the Judgement Lubogo, Ag. J.S.C., there will be an Order in the terms proposed by Lubogo Ag. J.S.C.

DATED at Mengo this 23rd day of December1988.

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CIVIL APPEAL NO. 12/87

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(Appeal from the Judgement and Decree of the lion. Justice A.E. Mpagi Bahigeine dated 21st October, 1987

JUDGEMENT OF LUBOGO AG. J.S.C

The appellant, Okello-Okello filed an action in the High Court against the respondent Uganda National Examination Board seeking

(a) (a) a declaration tat the plaintiff is the rightful and bonafide proprietor/lessee of the property comprised in L.H.R. Vol. 1253 Folio 9 M 207 off Mabua Rd, Kampala.
(b) a permanent injuction to restrain the defendant it servants and/or agent or anybody or entity claiming title or interest under the defendant from interfering with the plaintiff's quiet possession of the suit property.
(c) general damages for inconveniences disturbances and embarrassment while quiet possession is denied to the plaintiff.

(d) costs of the suit

The learned trial Ag. Judge Mpagi-Bahigeine, as she then was, dismissed the suit on the ground that the appellant did not establish his title to her satisfaction. Hence this appeal.

The brief facts of the case are that the East African Examination Council was given a lease in 1973 for 99 years by the land commission on condition that the building should be completed within two years from the date of the lease failing which the lease would determine, with a proviso that the Secretary of the Land Commission within his discretion would renew the lease. The East African Examination Council failed to comply with the building convenant within the stipulated time; the Land Commission extended time for another 2 years, again the East African Examination Council failed. Lastly it was extended to 1980. In the meantime the East African Examination Council had ceased to exist in 1977 after the collapse of the East African Community in the same year.

In 1983 the Uganda National Examination Board came into existence by Act of Parliament. During the intervening period between 1980 and 1983 the appellant applied to the Land

Commission for the land above mentioned. The application was granted and eventually got a title Deed to the suit property on 1st July, 1983. After fulfilling all the necessary procedures with the City Council regarding plans of the building and obtaining finance started to develop the suit property.

It was during that time the respondent began to interfere with the workmen aid at the same time claiming the suit property. The appellant then filed an action in the High Court seeking the remedies above mentioned. The appellant has seven grounds of appeal that:

(1) "The learned trial Judge erred in law in refusing to strike out the pleadings in the written statement of Defence which alleged fraud without stating the particulars thereof, and the learned trial Judge misdirected herself in basing her refusal on the question of proof which is a matter of evidence while the objection was strictly on a matter of law".

In his submission learned Counsel for the Appellant Mr. Kayondo S.C. stated that paras 3 and 4 of W.S.D. raised the issue of fraud, but did not state whether the imputation is against the appellant or somebody else. He said that he had written to the Attorney General whose department was handling the case for particulars of fraud, but received no reply nor an amendment to the W.S.D was never made. The requirement to give particulars was a matter of la and not a matter of evidence as the trial Judge indicated. He went on to say that the finding by the trial Judge on the instruments No. 251162 and No. 215386 purporting to re-enter and to effect the registration of the appellant respectively were insufficient as no dates were given.

Order 6 rule 2 of the Civil Procedure Rules reads:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all cases in which particulars may be

necessary, such particulars with dates shall be stated in the pleadings."

This rule is mandatory in that the particulars of fraud and dates regarding the alleged fraud should be given. The learned trial Judge, however, directed her attention to paras 2 and 3 of the written statement of Defence she said:-

> "Para 2 of the written statement of Defence admits of paras 2 and 7 of the plaint. The said para 2 of the plaint merely identifies and describes the Defendant Body. Para 7 of the plaint merely reiterates that the statutory notice had been served on the defendant. I thus consider the objection to para 2 of the written statement of Defence to be deliberately frivolous and vexatious".

She then quoted the whole of para 3 of the written statement of Defense and remarked: -

> "A mere gloss over this para 3 of the written statement of Defence indicates that two specific instruments are pointed out as allegedly being tainted with error These are the Instrument No. 251162 purporting to effect re-entry by the Uganda Land Commission and Instrument No. 215386 purporting to effect transfer of the property into the plaintiff's names. These would be the Instruments giving effect to the entire transaction-. It is these Instruments that are being challenged. The charges of fraud have been given a definite character by pointing out these two particular Instruments upon which the said charges rest".

