

UGANDA / JUDGMENT

Baligira and 7 Others v Kanyankole and 4 Others (Civil Appeal 100 of 2014) [2017] UGCA 135 (14 August 2017)

[2017] UGCA 135**COURT**

Court of Appeal of Uganda

BEFORE

Kasule, Ag JA, Kiryabwire, JA, Musoke, JA

CASE / FILE NUMBER

Civil Appeal 100 of 2014

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA****CIVIL APPEAL NUMBER 100 OF 2014**

20 CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

JUDGMENT

This is a second appeal arising from the original decision of His Worship 25 S. M. Obbo Londo Chief Magistrate of Mpigi delivered on the 15th June 2012. On first appeal of that decision to the High Court Land Division, the first appellate Court quashed the decision hence this second appeal.

The background to this case is that the respondents sued the appellants at the Chief Magistrate Court of Mpigi at Mpigi seeking a declaratory judgment that they were the owners of the suit land comprised in

Leasehold Register Volume 1255 Folio 12 Plot 6, Gomba block 388 situate at Gwanga, Kawoko Mpigi measuring about 389.44 hectares (hereinafter referred to as the suit land). They further sought ^a permanent injunction against the appellants' trespass on the land, an eviction order, general damages for loss of property, interest and costs of the suit. The

respondents' claim was that prior to 1994, the 1st (Kanyankole or sometimes written Kanyankore in the record) and 5th (Busalabwe) respondents were the registered proprietors of the suit property. Busalabwe is the son of Kanyankole. The rest of the respondents (2nd - 4th) appear to be family members. The 7th (Ntambala) and 8th (Kakondo) appellants are alleged to have bought the suit land from them. Subsequently, the 7th and 8th appellants sold the suit land to the 1st to 6th appellants. However, the 1st and 5th respondents in their pleadings contest that they sold their land to the 7th and 8th appellants in the first place and furthermore that they have constantly been in possession of the suit land and therefore not parted with it.

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During the hearing of this appeal, counsel for the appellants amended the grounds in the memorandum of appeal as follows:

- 1. That the learned appellate Judge erred in law when he failed to properly re-evaluate the evidence on record thereby arriving at a wrong decision that the respondents herein are the lawful owners of the suit land
- 2. That the learned appellate Judge erred in law when he failed to properly re-evaluate the evidence on record thereby arriving at a wrong decision that the 1st to 6th appellants were not bona fide purchasers of the suit land for value without notice.

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- 3. That the learned appellate Judge erred in law in holding that a diligent search of the register would have shown that the 1st and 2nd respondents were irregularly and illegally removed from the register without a valid transfer instrument thereby arriving at a wrong conclusion.
- 4. That the learned appellate Judge erred in law when he found that there was no proof that the 7th and 8th appellants ever bought the suit land from the 1st respondent or any other respondents.

Mr. Joseph Matsiko appeared for the appellants whereas Mr. Deo Lubumba and Mr. Paul Kusiima represented the respondents. 10

Considering that the matter before us is a second appeal, we wish to recall the duty of a second appellate Court as provided by law. Section 72 of the Civil Procedure Act, Cap 71 (CPA) provides:

"(1-) Except where otherwise expressly provided in this Act or by any other law for the time being in force, on appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-

- (a) The decision is contrary to law or to some usage having the force of law
- (b) The decision has failed to determine some material issue of law or usage having the force of law
- (c) A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits..."

Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10 (hereinafter referred to as the "Rules of this Court") further provides:

"on any second appeal from the decision of the High Court acting in the exercise of its appellate jurisdiction, the Court shall have the power to appraise the inferences of fact drawn by the trial Court, but shall not have discretion to hear additional evidence..."

The role of a second appellate Court was exhaustively discussed in the case of *Kifamunte Henry V Uganda*, 5C (Cr) Appeal No 10 of 2007 where it was held:

"...the first appellate Court has no duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it... On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles..."

The court went on to hold that:

"This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We cannot interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, Court of Appeal misapplied or

failed to apply the principles set out in such decisions as *Pandey v R* [1957] E. A 336"

Finally the Court also held that:

"...on second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact; this being a question of law: *R v Hossain bin Said* (1942) 9 EACA 62,

We shall now proceed to resolve the grounds of appeal in the order in which they were argued before us.

