THE REPUBLIC OF UGANDA

IN THE SUPREME COURT, AT KAMPALA

(CORAM: ODOKI, CJ., KATUREEBE, KITUMBA, TUMWESIGYE, KISAA KYE, JJ.SC.).

CIVIL APPEAL NO. 15 OF 2004

BETWEEN

LAWRENCE KITTS ::: APPELLANT

AND

BUGISU COOPERATIVE UNION :::::.::::::::::::::::: RESPONDENT.

(Appeal from the decision of the Court of Appeal at Kampala; Okello, Twinomujuni and Byamugisha, JJ.A dated 1st April 2003 in Civil Appeal No. 56 of 2001).

JUDGMENT OF.BART M. KATUREEBE, JSC.

This appeal arises from the decision of the Court of Appeal whereby that court reversed the decision of the High Court which had been given in favour of the Respondent. The appellant who had been the plaintiff in the High Court, was dissatisfied with the decision of the Court of appeal.

The case arises from a land dispute. The appellant purchased the suit land from one Mabaaku Wangofu and took possession of the same. He later applied to the Uganda Land Commission for a lease over the same land. He was given a lease offer by the Commission,

but before we could accept the offer, he was in exile, Subsequently, the same land was bought by the respondent from some other people, and it proceeded to process a land over the same land and was accordingly registered as proprietor of the same under the Registration of Titles Act.

The appellant then filed a suit in the High Court against the respondent who was the 2 defendant, and two other people, namely one John Wakuma as 1st defendant and the Registrar of Titles as 3rd defendant. This two are not party to this appeal. He claimed that he had an equitable interest in the suit land and that the respondent was aware of his interest at the time it acquired the suit land and processed a title for it. He asserted that the respondent was not a bona fide purchaser for value as it had notice of his interest. Furthermore, he alleged that the respondent had knowledge that the person who purportedly sold the land to it had no interest in the same. He accused the respondent of fraud whose particulars were given as:

i) Purchasing the land when the plaintiff was detained in military custody

ii) Selling the land when the plaintiff was detained in military custody

iii) Agents and/servants of the second defendant (respondent) purchasing the land deliberately due to political difference

iv) Selling the land well aware Mbale Civil Suit No. 1 of 1981 had decreed the land to belong to the plaintiff.

v) Paying rents for survey of the land after becoming aware of Civil Suit No. 1/81 and the plaintiff's further objection.

vi) Secretly selling and purchasing the land.

vii) Purchasing and selling land aware that there were disputes.

At the trial, the respondent, for its part argued that it had in 1981 purchased a total of 39.3 hectares of land at Khamoto which land was customarily held by the Bushilusha clan, and Bumakyero clan and the **1st** respondent. They claimed to have ascertained that the sellers were entitled to sell the land. It denied any notice of the appellant's interest. It applied for a lease in the normal way in 1990, the land was surveyed, and it became the registered proprietor thereof on the 22 January 19914 It denied any of the particulars of fraud.

The following issues were framed for court's determination: 1 Whether the plaintiff purchased the land in issue.
2. Whether the plaintiff applied for the land in dispute
3. Whether the second defendant purchased the land in dispute from the first defendant.
4. Whether the second defendant is a bona tide purchaser for value without notice.
5. What remedies are available if any.

The trial court answered the first three of the above issues in the affirmative. The court found as a fact that the appellant purchased the land in issue. The court, though not finding the respondent guilty of fraud, nonetheless found that its conduct amounted to willful negligence for which it could be deprived of the protection given to a bona fide purchaser for value without notice. The court further found that the first defendant in that suit, was fraudulent as he sold the disputed land to the respondent when he was aware that another person, PW2 Wangofu had already sold the land to the appellant. The court, therefore, ordered for the cancellation of the respondent's name from the register and for the land to revert to the appellant. The first defendant and the respondent were ordered to pay to the appellant general damages of Shs.3,000,000/= for trespass and costs of the suit.

