

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGGO

**(CORAM: ODOKI CJ, ODER, TSEKOOKO, KAROKORA AND
KANYEIHAMBA JJ.SC)**

CIVIL APPEAL NO.2 OF 2004

BETWEEN

1. KAMPALA DISTRICT LAND BOARD)
2. CHEMICAL DISTRIBUTORS)
APPELLANTS

AND

NATIONAL HOUSING AND CONSTRUCTION CORPORATION) ...
RESPONDENT

*(Appeal from the judgment and orders of the Court of Appeal
(Mukasa-Kikonyogo, DCJ, Twinomujuni and Byamugisha JJ.A)
DATED 3rd February 2004 in Civil Appeal No.43 of 2002)*

JUDGMENT OF ODOKI CJ

This is an appeal from the judgment and orders of the Court of Appeal of Uganda which allowed the respondent's appeal against the appellants.

The facts as found by the courts below were that around 1996, the respondent was granted a lease of land registered under Leasehold Register Volume 1065 Folio 16 Plot No. M 239 at Bugolobi, a suburb of Kampala City. The land was part of a statutory lease of 190 years granted to Kampala City Council by the Uganda Land Commission. Adjacent to this land and also part

of the statutory lease was another piece of land known as Plot No. 157 Luthuli Second Close, Bugolobi (hereinafter referred to as the suit land)

In 1970 the respondent constructed blocks of flats on its land during which period it was allowed to utilize the suit land to facilitate construction. It constructed on the suit land a latrine for workers and subsequently built a fence around its block of flats which enclosed the suit land. Between 1970 and 2000 the respondent remained in possession of the suit land, and kept it properly maintained for use as children's playground, for drying residents' clothes, and passed water pipes underneath it. The public latrine remained on this land in use by the respondent's workers and Local Council residents during their meetings.

In June 1999, the respondent learnt that the suit land had been offered on a lease to the second appellant. Despite protests from the respondent and other residents of the Local Council of the area, the 1st appellant granted the lease. Subsequently, the 2nd appellant received a land title to the land now registered as Leasehold Register Volume 2860, Folio 4, Luthuli Second Close, Bugolobi.

The respondent filed a suit against the two appellants seeking the following orders:

- (a) A declaration that all the land comprised in Leasehold Volume 2860 Folio 20 Plot 4 Luthuli Second Close at Bugolobi until 25 January 2001 described at Plot M 597 Luthuli Second Close Bugolobi Estate, belongs exclusively to the respondent and not any other party.
- (b) A declaration that the grant of title over the suit land by the first appellant to the second appellant was void ***ab initio*** as there was no land available to the respondent for grant to 2nd respondent.

- (c) A declaration that the second appellant's lease and title to the suit land was null and void.
- (d) An order directing the Registrar of Titles to cancel the certificate of title to the suit land issued to the 2nd appellant.
- (e) A permanent injunction to issue against the second defendant restraining it, its agents, servants and any other person deriving title from the 2nd defendant from entering remaining or otherwise interfering with the suit property.
- (f) An order for eviction of the second appellant from the suit land.
- (g) An order directing the first defendant to grant the suit land to the respondent.
- (h) An award of punitive and general damages, costs and any other relief deemed fit by the court. In their written statements of defence the appellants denied the respondent's claims. The first appellant denied that the respondent ever fenced or was in possession of the suit land, that the respondent was a **bona fide** purchaser or lawful or customary tenant on the suit land, and also denied allegations of fraud.

The second appellant pleaded, **inter alia**, that the certificate of title to the suit land was properly granted since the suit land was available for leasing at the time of grant, and there was no subsisting lease. It pleaded further that it was the registered proprietor of the suit land which title was obtained without fraud. It denied that the suit land was fenced by the respondent or that it was in its possession and used by the respondent's agents.

The High Court disallowed the respondent's claim and gave judgment in favour of the appellants. The respondent successfully appealed to the Court of Appeal which granted the declarations and orders which had been sought

in the plaint. The appellants were dissatisfied with the decision of the Court of Appeal. Hence this appeal.

The appellants preferred eleven grounds of appeal which are stated as follows:

1. The learned Justices of Appeal erred in law when they failed to consider the submission of the appellants.
2. The learned Justices of Appeal erred in law when they failed to properly re-evaluate the evidence and when they made finding of fact without evidence on record to support them.
3. The learned Justices of Appeal erred in law and fact when they held that the respondent was in possession/occupation of the suit land since 1970.
4. The learned Justices of Appeal erred in law and fact when they held that the suit land was registered on the coming into force of the 1995 Constitution.
5. The learned Justices of Appeal erred in law and fact when they held that the existence of a plot number for the suit land means that it was registered.
6. The learned Justices of Appeal erred in law and fact when they held that the suit land belongs to the respondent.
7. The learned Justices of Appeal erred in law and fact when they held that the respondent was a bona fide occupant of the suit land.
8. The learned Justices of Appeal erred in law when they held that the suit land was not available for leasing.
9. The learned Justices of Appeal erred in law and fact when they held that the application and registration of the 2nd appellant was fraudulent.