With due respect to the learned trial Judge the Instruments referred to in para 3 of the written statement of Defence or said to be "unlawful" and not fraudulent, by the learned trial Judge "in that they were passed before the original lease was lawfully terminated". An act being unlawful does not mean it is fraudulent. If however, it means the same thing, in this context, then no dates were given as to when they came into existence. These were the particulars that were sought for in the letter Exh P5 dated 17th September, 1987 to the Attorney General by

learned counsel for the Appellant.

Moreover, the particulars of fraud, as it is in the case of negligence, must be under a definite head entitled “Particulars of Fraud”. It was not so in the written statement of Defence.

However, in his submission learned counsel pointed out that he directed the attention of the learned trial Judge to paras 3 and 4 of the written statement of Defence which alleged fraud and not to paras 2 of .S.D. Both paras 3 and 4 alleged fraud and therefore particulars should have been given.

In conclusion, on this issue the learned trial Judge had this to say:

> “In the case before me it is the defence challenging the transaction on the ground of fraud. This does not lessen the plaintiff’s burden of proof in establishing his case.”

The learned trial Judge having directed herself properly on the issue of the burden of proof, she should have gone further to show fraud on the part of the appellant. There was nothing more the appellant could do, but to produce the Certificate of Title and leave the respondent to prove fraud.

The learned trial Judge misdirected herself on the question of striking out the written Statement of Defence when it was raised on a preliminary objection by counsel for the appellant. It was not necessary to defer the matter to a later stage in the proceedings before a finding on the matter was made. This was a fundamental objection which would affect the question whether the case proceeded farther. This was a matter of law and not a matter of evidence. For these reasons this ground would succeed.

The second ground of appeal was that:-

"the learned trial Judge erred in striking out the issues on which the determination of the suit would depend".

In this ground learned counsel for the appellant submitted that the learned trial Judge struck out the issues which she had accepted and recorded, but struck them out without giving any reason why it was necessary to do so.

The issues that were recorded by the learned trial Judge were: -

"1. Whether L.H.R. Vol. 1253 Folio 9 plot M 207 of Mabua Road, Kololo ("the suit property) was lawfully registered into the names of the plaintiff and/or whether the plaintiff is a bonafide lessee for value of the suit property, or whether the registration was perpetuated by fraud and if so whether the fraud is attributable to the plaintiff and/or whether it affects the plaintiff's and/or whether it affects the title?

2. Whether the defendant can legally claim succession of title automatically or otherwise to the East African Examination Council's property and/or claims?

3. Whether the defendant's claim over the suit property and physical interference with the same by its servants, officers and/or agents in the course of their employment with the Defendant amounts to trespass?

4. Whether the plaintiff is entitled to the declaration, permanent injuction and damages prayed from the Honourable Court and to how much general damages he is entitled?

These issues which were framed by the learned trial Judge appear to be issues of law and fact and in accordance with Order 13 Rule 1 (4). I do not see anything wrong with them In her

judgement she said:-

> "All in all I consider these issues to be wrongly framed I feel fortified by the above two provisions and am proceeding to strike them out They are accordingly struck off the record."

The two provisions referred to in the above quotation are Order 13 Rule 1 (6) CPR and Order 13 Rule 5 (2) CPR. However, it appears to me that the issues were struck out on the ground that they were wrongly framed and not on the ground that at the hearing of the suit the defendant made no defence or that the issues had been joined upon the pleadings. The learned trial Judge should have proceeded to indicate in what manner they were wrongly framed or introduced, in order to strike them out as the court has a discretion in the matter under O.13 5 (2) CPR. It probably would have been a different matter if the learned trial Judge had said that she inadvertently framed the issues without due regard to the provision of 0 13 rule *5* (1) CPR which gives a right to amend if they were wrongly framed. This ground, therefore, would also succeed

The third ground of appeal reads:-

> "The learned trial Judge erred in law and in fact in disregarding or failing to appreciate or properly to evaluate the appellant's evidence of ownership and/or registered proprietorship of L H R Vol. 1253 Folio 9 known as plot M 207 of Mabua Road Kololo which under section 56 of the Registration of Titles Act is conclusive evidence of the appellants title being paramount and in not impeachable or defeasible".