On appeal by the respondent, the Court of Appeal found for the respondent, allowed the appeal and substituted the orders of the High Court with one re-instating the respondent's name on the Register and the certificate of Title. The Court of Appeal also set aside the order for damages and awarded costs in the Court of Appeal and the lower court to the respondent. Dissatisfied, the appellant appealed to this court on two grounds as follows:

1. ***"The Honourable Justices erred in law and fact when they held that the learned Judge did not apply the facts of the case to the law thus coming to a wrong decision.***

2. ***The Honourable Justices erred in law and fact when they failed to evaluate the evidence on record properly or at all, thus accassioning a miscarriage of justice.***

When this appeal came up for hearing before this court, the appellant was represented by Mr. Obed Mwebesa, while the respondent was represented by Mr. James Gyabi. Both filed written submissions. In his submission, Mr. Mwebesa argued both grounds of appeal together as Mr. Gyabi did in response. I intend to consider them in the same manner.

Counsel argued that the Court of Appeal wrongly applied the facts of the case to the law. In his view, once the court found that the appellant had bought the land in issue, then the respondent should have become suspicious when it was purchasing the land and made inquires about the interest of the appellant. He asserted that the respondent, on the evidence of PW3 and DW6, was aware of the interest of the appellant, yet he still went ahead to process a land title. He cited the case of ***DAVID SEJJAKA NALIMA —Vs- REBECCA MUSOKE, SCCA NO.*** 12/85 in support of his submission that where a party abstains from making inquires for fear of learning the truth about a property he is purchasing, that party may be found not to be a bona fide purchaser for value and fraud may be properly ascribed to him. Counsel supported the finding of the trial Judge that the respondent was not a bona fide purchaser for value and supported the decision of the trial court to cancel the certificate of title of the respondent in accordance with section 176 of the Registration of Titles Act.

Counsel further criticised the Court of Appeal for what he called a failure in its duty to re-evaluate the evidence as a first appellate court. In his view, the court would not have come to the conclusion that the sellers to the appellant did not own the land since they had no title to it if it had properly re-evaluated the evidence. It would instead have found that the appellant had interest in the suit land before the respondent purchased it, and that the respondent was aware of that interest. Counsel further criticised the Court of Appeal for stating that the lease offer was the

basis of the appellant's claim yet failing to consider the appellant's equitable interest in the land. He further submitted that the Justices of Appeal were wrong to find that because the appellant had purchased customary land, that had made his interest in the property void, yet the respondent had also bought the same property as customary land. To counsel this amounted to a miscarriage of justice visited upon the appellant. Therefore, he submitted, the appellant had an equitable interest in

the land, and on the evidence, the respondent was not a bona fide purchaser for value and was guilty of fraud. He supported the decision of the trial Judge and prayed this court to allow the appeal, set aside the decision of the Court of Appeal and reaffirm the decision of the High Court. He also prayed for costs in this court and in the courts below.

In response, counsel for the respondent supported the decision of the Court of Appeal. He contended that the court was alive to its duty as a first appellate court and had accordingly re-evaluated the evidence at great length, considered the law applicable and came to the right conclusion and decision. On the basis of ***UGANDA BREWERIES -Vs- UGANDA RAILWAYS CORPORATION, SCCA NO.* 6 *OF 2001,*** counsel submitted that Court of Appeal was not bound to follow the trial Judge's findings of fact if it appeared to it that the trial Judge had failed to take into account particular circumstances or had come to a decision that was wrong.

Counsel submitted further that ,this was a case of customary land holding and that the Court of Appeal had considered the matter in the context of the law applicable, i.e. the Public Land Act, 1969, the Land Reform Decree No. 3/75, and The Registration of Titles Act. He supported the decision of the Court of Appeal that the land in issue

was a customary holding which did not create a legal interest in land, and the Uganda Land Commission was entitled under the Land Reform Decree to offer the same to any other person, including the respondent, and to process a certificate of Title under the Registration of Titles Act. Counsel further pointed out that the trial Judge had not found evidence of fraud, and was therefore wrong to have ordered cancellation of the Respondent's title. The Court of Appeal was right to restore the title. He urged this court to confirm the decision of the Court of Appeal and dismiss the appeal with costs.