10. The learned Justices of Appeal erred in law and fact when they held that the doctrine of estoppel was not applicable against the respondent.

11. The learned Justices of Appeal erred in law when they awarded the respondent damages and ordered the 1st appellant to lease the suit land to the respondent.

The respondent filed a notice of grounds for affirming the decision of the Court of Appeal consisting of the following grounds:

1. The suit land was part of land registered under the Statutory Lease LRV 796 Folio 6 granted to the City Council of Kampala as from 1st May, 1970 for a term of 190 years.

2. The respondent was a bona fide occupant of the suit land as Kampala City Council, which had a Statutory Lease over the same till October 1995 and never changed the respondent's occupancy.

3. The 1995 Constitution, though it abolished statutory leases, did not declare the said leases to have been null and void ***ab initio***.

The appeal was argued by Mr. Ojambo Robert with Mr. Paul Muhimbura for the second appellant, and Mr. Nelson Nerima for the first appellant. Mr. Geoffrey Mutawe and Mrs. M. Sakwa represented the respondent.

Learned Counsel for the appellant argued grounds 1, 2 and 3 together, grounds 4,5, and 7 together, and finally grounds 8, 9 and 10 together. I propose to follow the same order except that I shall deal with grounds 6 and 11 last.

Respondent's Possession or Occupation of the suit land:

The first three grounds of appeal criticised the manner in which the Court of Appeal evaluated the evidence, the failure to consider the appellants

submissions and the holding that the respondent was in possession or occupation of the suit land since 1970.

The main argument of Mr. Ojambo, learned counsel for the appellant, on the three grounds was that the learned Justices of the Court of Court failed to address themselves to the main issue which was whether the respondent occupied or possessed the suit land since 1970. This was the first issue framed at the trial. Instead, learned counsel argued, the learned Justices of Appeal held that there was overwhelming evidence that the suit land was in exclusive possession of the respondent, whereas they were referring to evidence of possession since 1999 when there was a site inspection of the suit land. Learned counsel contended that there was no evidence that the toilet was used after construction by their tenants and workers. He submitted that Pw2 was only there in 1988 and not in 1970, and Pw8 was not there since 1989.

Referring to admitted facts, he submitted that fact 11 was not admitted and contended that the learned Justices of Appeal failed to look for the evidence that the suit property was derived from the statutory lease. He submitted that Article 285 of the Constitution abolished statutory leases to urban authorities but this was not considered by the Court of Appeal.

In reply Mr. Mutawe, learned counsel for the respondent, submitted that ground one had no merit because the learned Justice of Appeal had considered the appellants submission in their judgment. As regards the evidence of a toilet, counsel submitted that the Minutes of the 1st Appellant admit that there was a water borne toilet in the middle of the plot belonging to the respondent. He referred to evidence of Pw5 who testified that the workers continued to use the toilet, and was also used during public functions.

As regards admission of fact No.11 counsel submitted that Plots 18/SW/1 and 18/SW/2 were adjacent to each other and that the certificate of the

respondent is derived from sheet 18/SW/1. In his lead judgment Twinomujuni J.A. found overwhelming evidence that the respondent was in exclusive possession of the suit land since 1970. He relied on the evidence of Pw1, Pw2, Pw5, Pw6, Pw8 and Pw9. The learned Justice of Appeal held that their evidence showed that between 1970 and 2001 when it was allocated to the 2nd appellant, it was used by the respondent to facilitate construction of Bugolobi flats, to be used as a playground, and open space for the children of tenants, to construct a public toilet for the respondent's cleaners and to serve residents at Local Council meetings, to lay sewage lines and water pipes of the respondents flats, and to provide tenants space for drying clothes.

There was also evidence that the suit land was fenced off by the respondent, that its mark-stones were all within the fence erected by the respondent in 1970 and that the respondent's occupation was never challenged by anyone till the land was allocated to the 2nd appellant. Minutes of the meeting of the 1st Appellant Board held in May 1999 (Exhibit P.12) confirmed that when the site (suit land) was inspected on May 12, 1999 to assess the situation on the ground, it was "**confirmed that plot M597 appears to be part of the National Housing and Construction Estate (block of flats) though a copy of the deed plan did not indicate so. There seemed to be no access to this plot. There was also a water borne toilet in the middle of this plot belonging to the National Housing and Construction Corporation. The plot looked well-maintained**".

Furthermore in a letter dated 22nd September 1999, Kampala City Council acknowledged that the respondent had installed water pipes on the land in a letter they wrote to it requesting it "to remove the water pipes you have installed on Plot M597 as soon as possible".