On this ground counsel for the appellant submitted that section 56 of the Registration of Titles Act is relevant to the question of proprietorship, and that the evidence of the appellant in the lower court was not challenged, nor did the trial Judge disbelieve it.

In his evidence in the lower court the appellant gave evidence on oath.

He stated:-

> "I am the Registered proprietor of L V 1253 Folio 9 plot M 207 Mabua Road, Kololo, I applied for this lease, and was given the offer I was eventually issued with a Title Deed after paying all the charges. The original Title Deed is mortgaged with Housing Finance (U) This is a copy of the Title Deed Exh P1. I intended to erect a residential house on this plot. I had my plans approved by City Council. The original one is with the Housing Finance (U). I then started
> developing it in 1983. The guest wing is completed. The main house is not yet completed..."

This evidence was not challenged and the learned trial Judge appears to have believed it as a copy of the Title Deed was exhibited as Exh P1 and accepted. It stands to reason, therefore, that the ownership of he lease in question was not disputed especiall1 in the light of the provisions of section 56 of the Registration of Title Act which reads:-

> "No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or an account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power".

The Certificate of Title was issued in the name of John Livingstone Okello-Okello, the appellant, on 1st July, 1983. It was therefore incumbent upon the respondent to adduce evidence to prove that the issue of the Certificate of Title was tainted with fraud. This

evidence was not tendered. Therefore on the balance of probabilities the learned trial Judge should have found for the appellant.

This ground would also succeed.

The fourth ground of appeal was:-

> "The learned trial Judge erred in law in failing to appreciate the extent and incidence of the burden and/or onus of proof and thereby wrongly imputed mal or non-feasance (if any) in the duties and functions of the Uganda Land Commission in granting a lease to an individual upon the applicant",

Learned Counsel for the appellant submitted on this ground that the appellant never submitted plans for the building to the City Council and the trial Jude referred to the non-production of authenticated documents.

In her Judgment the learned trial Judge said:-

> "It is very interesting to note that plaintiff told the court that he had applied for the plot for the purpose of erecting a residential house and that he had his plans approved by the City Council. It is to be noted the Court was not shown these plans. He never disclosed there was already a structure under construction as is now apparent according to Exh p 4 which is not disputed".

According to paragraph 3 of the plaint the main issue to be decided was whether: -

> "The plaintiff is the rightful and bona fide lessee for value of Vol 1253 Folio 9 plot M 207 off Mabua Road, Kololo, Kampala".

Even issue No. 1 which was cancelled referred to the same thing. The defendant averred in his written statement of Defence para 3 that:-

> "The defendant pleads that the property comprised in Leasehold Register Volume 1253 Polio 9 otherwise known as plot M 207 Mabua Road has never been legally and effectively transferred to any person save the original proprietor thereof, East African Examination Council...."

The central averment of the plaintiff's and the Defendant's pleadings to be adjudicated upon was whether the property belonged to the plaintiff or to the defendant and not whether the procedure of the City Council was adhered to. The appellant produced his Certificate of Title and that was evidence which could not be challenged in any court of law except on the ground of fraud. No such evidence was adduced by the respondent. The onus of proof was squarely upon the respondent, and not upon the appellant to produce evidence of fraud. This ground would, therefore, also succeed.

The submissions on ground five and six have been covered above, nevertheless I reproduce them here:-

5. "The learned trial Judge misdirected herself on the facts and on the law in finding and/or assuming that merely because an extension of the lease had been applied for by the East African Examination Council it was automatically granted which was not the case and the learned trial Jude ought on the primary and secondary evidence on record by the appellant which was unchallenged, to have found that the Appellant is the registered and have bona fide proprietor of the suit property."

And the sixth ground is as follows:-

6. “The learned trial Judge erred in law and misdirected herself in finding that the Uganda National Examination Board is the successor in title of the East African examination Council and the trial Judge erred in failing that the relationship between the East African Examination Council and the Uganda National Examination Board under no circumstances fetters or affects the Appellant’s indefeasible and unimpeachable title”.