Grounds 1 and 4:

Arguments for the appellants

- Counsel for the appellant submitted that the main question for determination in these two grounds is whether the respondents are lawful owners of the suit land. He contended that the answer to that question should be in the negative and that the respondents are simply trespassers. He challenged the evidence of the respondents submitting that they are convicts, having been convicted of trespass on the same suit land, which conviction the respondents have never appealed to date. Counsel argued that a person who is convicted of criminal trespass beyond reasonable doubt, and whose conviction still stands cannot at the same time be a lawful owner in respect of the same suit land; as that 15 20
- would amount to a travesty of justice. 25

Counsel argued that the evidence adduced at the trial (testimonies of PW3, PW7, PW8 & PW9) clearly show that the 1st and 5th respondents in 1994, sold the suit land and subsequently transferred their respective interests into the names of the 7th and 8th appellants. The 7th and 8th appellants then sold their interests to the 1st to 6th appellants.

Counsel for the appellants further argued that the respondent's delay in challenging the alleged sale from 1994 to 2002 is questionable and can only lead to the conclusion that the respondents sold the suit land. Furthermore, there is evidence to show that the respondents later moved to Rwanda, only years later, to attempt to return to the suit land where they then committed the offence of trespass, for which they were convicted.

In his submissions, counsel for the appellants criticized the first appellate Judge's reasons for finding that no actual sale had taken place. He faulted the appellate Judge for taking judicial notice of the practice of witnessing of land sale agreements in rural areas by local authorities or immediate neighbors which is contrary to Section 56 of the Evidence Act, Cap 6 which specifically lists down the facts courts ought to take judicial notice of and nothing can be taken judicial notice of outside it. 15

- Counsel for the appellants equally faulted the trial Judge for finding that Kakondo (the 8th appellant) did not remember how much he paid to Busalabwe (the 5th respondent) for his portion of the suit land, submitting that it was imperative to note that the transaction took place long ago in 1994, and that the witness was 55 years old at the time of 20
- testifying in 2009, (15 years later) but that he still gave an approximation of 4-5 million shillings which price Ntambala corroborated. 25

He prayed that after re-evaluating the evidence on record, this Honorable court finds that the 1st and 5th respondents sold the suit land to the 7th and 8th appellants

Arguments for the respondents

5 In rebuttal, counsel for the respondents emphasized that this Court is legally not mandated to re-evaluate the evidence as ground one suggests. Therefore, they argued, there was no need for them to delve into the evidence already re-evaluated.

Counsel submitted that the learned appellate Judge was very much alive to the legal requirement of re-evaluating the evidence given by the Magistrate's court which he ably discharged. 10

Counsel further submitted that having found that the Magistrate court failed in evaluating the entire evidence, the appellate Judge correctly overturned the decision of the Magistrate court giving justification for

faulting the trial Magistrate. He then prayed that the appeal be dismissed 15

Resolution of the Appeal

We have considered the above grounds as well as the submissions made by counsel in relation to each. We are hard pressed to find any point of law to be determined here. Rather, the question counsel for the appellants would like this court to resolve is whether the respondents are lawful owners of the suit land which in our view, is a question of fact and would require a wholesale re-evaluation of the evidence without necessarily addressing any specific point of law. However, this is ^a

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second appeal in which this Court is mandated to consider only matters of law.

We find that the legal basis for this second appeal may probably lie in the next two grounds which we shall consider in resolving this appeal. In the premises, we dismiss grounds 1 and 4 for falling outside the ambit or scope of a second appeal.

Grounds 2 and 3:

Arguments for the appellants

Counsel for the appellants submitted that it was important for Court to appreciate that on first appeal, the alleged fraud, if at all, was never attributed to any of the first six appellants who are the bona fide purchasers for value without notice. 10

Secondly, that the appellate Judge relied on a photocopy of the certificate of title which did not have an instrument number yet the evidence showed that there was another copy of the same certificate that had the said instrument number.