The learned Justice of appeal concluded,

"Clearly these admissions put the matter of possession of the suit before allocation, firmly in the hands of the appellant (now respondent). The respondents (now appellants)

themselves did not call any evidence to challenge this state of affairs."

It is my view that the learned Justices of Appeal were justified in coming to that conclusion. The evidence on records was adequately reevaluated before coming to the findings to which I have already referred.

There was ample evidence to support the findings that the respondent had been in possession of the suit land for a long time and had effectively utilised it for various purposes including building a public toilet on it, passing under ground pipes under it, and using it as a playground. Besides there was undisputed evidence that the plot had been fenced with chain-link and steel angle bars. This is the effect of the testimony of Nkoba Jack Vincent (PW1) a Land Surveyor with the respondent, Ham Tumuhairwe (PW2) the Housing Manager of the respondent and Baryayaga Purunari (PW8), the Supervisor of Employees of the respondent.

PW2 and PW8 confirmed that the public toilet was constructed around 1971 as part of the construction of the whole estate. They also testified that the suit land was fenced though the Bugolobi flats were then occupied by soldiers as barracks (from 1971 -1979). These two witnesses were knowledgeable people who had worked with the respondent for between 12 and 29 years. Their evidence was not contradicted or discredited by the appellants who called no evidence. Grounds 1, 2 and 3 have no merit and should therefore fail.

Whether the land occupied by the respondent was registered land.

Grounds 4, 5, and 7 raise the question whether the respondent was a bonafide occupant of registered land. They challenge the findings of the Court of Appeal that:

(a) the suit land was registered land on the coming into force of the 1995 Constitution,

(b) the existence of a plot number for the suit land meant that it was registered, and

(c) the respondent was a bonafide occupant of the suit land.

Mr. Nerima for the appellants, submitted that the respondent was not a bona fide occupant because the suit land was unregistered. He referred to Article 237 (9) of the Constitution which empowered Parliament to make a law regulating the relationship between a bona fide occupant and a registered owner, and submitted that Parliament had defined a bona fide occupant in Section 29 (2) (a) of the Land Act as follows:

"(2) Bonafide occupant means a person who before the coming into force of the Constitution-

(a) **had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or**

(b) **had been settled on the land by the Government or an agent of the Government which may include a local authority."**

Learned Counsel pointed out that Section 31(1) of the Land Act gives security of tenure to a tenant on registered land, and provides that "**A tenant by occupancy on registered land shall enjoy security of occupancy on the land.**"

He contended that section 31(2) (3) (4) (6) and (7), and Section 33 (1) (2) and (7), Section 34(3) (4) and (5), Section 36(1), Section 37(2) (a) and Section 38(2) (3) and (4) all transactions by a bona fide occupant presuppose a registered owner. The respondent's witnesses namely Pw1, Pw3 and Pw4, he argued, conceded that the suit land was unregistered. Learned Counsel also contended that the advocate who carried out the search testified that the plot had never been registered. The advocate had

lodged a caveat on behalf of the respondent to stop the suit land being brought under the Registration of Titles Act. He pointed out that the City Council of Kampala was granted a lease in 1970.

Mr. Nerima, further contended that it was a misdirection for the Court of Appeal to hold that the existence of a plot number meant that the land was registered. It was his contention that under Section 1 (2) of the Land Act, registered owner means "**a registered owner in accordance with the Registration of Titles Act.**" He argued that registration occurs where a certificate of title is issued, not in this case where the land had only been surveyed.

In the alternative, Mr. Nerima submitted that if the suit land was registered in the name of the City Council, the lease was abolished by Article 285 of the Constitution. According to the Land Act, counsel contended, land which is unregistered was transferred to the District Land Board. It was counsel's submission that when the land was allocated in 1999 to the 2nd appellant, there was no registered owner. Therefore the respondent could not qualify to be a bona fide occupant, he concluded.

For the respondent, Mr. Mutawe submitted that the City Council had title to the suit land which was registered. He referred to the evidence in Exhibit P. 13, the Minutes of the Meeting of the 1st appellant, where the City Advocate advised the 1st appellant that the City Council was the registered proprietor of the suit land and it never challenged the respondent's occupancy. Minute KDLB.23/8/2000 read in part,

"At the request of the Board, the City Advocate in her Memo dated November 1, 1999, advised that Section 30(2) (a) the Land Act No.16 1998 protected National Housing Corporation as a bonafide occupant. Before the coming into force of the Constitution 1995, Kampala City Council was the registered owner of the land under a statutory lease and there were no records showing that it ever challenged the corporation's

occupancy. In this regard, National Housing Corporation was in the category of "bonafide" occupant and all rights accruing to a bonafide occupant accrue to National Housing Corporation."

Learned Counsel also referred to the existence of Exhibit P.10 which is a copy of a certificate of title issued to Kampala City Council in 1970 in respect of the land comprised in Leasehold Register Volume 796 Folio 6 with an accompanying copy of a Statutory Lease which covered the suit land. It was counsel's submission that these two exhibits contained admissions under Section 19 of the Evidence Act which no oral evidence could displace. He argued that although on the coming into force of the Constitution, statutory leases were abolished, there was no law which deprived those having rights in land of their rights.