I have carefully considered the record and the submission of counsel. It is clear that the land in issue was, before its conversion to leasehold, customary tenure. The appellant's case is that he had an equitable interest prior to the respondent's acquisition of the land which interest the respondent was aware of, or could have found out had it exercised due diligence before registering the land and obtaining title therefore. This failure amounted to willful negligence, and therefore deprived the respondent of the protection of a bona tide purchaser for value.

The trial Judge dealt with this matter thus: -

"From the evidence of DW6 Mohamed Wepukbulu who the Estates Manager of the 2nd defendant (respondent) directly concerned with the transaction, no efforts were mode to inquire about or take in the equitable interest of the plaintiff. In this regard, I am of the view that the 2nd defendant was grossly negligent in not exercising ordinary precautions to take in the interest of the plaintiff and should not e accorded the protection given to a bona fide purchaser for value without notice. The conduct of the 2nd defendant while not direct fraud amounts to willful negligence for which it can be deprived of the protection to a bona fide purchaser for value without notice."

With respect, I think the learned trial Judge did not address himself to the relevant laws at the time. Having found that the land in issue was customary holding, the Judge ought have addressed himself to the provisions of the Land Reform Decree 1975 and the Public Land Act, 1969 to ascertain how customary interests were provided for under the law. In that regard section 3 of the Decree should have offered a useful guide. It states:

3.(1) "The system of occupying public land under customary tenure may continue and no holder of a customary tenure shall be terminated in his holding except under terms and

conditions imposed by the commission including the payment of compensation, and approved by the Minister having regard to the zoning scheme, if any, affecting the land so occupied, and

accordingly, the Public Land Act, 1969 shall be construed as if subsection (2) of section 24 thereof has been deleted therefrom."

(2) "For the avoidance of doubt, a customary occupation of Public land shall, notwithstanding anything contained in any other written law, be only at sufferance and lease of any such land may be granted by the Commission to any person, including the holder of the tenure, in accordance with this Decree ".

From the evidence, it is clear that the appellant was aware that he had a customary tenure on public land. That is why he applied for and was given, a lease offer on 3rd March 1976 so that he could convert his customary tenure into leasehold under the Registration of Titles Act. The lease offer had to be accepted within a given time. He failed to do so, apparently because he had fled the country. Under section 3(2) above, as long as he remained a customary tenant on public land, he remained so only at sufferance. The Uganda Land Commission was entitled to give a lease of the land to any other person. This is apparently what happened. The interest of the appellant could not be superior to the interest of the respondent. The above provision alone would have defeated the appellant's suit.

Furthermore, as the Court of Appeal found, there was no evidence that when the appellant bought the land from those that sold to him, permission had been sought from, and necessary notice been given to, the prescribed authority under section 4(1) of the Land Reform Decree.

The Court of Appeal, correctly addressed the law on this point thus:

"The provisions of the above section were judicially considered in the case of PAUL KISEKKA SAKU —Vs- SEVENTH DAY ADVENTIST CHURCH (SCCA NO. 8/93). It was held that the transfer of a Kibanja or customary holding without giving notice to the prescribed authority, renders such transfer void under the provisions of the Act. Section 56 states that a certificate of title shall be conclusive evidence of all particulars and endorsements appearing therein, and that the person named therein as the proprietor is possessed of the estate or interest described. The courts are enjoined to receive and treat the certificate of title as conclusive evidence of its particulars. Section 61 provides that with the exceptions stated therein, the

estate or interest of a registered proprietor under the Act prevails over any other unregistered interest or claim over the land. Section 184 operates as a bar in any action brought for ejectment or recovery of land against a person who becomes registered under the provisions of the Act except as stated under the provision. Both these sections protect the title of a registered proprietor except in case of fraud. The fraud must be attributed to the person who becomes registered as proprietor. In the case of MUSISI —Vs GRINDLAYS BANK (U) LTD & OTHERS[1983] HCB 39 it was held that a person registered through fraud is one "who becomes registered proprietor through a fraudulent act by him or to which he is a party or with full knowledge of the fraud."