Thirdly, counsel for the appellants argued that the absence of an instrument number was never pleaded as evidence of fraud and that even if there was no said number, the absence of an instrument number

was a correctable mistake which could be rectified by a Registrar, This was not evidence of fraud by the transferee and thus cannot be ^a ground for impeaching a certificate of title. He relied on *Crane Bank Limited v Bellex Tours and Travels Limited*, Supreme Court Civil Appeal No. 6 of 2013 and No. 1 of 2014 (Consolidated) where it was held that fraud must be specifically pleaded and proved to buttress his argument. 20 25

He further argued that the lack of an instrument number was never ^a matter for trial and did not arise during submissions or evidence taking and therefore the learned Judge on appeal had no legal justification to consider it as a basis for his judgment.

- 5 Counsel for the appellants submitted that the absence of an instrument number could only be attributable to the Registrar of Titles and not to the appellants since the responsibility of making entries on the certificate of title falls squarely on the Lands Registry as stated in the case of *Aida Najjemba v Esther Mpagi* CACA No. 74 of 2005.
- Counsel submitted that the first appellate Judge's finding that the 1st to 6th appellants were not bona fide purchasers was a total departure from Sections 59 and 135 of the Registration of Titles Act, Cap 230 which provides that a certificate of title is conclusive evidence of ownership and establish the requirements for qualification of a bona fide purchaser for value without notice. On this, counsel relied on the authorities of *David Sejjaka Nalima v Rebecca Musoke*, C. A No. L2 of L995, *Frederick Zaabwe v Orient Bank*, Civil Appeal No. 4 of 2006 (SCU), *Kampala Bottlers Ltd v Damanico (U) Ltd*, SCCA No. 22 of L992 10 15

Regarding the contradictions cited by the Judge on appeal about PW7 Edward Karibwendi's evidence and PW3 Edward Kakondo as to where the transfer was actually signed, counsel for the appellants submitted that there was simply an omission to mention that a second signing was at the Registrar's office in the presence of the Registrar of Titles. He pointed out that the appellate Judge failed to properly re-evaluate the evidence hence erroneously found Karibwendi to be a contradictory witness whose evidence could not be relied upon. He submitted that, in 20 25

any event, even if the said testimonies had contradictions, the fact that the transfer forms were actually signed, made any inconsistencies immaterial.

He prayed that this Court allows grounds 2 and 3 as well as the entire appeal with costs to the appellants.

Arguments for the respondents

Learned counsel for the respondents submitted that the fate of grounds two and three depended on Court's findings on ground one. He submitted that counsel for the appellant once again is attempting to lead this Court into re-evaluating all the evidence and yet the appellate Judge considered all the evidence on record and gave his reasons for his decision.

Counsel for the respondents further submitted that the appellate Judge was entitled to look at the manner in which the Principal Registrar of Titles (who was in fact a witness in the case) handled the entries on the certificate of title. Counsel for the respondents submitted that the observations

made by the appellate Judge were supportive of the denials by the respondents of having ever sold their land and were not in violation of the law. He further submitted that the Judge gave several reasons, with legal authorities, why the respondents' evidence was credible and also why he found that the appellants were not bona fide purchasers for value. Counsel prayed that these grounds as well as the entire appeal be dismissed with costs in this Court and the courts below. 20

Resolution of grounds 2 and 3 of the appeal

We agree that in determining whether the 1st to 6th appellants are bona fide purchasers for value without notice, this is a question of law.

5 We shall now briefly review the jurisprudence concerning fraud from various decisions. Fraud was defined by Justice Bart Katureebe, JSC in the case of Fredrick J. K Zaabwe vs Orient Bank Ltd & Others (supra) as an intentional perversion of the truth for the purpose of inducing another into reliance upon it, to part with some valuable thing belonging to him or to surrender a legal right. Fraud can also be a false representation of a matter of fact, whether by word or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that that other shall act upon it to his/ her legal injury. It is anything calculated to deceive, whether by ^a single act or combination, or by suppression of the truth, or suggestion of what is false, whether it is by direct falsehood, innuendo or gesture. It is also a generic term embracing all multifarious means which human ingenuity can get advantage over by false suggestions or by suppression of the truth, and includes all surprise, trick, cunning, dissembling and unfair way by which another is cheated. In that regard, "bad faith" and "fraud" are synonymous of dishonesty, infidelity, unfaithfulness, perfidy, unfairness. 10 '15 20

In Kampala Bottlers (U) Ltd vs Damanico (U) Ltd, SCCA No. 22 of 1992 (unreported), the Supreme Court held that fraud must be attributed either directly or by necessary implication to the transferee, that is, the transferee must be guilty of some fraudulent act or must know of such act by somebody else and taken advantage of such act. In B. E. A Timber

Co. vs Inder Singh Gill [1959] E. A 463, Forbes V. P held, among other things, that fraudulent acts may be inferred from acts of intent.