Counsel contended further that the Land Act 1998 protected the respondent as a bona fide occupant. Before coming into force of the Constitution 1995, Kampala City Council was the registered owner of the land under a statutory lease and there were no records showing that it ever challenged the respondent's occupancy. In this regard, the respondent was in the category of "**bona fide occupant**" and rights accruing to a bona fide occupant, accrue to the respondent.

In dealing with the question whether the respondent was a bona fide occupant of registered land, Twinomujuni, JA, in his lead judgment observed,

"in the instant case, the appellants proved that it had utilised the suit land for 25 years unchallenged before coming into force of the 1995 Constitution. The learned trial judge erred to hold that the appellant was not a bona fide occupant. He seems to have arrived in this conclusion basing on his earlier finding that the suit land was not registered and that therefore, there was no registered owner. With respect, that holding was not correct as I have indicated when considering ground two above. The mere fact that the suit land was known as Plot M597 Luthuli Second Close Bugolobi between

1970 and 2001 suggests that the plot was registered. If this inference is correct then it must have been registered in the names of someone."

The second ground of appeal in the Court of Appeal which the learned Justice of Appeal was referring to was to the effect that the trial judge had erred in holding that there was no registered owner of the suit land on the day the 1995 Constitution came into force. The learned Justice of Appeal considered the facts which had been admitted at the trial which were:

"9. The 2nd defendant's Title LRV 2860 Folio 20 issued on 25/01/2001 is derived from Sheet No.71/1/18/Sw/2.

10. **Kampala Municipal Council was the Registered Proprietor of Land under a Statutory Lease LVR 254 Folio 6.**

11. **The Sheet No.71/1/118/SW/12 is reflected on the key plan of the land under Statutory Lease 254 Folio 6 above."**

The Learned Justice[^] of Appeal then concluded:

"These three admitted facts clearly establish that the suit land was the registered property of Kampala Municipal Council. Under Section 56 of the Evidence Act, those facts once admitted needed no further proof and were no longer in issue. I would respectfully disagree with the learned trial Judge's holding that "there is no evidence at all of registration of the land prior to 25th January 2001". I would hold that the suit land formed part of the Statutory Lease which was granted to Kampala Municipal Council and was therefore registered as its property. I find no evidence on record that could contradict the above holding of fact. The logical inference from this holding is that on the coming into force of the 1995 Constitution, the suit land was registered property of Kampala City Council. This ground of appeal succeeds."

I am unable to fault the conclusions reached by the learned Justice of Appeal, with whom other members of the Court of Appeal agreed.

I have already held that the respondent had been in occupation or possession of the suit land for more than twelve years at the time of coming into force of the 1995 Constitution. The respondent had not only occupied the land but had also utilised it, without any challenge from Kampala City Council. The respondent was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31(1) of the Land Act if the suit land was registered land.

The evidence on record was, in my view, sufficient to establish that the suit land was registered. 11 was not merely surveyed land as submitted by learned counsel for the appellants. The suit land was adjacent to the lease granted by Kampala City Council as the urban authority to the respondent and registered on 1 May 1969 for 99 years, on which the various blocks of flats were constructed. The head Statutory Lease granted to Kampala City Council by the Uganda Land Commission on 17 December 1970 was included both the lease granted to the respondent comprised in Leasehold register Volume 796 Folio 6 and the unallocated suit land adjacent to it, marked as Plot M597. The Statutory lease comprised of:

"All that part of public land contained within the present gazetted boundaries of the City of Kampala shown for the purposes of identification only on the plan marked "A" hereto annexed and thereon coloured blue (but save and except the land coloured green on the 24 plans marked "B" "C" "D" "DI" "D2" "E" "F" "G" "H" "11" "12" "J" "K" "L" "M" "N" "O" "P" "Q" "R" "S" "T" "W" "X" and "Y" here annexed). TO HOLD the same to the Lessee for the term of 190 (one hundred and ninety years and 10 months from the 1st day of May 1970

The land granted to Kampala City Council was delineated and divided into plots which were marked. It is clear from the key plan of the land comprised in this folio (except mailo and freehold land and shown in blue) that the suit land was included and marked as Plot No.M597. This plot also reflected in Sheet No.71/1/18/SW/2 which is also reflected in the Statutory Lease Volume 525 Folio 6.

In my view, therefore, the suit land formed part of statutory lease granted to Kampala City Council and was registered in the Council's name. Accordingly, the respondent was a bona fide occupant of registered land at the time the 1995 Constitution was made.

Mr. Nerima, learned counsel for the appellant, argued, in the alternative, that the 1995 Constitution abolished statutory leases and therefore the respondent was not a bona fide occupant of registered land.