In another case of KAMPALA BROTHERS LTD —Vs- DAMANICO (U) LTD SCCA No. 22/92 it was held that the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of it. In other words it has to be established by evidence that the registered proprietor gained registration through participation in fraud. The standard of proof is higher than a preponderance of probability."

I believe this is a correct statement of the law. The court then proceeded to apply the law to the facts of the case. The court found, correctly, that the appellant had failed to discharge the burden of proving fraud. Indeed, as quoted above, even the trial judge did not find fraud, but "willful negligence." The appellant simply failed to bring himself within the ambit of section 184 of the Registration of Titles Act. Moreover, the customary interest of the appellant [ad long been extinguished by the provisions of section 3(1) of the Land Reform decree. As both courts concluded there was no evidence that the officials of the respondent misled the Uganda Land Commission at any one time during the survey of the land or the preparation of the title.

In the circumstances I find that the Court of Appeal properly and diligently re-evaluated the evidence and correctly applied the law to the facts of the case. Ground one must fail.

With respect to ground two, I can only reiterate what I have already stated with respect to ground One. The claim for a miscarriage of Justice was based on a wrong premise that the appellant had been deprived of his land. Clearly under the law, the appellant's interest had been lawfully extinguished. The Court of Appeal rightly cited the case of **FIRIDA BIRABWA —Vs-**

TIGAWALANA HCC No. 2/92 where the expression ***"substantial miscarriage of justice"*** was considered. It was held in that case that a substantial miscarriage of justice occurs where there has been a misdirection by the trial court on matters relating to evidence or where there has been unfairness in the conduct of the trial. In this case, there is no allegation that this happened.

One naturally sympathises with the appellant that he had to be away in exile. Possibly he would have accepted the lease offer and would himself have been the registered proprietor. But the law took its course and the respondent was duly registered as proprietor with a valid leasehold interest. Accordingly ground 2 also must fail.

Be that as it may, this appeal highlights the plight of millions of citizens who held land by way of customary tenure and were then declared tenants at sufferance under the Land Reform Decree, 1975. They could be evicted by a more powerful person who could easily process a land title and only pay compensation for developments of the customary tenant. Yet to the customary tenant, the right to live on his land was more important than any money he may be paid as compensation for developments, with nowhere to go. There is no doubt in my mind that that is why the 1995 Constitution fully institutionalized customary tenure as one of the systems by which citizens may own land. This was, of course, too late to help the appellant.

In the circumstances, I would dismiss the appeal. But in the interests of justice, each party shall bear its own costs in this co.irt and in the Court of Appeal.

Dated at Kampala this 27th day Of October 2010

Bart M. Katureebe.

JUSTICE OF THE SUPREME COURT

JUDGMENT OF KITUMBA, JSC.

I have had the advantage of reading in draft the lead judgment of my senior brother Katureebe JSC.

I agree with the reasons, the conclusions he has reached in that judgment and the orders proposed herein.

I would dismiss the appeal with costs to the respondent in this court and below.

Dated at Kampala, this 27th Day Of October 2010.

C.N.B. KITUMBA
JUSTICE OF THE SUPREME COURT

JUDGMENT OF DR. E. M. KISAAKYE, JSC

I have had the privilege to read in draft the judgment of my learned brother, Katureebe, JSC. I concur with the orders he has proposed and I have nothing useful to add.

Dated at Kampala this 27th day Of October 2010.

DR. ESTHER M. KISAAKYE
JUSTICE OF THE SUPREME COURT

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my brother Katureebe JSC.

I agree with the judgment and the orders he has proposed and I have nothing more useful to add.

Dated at Kampala this day Of October 2010 .

JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading the judgment prepared by my learned brother, Katureebe JSC and I agree with it and the orders he has made.

As the other members of the Court also agree, this appeal is dismissed with orders proposed by the learned Justice of the Supreme Court.

Dated at Kampala this 27th day Of October 2010

B.J.ODOKI.

CHIEF JUSTICE