In J. W Kazoora vs Rukuba, SCCA No. L3 of 1992, Oder, JSC (as he then was) held that allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities. (Also see: Hannington Njuki vs George William Musisi [1999] KALR 783)

In light of the aforementioned principles, we note that in the counter claim of the respondents filed on 26th February 2009 paragraph 2, it is pleaded; 10

"2. Particulars of Fraud:

(a) Paragraph 5 of the plaint in H. C. C. S No. 202 OF 2002 is repeated

- (b) Kotimbo Ntombala had never acquired the suit land from Bernord Konankole and Busalobwe. Consequently he had no right to subdivide the suit land and make transfers in favour of other parties as reflected in annexure "A" to the amended plaint. 15
- (c) The plaintiffs had actual and/ or constructive notice of the defendants' interest in the suit land since the defendants were in occupation of the suit land and all developments thereon belonged to the defendants. The plaintiff's mode entries on the title to the suit land contrary to the defendants' interest."

Paragraph 5 of the plaint in H. C. C. S No. 202 OF 2002 states the particulars of fraud as follows:

- (a) Forging the application for consent to transfer document 25
- (b) Forging the signature of the 2nd plaintiff on the document
- (c) Forging the right thumb mark of the 1st plaintiff
- (d) Presenting the forged document

It would appear to us that the learned first appellate Judge did not consider these particulars as pleaded or if he did, he did so without specific reference to them in his judgment.

The learned first appellate Judge, on the authority of *Mokulo International Ltd vs His Eminence Cardinal Nsubugo and Another* [1982] HCB 77, for the proposition that a Court of Law cannot sanction what is illegal and when illegality is brought to the attention of the Court, the same overrides all questions of pleading (at page 52 of the record) found that:

"... All the evidence adduced by Koribwende, Ntomboro and Kokondo who were players in the transfer to Ntomboro and Kokondo is contradictory and display obvious illegalities that in my view was within the knowledge of these witnesses. It was fraud on the part of Ntomboro and Kokondo and it was grossly irregular for Koribwende, ^a Principal Registrar of Titles to sanction and effect such illegal and fraudulent transaction..." 15 20

The learned first appellate Judge in his Judgment (at Page 53-54 of the record) nullified the transaction between the original owners of the suit land (Kanyankole and Busalabwe now respondents) and Ntambara and Kakondo (now appellants) for the reasons that there was no proof of sale, no proof of valuable consideration and that no agreement whether

oral or written had been proved. He then went on further to hold (at Page 53 of the record)

"... There was no effectual transfer of title and there was irregular and illegal transfer. That puts to the end the case of the 1st and 8th Respondent..."

The learned Judge further found that the names of Ntambara and Kakondo had been entered on the title without any registered instrument number which amounted to a fraudulent act. He then went on to further find that appellants 1 to 6 could not be bona fide purchasers for value as they had to show that they had obtained a valid certificate of title from a registered proprietor who had not previously obtained it through "... fraud or otherwise..." The learned Judge further held 10 15

"... Ntambaro and Kakondo's transfer from Kanyankore and Busolobwe without a transfer instrument was invalid and therefore could not pass a valid title to any of the 7 to 6 respondents..."

In our view, it is debatable as to whether the fraud as stated satisfies the legal standard of beyond a mere balance of probabilities. We agree with counsel for the appellants that the lack of an instrument number was never an issue that arose at trial or in the pleadings. That notwithstanding, Annexure "A" relied upon by the learned first appellate Judge was an Owner's copy (also referred to as a duplicate certificate) which did not state an instrument number against the entry of the names of Ntambara and Kakondo whereas the Registry copy (page 94 of the record) contained an instrument number (Instrument No 264317). It is therefore not proved in our finding that this omission of the instrument number on the duplicate certificate of title amounts to fraud and or will in law fail to legally confer title on a transferee.