In reply Mr. Mutawe for the respondent conceded that on the coming into force of the Constitution, statutory leases were abolished, but contended that this did not mean that all those having rights in the land comprising the statutory lease lost their rights. Indeed in the third ground for affirming the decision of the Court of Appeal, the respondent contends that although the 1995 Constitution abolished statutory leases, it did not declare the said, leases to have been null and void ***ab initio***.

I think it is well settled that the Constitution abolished statutory leases. Article 285 of the Constitution provides,

"Upon the coming into force of this Constitution and subject to the provision of paragraph (a) of clause (2) of Article 237 of the Constitution, statutory leases to urban authorities shall lease to exist."

The effect of this provision is that the statutory lease granted to the City Council by the Uganda Land Commission in 1970 was extinguished on the coming into force of the Constitution.

Kampala City Council ceased to be the registered owner of the suit land on the coming into force of the Constitution. That would mean that the respondent ceased to be a bona fide occupant of the City Council, as the registered owner.

The fundamental question to be answered is what happened to the land previously held by the City Council as a controlling authority, and those interests granted or held under the extinguished statutory lease.

It must be recognised that the Constitution made far reaching changes in the system of land holding in Uganda and the manner of control and management of land. By virtue of Article 237(1) of the Constitution,

"Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution."

The land tenure systems provided are customary, freehold, mailo and leasehold . Provisions were made in the Constitution to protect the rights of those tenants in occupation of registered land. Institutions for holding and allocation of land, and for effective resolution of land disputes were established. Subsequently the Land Act was made to give effect to the provisions of the Constitution. Among the institutions established were the Uganda Land Commission, the District Land Boards and the Land Tribunals.

The main function of the Land Commission was to hold and manage any land vested in or acquired by the Government of Uganda. The functions of a District Land Board included holding and allocation of land in a district which is not owned by any person, and to facilitate the registration and transfer of interests in land.

It seems to me, therefore, **th**at the District Land Boards became successors in title to controlling authorities or urban authorities in respect of public land which had not been granted or alienated to any person or authority. The District Land Boards became successors by operation of law because land was vested in them by law, not by grant, transfer or registration, under Section 59(8) of Land Act.

In the instant case, it is common knowledge that the suit land was vested in the Kampala District Land Board which had jurisdiction to allocate it, if it was not owned by any person or authority. It was argued for the respondent that it was an owner by virtue of being a bona fide occupant of the suit land for over twelve years. Under the Constitution and the Land Act (Cap.227) the respondent would ordinarily have enjoyed the protection granted to such tenants, had the statutory leases not been abolished. But the respondent contends that the abolition of the statutory lease under which it held the suit land did not mean that its interest in land was thereby abolished or extinguished.

The implications of the abolition of statutory leases have not been determined and in my view this remains a gray area. I am unable to hold that the rights of the respondent as a tenant in possession who held adversely to the City Council for a long time were automatically extinguished on the abolition of the statutory lease. In my opinion, the respondent could claim the rights and benefits accruing to a bona fide occupant of a registered owner, who must be deemed to be the Kampala District Land Board under Section 59(8) of the Land Act which provides:

"The board shall hold in trust for the citizens the reversion on any lease to which subsection (1) (c) relates and may exercise in relation to the lease and the reversion the powers of the controlling authority under the Public Lands Act 1969, as if that Act had not been repealed; but subject to the foregoing, that Act shall in respect of any such lease or reversion, have effect with

such modifications as may be necessary to give effect to this Act and subject to the provisions of the Constitution."

Accordingly I hold that grounds 4, 5 and 7 have no merit and should fail. I would hold that the three grounds affirming the decision of the Court of Appeal should succeed.

Whether the grant of the lease was fraudulent:

In grounds 8, 9 and 10, the appellants complain that the Court of Appeal erred in law in holding that the suit land was not available for leasing, that the application and registration of the 2nd appellant was fraudulent and that the doctrine of estoppel was not applicable against the respondent. Arguing these grounds on behalf of the appellants, Mr. Muhimbura submitted on ground 8 that since the land in dispute was not registered nor owned by the respondent in accordance with the law, the land suit land was available for leasing by the 1st appellant in accordance with Article 241(1) (a) of the Constitution and Section 59(1) (a) of the Land Act. Counsel contended that even if the respondent had been a bona fide occupant it would not preclude the 1st appellant from allocating land to the 2nd appellant, but in this case since the respondent was not a bona fide occupant it could not enjoy security of tenure.

The Court of Appeal held that the respondent was a bona fide occupant of the suit land and therefore the land was not available for leasing without reference to the appellant. I agree with that holding. That holding is consistent with the finding that the respondent was a bona fide occupant of the suit land.