Now I come to the last ground of Appeal which reads:-

7. “The learned trial Judge erred in law and on the facts in failing to avoid to the Appellant general damages of shs. 500,000/- as prayed for at the trial and she further erred in stating in her obiter dictum that if she was to hold Otherwise she would have awarded general damages of shs.50,000/-”,

On this ground, although the learned trial Judge did not say on what principle she relied, but at least gave reasons for her decision. She said:-

> “Where I to hold otherwise would have awarded general damages of shs.50,000/-. (shillings fifty thousand only) for the plaintiff has not indicated that his construction or development has ever had to stop at anytime because of the inconveniences, disturbances caused by the servants and/or agents of the defendant”.

Counsel for the appellant did not show us whether the principles of awarding general damages had been violated y the learned trial Judge, nor did he attack the reasons given by her. The plaint was filed on 2nd July 1987 after the new currency had been introduced and Judgement was delivered on 21/10/87. This means that the element of inflation could not have been taken into consideration because the period between the introduction of the new currency and judgement was almost negligible. Moreover the appellant failed to show the extent of inconvenience and disturbance. This ground would, therefore, fail.

I would, therefore, allow the appeal with costs in this court and the court below.

I must mention, however, that we did not have the assistance of the State Attorney in this appeal.

Delivered this 23rd day of December 1988.

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JUDGMENT OF ODOKI J.S.C.

I have had the benefit of reading in draft the judgement Lubogo Ag. J.S.C. and I agree with him that this appeal must be allowed. I only wish to add a few observations.

While I agree with Lubogo Ag. J.S.C. that the respondent's pleadings did not strictly conform to the provisions of r.2 of 0.6 with regard to the need to state the particulars of fraud, I am of the opinion that the written statement of defence was not so defective as to warrant being struck out. I agree with Wambuzi C.J. that the statement of defence contained sufficient particulars of the alleged fraud. The numbers of the instruments which were alleged to have been tainted with fraud given. The failure to give their dates was not a fatal defect nor prejudicial to the appellant who, being the registered proprietor, must have known these

dates. In my view, the trial judge was justified in holding that the charges of fraud had been given a definite character by pointing out the two instruments upon which the charges rested.

I agree that it is the rule practice to specify tile particulars of fraud under a definite heading entitled “particulars of Fraud”. But in my view that is only a requirement as to the form of pleadings whose departure from will not necessarily vitiate the pleadings. In this connection, I would agree With what Spry Up said in Castelino V. Rodrigues, (1972) E.A. 223

> “Of course rules are made to be observed, but irregularities of form may be ignored or cured by amendment where they have occasioned no prejudice. In those matters of form courts are much less strict today than formerly”.

The main issue in this appeal was whether the appellant’s certificate of title could impeached on ground of fraud. The law is clear that a certificate of title is conclusive evidence of title: See suction 56 of the Registration of Titles Act. The certificate can only be impeached on limited grounds including fraud as set out in section 184 of the same act. Therefore in tile absence of fraud, a court cannot go behind the fact of registration. See Olinda de Souza Figueiredo V. Kassamali Nanji. (1962) 756 In Waimiha Saw Milling Co. Ltd V. Waione Timber Co. Ltd (1926) 101, While dealing with an Australian statute similar to our registration of titles act, the Privy Council said,

> “The cardinal principle of the statute is that the register is everything and that except in Cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of title under which he takes from the registered proprietor has an indefeasible title against all the world.”

The appellant produced a copy of his certificate of title which was conclusive evidence that he was the registered proprietor or owner of the suit property. It was upon the respondent to adduce evidence to substantiate his allegations of fraud against
the appellant. But the appellant filed to do so leaving the title of the appellant unchallenged. The appellant was in those circumstances entitled to judgement. I agree with Wambuzi C.J.

that this ground alone was sufficient to dispose of the appeal in favour of the appellant.

I concur in the order for costs as proposed by Lubogo Ag. J.S.C

DATED at Mengo this 23rd day of December 1988

B.J. ODOKI

JUSTICE OF SUPREME COURT

I CERTIFY THAT This A TRUE COPY OF THE ORIGINAL

B.F.B.BABIGUMIRA

REGISTRAR SUPREME COURT.