We further find that the evidence does not support the conclusion reached by the first appellate Court that there was no agreement of sale as the record points to an agreement to sell land between the original owners (Kanyankole and Busalabwe) of the suit land, and Ntambara and

- Kakondo (the first buyers) which was based on mutual trust and understanding. This perhaps explains the absence of written sale agreements and is not uncommon in real life. An agreement that is not written but is founded on mutual trust is an oral contract. In any event there is on record a signed transfer by both parties. According to the two 10
- ^finger print experts who testified at the trial (PW9 and DW4) Kanyankore's thumb print on the disputed transfer forms and his control sample were identical, indicating a possible sale by Kanyankore as the evidence shows that he appended his thumb to the transfer document. How the said thumb print actually came to be appended to the transfer 15
- form we shall not know as Kanyankole in the trial Court was not able to testify as he was reported to appear confused and unable to follow the proceedings (probably because of his advanced age of 85 at the time). However what is clear is that Kanyankore's thumb print on the transfer, was not forged as had been pleaded. 20
- There is some contest as to whether Busalabwe sold his portion of the land and signed the transfer of the suit land. Busalabwe denies that he sold his portion of the suit land in his evidence and it is pleaded that his 25

signature, like the thumb print of his father Kanyankole, was also forged. However Busalabwe did not testify as to how his signature was forged as pleaded in the plaint. This falls short of the test in the Kazooru Case (Supra) where fraud must not only be pleaded but also proved to ^a standard that is more than just a mere balance of probabilities. The evidence on record, on the other hand, shows that Busalabwe's signature is on the transfer. Kakondo lthe 8'h Appellant) testified that he and Busalabwe signed the transfer forms, which Busalabwe himself brought for signature (page 139 of the record). Indeed it is true that Busalabwe's signature appears twice (not very identical) on the transfer form, as the first appellate Judge points out. But in our finding, at least one of the said signatures actually looks like the Busalabwe's signature as shown in the lease agreement by the Uganda Land Commission attached to the Registry copy of the Certificate of title (page 97 of the record) which is not in contest.

On the issue of purchase price, even though Kakondo did not recall the actual amount of money, he testified that he paid a purchase price of between 4-5 million shillings. Ntambala who with Kakondo jointly bought Busalabwe's portion of the suit land also testified that the purchase price was Shs 4,000,000/=.

It follows therefore that in law, there is nothing to show that there was no enforceable oral contract between Kanyankole and Busalabwe on the one hand and Ntambala and Kakondo on the other; or that the suit land was not paid for. There is equally nothing in law to show that the transfer of the ownership/proprietorship of the suit land was tainted with fraud as alleged. It is therefore our finding that that the 1-6th

appellants were clearly bona fide purchasers for value of the suit land.

In the premises, we uphold grounds 2 and 3.

Final Result

- 1. Grounds 1 and 4 fail and are dismissed;
- 2. Grounds 2 and 3 succeed.
- 5 This appeal succeeds in part. However the effect of the above finding is that the Judgment of the learned appellate Judge is set aside and the Judgment of the Chief Magistrates Court of Mpigi is reinstated. We note however that Order number 4 in the Judgment of the Chief Magistrate's Judgment (paragraph 4 of the Decree) the Chief Magistrate awarded damages to the first to the sixth appellants but no amount was mentioned. This was clearly a slip and or omission which was not part of the grounds in the first or second appeal and should be rectified at the Chief Magistrates Court. IO

Save for the above observation and for the avoidance of doubt and in line with the Judgment of the Chief Magistrate and the prayers in this appeal and the plaint, we find and order; 1-5

- 1. That the disputed land belongs to the first to sixth appellants;

- 2. That a permanent injunction issue against all the respondents and their agents restricting them from further trespassing on the said suit land;
- 3. That an Order evicting all the respondents do issue and
- 4. All appellants (first to eighth) are awarded costs of this appeal and the Courts below.

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Dated at Kampala, this 14th day of August2017

CE REMMY KASULE HON.

Justice of Appeal

HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

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HON. LADY JUSTICE ELIZABETH MUSOKE

Justice of Appeal

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