A bona fide occupant was given security of tenure and his interest could not be alienated except as provided by the law. For instance, the bona fide occupant could apply for a certificate of occupancy under Section 33(1) of the Land Act. A bona fide occupant could apply for a lease under Section 38

of the Land Act. While the land occupied by a bona fide occupant could be leased to somebody else, I think that the first option would have to be given to the bona fide occupant. As this was not done, in the present case, the suit land was not available for leasing to the 2nd appellant. Ground 8 should therefore fail. With regard to the holding that the 2nd appellant acquired the suit land by fraud, Mr. Muhimbura submitted that Twinomujuni, J.A. in his lead judgment based his finding of fraud on the three grounds. The first ground is that both appellants knew that the suit land was in possession of the respondent the time it was registered in the name of the 2nd appellant. Counsel argued that there was no evidence in the High Court that the two appellants knew that the respondent was in possession of the suit land. The second ground was that the respondent protested to the 1st appellant but the protests were ignored. Muhimbura submitted that the protests came in 2001 after the allocation of the suit land to the 1st appellant in 1999.

The third ground on which fraud was based was that no proper procedure was followed in granting and transferring the land to the respondent. Learned counsel argued that the suit land was allocated in 1999 but the Land Regulations were made in 2001, and were therefore inapplicable.

Mr. Mutawe for the respondent submitted that the lease to the 2nd appellant was irregularly accepted. He pointed out that the 2nd appellant was required to accept the offer within one month from the date of offer which was 2nd June 1999. The offer should therefore have been accepted by 3rd July 1999. However by the time counsel for the respondent wrote the letter of protest to the 1st appellant on 19 July 1999, the 2nd respondent had not accepted the offer as stipulated in the lease offer. Mr. Mutawe further submitted that there was plenty of evidence to establish fraud. The first piece of evidence he referred to was Exh. P1 which was a letter dated July 29, 1999 from the 2nd appellant to the 1st appellant where the former claimed that the suit land was part of the late Muzee Semakula's kibanja which forms part of the respondents title, and that there was a house at the time the land was surveyed and that is why it was not included in the title of the respondent. In that letter, the 1st appellant claimed that the respondent was trying to steal Muzee's Land. The 1st appellant said they were willing as a family to negotiate with respondent if the latter wanted to expand their development.

The second piece of evidence of fraud according to learned counsel, was Exh.P.2, a letter from the Managing Director of the 1st appellant, Silver Byaruhanga dated August 8, 1999 addressed to the 2nd appellant which when considered together with Exh. P.12 which contains minutes of the meeting of the 1st appellant clearly showed that there was no access road to the suit land. The minutes stated that "There also seemed to be no access to this plot." Mr. Mutawe submitted that the 2nd appellant confessed to have bribed the workers of the 1st appellant in order to grant him a road. This was contained in Exh.P.2 where the 2nd appellant stated,

"When they were surveying, I approached the people on site. We talked to each other and I asked them a tricky question, "Does your plan also provide new roads? And they said where necessary. I also asked them to get me a plan for that land and they told me that they can do it if I have interest. After the job, I indeed gave them a tip of 1,500,000/=. To me I was buying the road and I got my deal and I am left with a balance of 500,000/= to be paid later."

The third piece of evidence is Exh.p.3 which is a letter dated 5 October 2000 from the 2nd appellant to the 1st appellant applying for change of status and revision of premium and ground rent on the suit land. The 2nd appellant requested the 1st appellant to ***"revisit our case and approve our application as kibanja for Chemical Distributors thus giving us fresh terms."***

Mr. Mutawe pointed out that the change of status was explained in Minute KDLB52/58/99 where it was stated that the 2nd appellant had provided evidence in support of their customary ownership/bona fide purchaser which included the original kibanja owner dated 23.7.1971 and two sale agreements dated 24.4.1984 and 1.2.1991, thus satisfying the 1st appellant

that the 2nd appellant had acquired the land from the original kibanja owners. The first appellant therefore confirmed the earlier allocation under Minute KDLB 53/53.8/99 of 22.5.1999 and rejected the application of the respondent on the ground that when it visited the suit land, on August 18, 1999, they found the existing facility which was a toilet, not in use and neglected. Mr. Mutawe submitted that this showed that the advice of the City advocate was correct and that is why the 2nd appellant was asked to be granted the suit land as a customary tenant, and it was duly granted as a kibanja.

The fourth evidence of fraud according to learned counsel is that under Exh. P.12 it was claimed in 1st appellant's minutes that the toilet was water bore whereas according to a letter dated 29 June 1999, the toilet was not in use, and the plot was underutilized. This could not be true given the fact that people were staying there.

It was submitted by counsel that the fifth piece of evidence was admitted facts No.34 and No.37 which indicated that the 1st appellant organized site inspection and went to the suit land without informing the respondent. Furthermore, the respondent's protestations were ignored, and yet both appellants knew of the respondent's interest. He submitted that the appellants were consciously defeating the unregistered interest of the respondent, and yet the respondent was entitled to a hearing before the application of the 1st appellant was granted.

In his lead judgment, Twinomujuni J.A, took into account the fact that the appellants knew that the suit land was in possession of the respondent and despite protests from the respondent and residents of the estate of the respondent, the protests were ignored as the respondent was not given any hearing before its interest was transferred to the 2nd appellant. The learned Justice of Appeal also held that if a person procures registration to defeat an existing unregistered interest on the part of another person of which he is proved to have knowledge, then such a person is guilty of fraud on the authority of ***John Katarikawe vs William Katweremu & Others*** (1977) HC.B.187. He also held that a deliberate failure to follow prescribed

procedure or to deceive that the land is available for leasing or to deny the respondent a fair hearing amounted to fraud. The learned Justice of Appeal held that the fraud alleged in this case was also attributable to the transferee, the 2nd appellant. The learned Justice of Appeal concluded,

"By insisting on registration of the suit land in favour of the 2nd respondent in total disregard of the appellants unregistered interest, which they were very much aware of and by failing to follow the right procedure prescribed by law for transfer of such unregistered interest the respondents (now appellants) were guilty of fraud, which defeats the act of registration."

With respect, I am unable to fault the conclusion reached by the learned Justice of Appeal with whom the other members of the Court of Appeal agreed. As both the learned counsel for the respondent and the learned Justice of Appeal pointed out there was ample evidence of fraud. From the evidence it is clear that the 2nd appellant went out of its way to defeat the interest of the respondent with the support of the 1st appellant. The status of the suit land seems to have been changing to suit the interests of the appellants, contrary to the legal advice of the City Advocate. The proper procedures for granting leases over unallocated land were flouted in favour of the 2nd appellant.

On the other hand, the respondent was not given opportunity to be present during the site inspection or to submit objections or to be heard before lease was granted. The respondent only took initiative to protest the allocation of the suit land to the 2nd appellant, and its protest, and that of the residents of the area, were summarily rejected. In my view the respondent should have been informed of the intention to grant the lease of the land in its possession, and given the first option to apply for it, if the 1st appellant wanted the suit land to be fully developed.

It is well settled that a certificate of title is indefeasible except on ground of fraud. Section 64(1) of the Registration of Titles Act (Cap.230) provides:

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant or otherwise, which but for this Act, might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the land or estate or interest in land subject to such encumbrances as are notified on the folium of the Register Book constituted by the certificate of title; but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that by wrong description of parcels or boundaries is included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or derived from or through such a purchaser."

Therefore under Section 176 of the Registration of Titles Act, a registered proprietor is protected against ejection except in certain cases, including fraud.

The indefeasibility of title on ground of fraud has been considered in a number of decisions in our Courts. In ***Kampala Bottles Ltd vs Damnico(U) Ltd*** Civil Appeal No. 22 of 1992, this Court approved the definition of fraud by the trial judge as follows:

"It is well established that fraud means actual fraud or some act of dishonesty. In Waimiha Saw Milling Co. Ltd vs Laine Timber Co. Ltd (1926) AC 101 at p.106, Lord Buchmaster said, 'Now fraud implies some act of dishonesty.' Lord Lindley in Assets Co. vs Mere Roihi (1950) AC 176 states, 'Fraud in these actions (i.e. actions seeking to effect (sic) a registered titles) means actual fraud, dishonesty of some sort or what is called constructive fraud an unfortunate expression and one very apt to mislead, but often used for want of a better term, to denote transactions in equity similar to those which flow from fraud."

It is now well settled that to procure registration of title in order to defeat an unregistered interest amounts to fraud. In ***Marko Matovu & Others vs Mohammed Ssevivi and Another.*** Civil Appeal No. 7 of 1978 (CA), ***Sijaka Nalima vs Rebecca Musoke.*** Civil Appeal No. 12 of 1985 (SC) and ***Uganda Posts and Telecommunications vs Lutaaya*** Civil Appeal No.36 of 1995 (SC) this Court approved the holding of the High Court in ***Katarikawe vs Katwireme*** (Supra) where it was stated:

"Although mere knowledge of unregistered interest cannot be imputed as fraud under the Act, it is my view that where such knowledge is accompanied by a wrongful intention to defeat such existing interest that would amount to fraud. In the absence of a statutory definition of fraud, I would adopt the definition in a similar Kenyan Statute which defines fraud as fraud shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by such

registration." I take this view because I doubt whether the framers of the act ever intended to encourage dishonest dealings in land as manifest in this case."

In the instant case, there was ample evidence of fraud attributable to both appellants that the grant and registration of the suit land in the name of the 2nd appellant was intended to defeat the unregistered interest of the respondent, and the Court of Appeal was justified in coming to that conclusion. Accordingly ground 9 has no merit and should fail.

In ground 10, the complaint is that the learned Justices of the Court of Appeal erred in law and fact when they held that the doctrine of estoppel was applicable. Mr Muhimbura for the appellants adopted his submissions in the Court of Appeal. He contended that by claiming in the plaint that it was a customary tenant and later abandoning this claim, the respondent was not sure of its interest in the suit land. It was his submission that if the respondent knew that it had an interest capable of being protected by law, it would not have applied to the 1st appellant for a lease over the suit land. Counsel a Iso contended that the respondent lodged a caveat and left it to lapse, and never took steps to stop the registration of the suit land.

In reply Mr. Mutawe submitted that estoppel did not arise in this case since the case for the respondent was that it had occupied the suit land for 29 years and its lodging the caveat confirmed its claim to the suit land for which they actually applied to be granted a lease.

In his judgment, Twinomujuni JA, held that in light of his finding that the registration of the 2nd appellant was tainted with fraud, the doctrine of estoppel did not arise. I am unable to see how the doctrine of estoppel applied against the respondent. The fact that the respondent applied for a lease on the suit land on 20 July 1999 did not mean that they had no prior interest in the land.

The application by the respondent was made after the offer of a lease to the 2nd appellant by the 1st appellant which summarily rejected it as an appeal

under Minute KDLB 23/8/2000 in November 2000. There was nothing in the application to estop the respondent from applying for the suit land. It did not claim to be a customary tenant. Neither did the lapse of the caveat indicate that the respondent ceased to have a claim in the suit land. I am unable to hold that the Court of Appeal erred in holding that the doctrine of estoppel did not apply against the respondent. Ground 10 should therefore fail.

Reliefs Granted:

The appellants complain in ground 6 that the Court of Appeal erred in law and fact when they held that the land belongs to the respondent. In ground 11, the complaint is that the Court of Appeal erred in law when they awarded the respondent damages and ordered the 1st appellant to lease the suit land to the respondent.

Mr. Nerima, for the appellants, submitted that a bona fide occupancy is not ownership and therefore the suit land cannot belong to the respondent. He argued that ordering the 1st appellant to lease the suit land to the respondent was an error in law and in fact. It would have been a proper relief if the action was for specific performance. All the Court could do was to order the 1st appellant to deal with the application of the respondent. The Court could not fetter the discretion of the 1st appellant. Counsel cited the case of **Registered Trustees of Kampala Institute vs Departed Asian Property Custodian Board** Civil Appeal No. 21 of 1993 (SC) in support of his submissions.

In concluding his judgment, Twinomujuni JA made the following order:

"in the result, I would allow this appeal, set aside the judgment of the High Court dated 3rd December 2001 and enter judgment in favour of the appellant in terms as prayed in the plaint."

In the plaint the respondent prayed for a long list of reliefs which consisted of the orders specified at the beginning of this judgment. The order complained of was listed under paragraph (g) which was an order directing the 1st appellant to grant the suit land to the respondent. There was no complaint with the rest of the orders granted by the Court of Appeal, which should stand. There was a complaint in ground 11 that the Court of Appeal erred in awarding the respondent damages. However, the Court of Appeal did not make a specific order in respect of general or punitive damages. The Court of Appeal did not assess any such damages. It is not clear what was the basis or the justification for the claim for such damages. I find not evidence or grounds to justify the award of such damages. I agree with counsel for the respondent that no such damages were awarded by the Court of Appeal, and none were awardable. Therefore the prayer in paragraph (h) in the plaint cannot be granted.

I have already held that the respondent was a bona fide occupant of the suit land. The respondent may not have been a registered owner but the respondent had a recognized or even registrable interest in the suit land. For this reason it can be said that the suit land belonged to the respondent as tenant in possession.

However, the interest possessed by the respondent did not entitle it to automatic grant of a lease over the suit land. In my view the respondent was entitled to apply for a lease over the suit land and to be given the first option to lease the land. I agree that the 1st appellant had discretion in granting leases but the discretion had to be exercised fairly and justly in accordance with the law.

I would therefore modify the order granted in paragraph (g) in the plaint to read as follows:

"(g) An order directing the 1st appellant to give due consideration to the respondent's application for a lease over the suit land including giving it priority in granting the lease."

I find no merit in grounds 6 and 11 which should substantially fail.

In the result, this appeal should be dismissed with costs in this Court and the Courts below. As the other members of the court also agree this appeal is dismissed with costs in this court and courts below.

JUDGEMENT OF ODER. JJSC

I have had the benefit of reading in draft the judgment of the Hon. The Chief Justice, Hon. B.J. Odoki, CJ, with which I agree. I also agree with the orders proposed by him.

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in draft the judgment prepared by my Lord the learned Chief Justice which judgment he has just delivered. I agree with his reasoning and conclusions in this appeal and I also agree that the appeal should be dismissed with costs here and in the Courts below.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my Lord, the Hon. Chief Justice and I agree with him that this appeal be dismissed with costs in this court and in the courts below.

Dated at Mengo, this 25th day of August 2005.