

UGANDA / JUDGMENT

Bwambale and Another v Yosafati Matte and Others (Civil Appeal No. 58/02) [2005] UGCA 101 (26 May 2005)

[2005] UGCA 101

COURT

Court of Appeal of Uganda

BEFORE

Byamugisha, JA, Mpagi-Bahigeine, JA, Twinomujuni,
JA

CASE / FILE NUMBER

Civil Appeal No. 58/02

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: *HON LADY JUSTICE A. E. N. MPAGI.-BAHIGEINE, JA HON. MR JUSTICE A.
TWINOMUJUNI, JA HON. LADY JUSTICE C. K. BYAMUGISHA, JA*

CIVIL APPEAL NQ.58/02

BETWEEN

1. COSTA BWAMBALE

2. JOSEPH MATTE APPELLANTS

AND

1. YOSAFATI MATTE 2. TIMOTHY BALUKU 3. DAUDI RUSAYA 4. DAUDI BYENGONZI
RESPONDENTS

[Appeal from the judgement/decree of the High court of Uganda at Fort Portal (Mwangusya J)]

*Dated 10th May 2001 in Civil Appeal No. DR 17/99 arising from the judgement and decree of the
Chief Magistrate dated the 18th October 1999 in Civil Suit No. DR MFP 9/90]*

JUDGEMENT OF BYAMUGISHA, JA

This is a second appeal from the decision of the High Court wherein in the exercise of its
appellate jurisdiction, allowed the respondents appeal.

The facts of this appeal are not in dispute. The second appellant, Joseph Matte, is the registered proprietor of land comprised in Bunyangabu Block 84 Plot 11 at Kihyo Busongora Kasese District. He became registered on the 3rd January 1985 under Instrument No.221212. The respondents or at least some of them claimed that they were occupying the same land at the time he became registered. Sometime in 1988 or thereabouts, the respondents applied to Uganda Land Commission for a grant of leases of their respective holdings. When a surveyor was brought to carry out the survey, he found that the land was already surveyed. In the meantime the second appellant brought a tractor to clear the land under the supervision of the first appellant. It seems some crops belonging to the respondents were destroyed. They, therefore, instituted a suit in the Chief Magistrate's court at Kasese, alleging that the first appellant together with his agents had trespassed on the land, without their consent. They also claimed that in the process he cleared part of the land, planted crops and converted their land into his own use. The plaint contained a list of damaged crops and their estimated monetary value for which they claimed special and general damages plus interest.

The respondents further alleged in the plaint that the second appellant's acquisition of the suit land and his subsequent registration was tainted with fraud. The particulars of fraud were stated in paragraph 8 of the amended plaint to be the following:-

- "(a) No inspection was carried out;
- (b) No survey was carried out;
- (c) The proper procedures were not followed; and
- (d) The 2nd second defendant registered himself in order to defeat the respondents' unregistered interest. A letter from District Administrator office to that effect is attached hereto as Annexure "G"

The respondents prayed for an injunction to restrain the first appellant and his agents from committing further acts of trespass, a declaration that the suit land legally and equitably belongs to them and an order for the cancellation of the second appellant's name from the register.

The appellants filed a joint written statement of defence in which they denied the averments contained in the plaint. They contended that there were no crops or developments on the land in issue and stated that they opened virgin land which was covered with natural vegetation. It was further averred that the respondents had freely admitted that the land in question belonged to the second appellant. There was also some averment in paragraph 3 of the written statement of defence that the suit filed by the respondents was barred by a previous suit that was filed in Kicwamba sub-county between the same parties and was still pending appeal in the Chief Magistrate's court.

At the trial, the following issues were framed for court's determination namely:

- **1. Whether title to Bunyangabu Block 84 Plot 11 was fraudulently acquired?**

- 2. Whether the plaintiffs have equitable interest in the land?
- 3 Whether the defendants are liable for destruction of the plaintiffs' crops?
- 4. What damages to be awarded to the plaintiffs and
- 5. What remedies are available to the plaintiffs?

The trial court answered all the issues in the negative and dismissed the suit with costs to the appellants. Being dissatisfied with the decision, they lodged an appeal in the High Court under the following grounds of appeal

1. **That the learned Chief Magistrate erred in law and fact in holding that the appellants had no interest in land prior to the respondent's registration.**
 2. **The trial Magistrate erred in law in holding that there was no fraud on the part of the respondent.**
 3. **The trial Magistrate evaluated the evidence before her with bias towards the respondent.**
- On appeal, counsel for the appellant argued the first two grounds of appeal. He abandoned the third one. The appellate judge in allowing the first ground of appeal stated as follows: -

¹I have studied the evidence on record and apart from Timothy Buluku (P. W. I) who testified that he started living in the area in 1982 and purchased some land in 1986 (i.e. after the respondent had acquired his title) the rest of the appellants who testified at the trial stated that they had lived on the land in dispute from the year 1962 during the Rwenzururu uprising. Sadi Kanyatna (P. W. S)⁹ on elder who assisted them to acquire the land testified to that fact. Even*

Timothy Baluku who acquired his land by purchase in 1986 bought from person's whom he found living on the land when he went to the area in 1982. So contrary to the defendant's testimony that he acquired empty land there was overwhelming evidence that the appellants had lived on the land and had unregistered interest which was defeated by registration of the respondent's interest on the same land. There is, therefore merit in the first ground of appeal which is allowed".

On whether the appellant had procured his registration by fraud, the appellate judge referred to a number of authorities and the provision of section 176 of the **Registration of Titles Act** and concluded as follows: -

*"As I have already stated the appellants have been in the area since 1962 and not barely two years and there is overwhelming evidence of their presence in form of their homes and crops. So for someone to acquire the area as empty land must have done so fraudulently and this fraudulent acquisition is attributable to him and no one else because he is the one who applied for the land as an empty area in the first place and was insisting that it was empty even at the time of trial when there was evidence that the land was under occupation". *.*

He allowed the appeal with costs to the respondents in the High Court and in the court below. He ordered for the cancellation of the second appellant's name from the register of the suit land hence the instant appeal.

The memorandum of appeal filed on their behalf contains the following grounds:

1. **The Learned judge erred in law and in fact when he failed to properly evaluate the evidence on record thereby coming to a wrong conclusion.**
- 2 **The learned judge erred in law and in fact when in evaluating the evidence he considered the evidence selectively and not as a whole.**
- 3 **The learned judge erred in law and in fact when he found that the respondents had unregistered interest in the disputed land.**
4. The learned judge erred in law and in fact in holding that the disputed land belonged to the respondents.
5. The learned judge erred in law and fact when he found that the respondents had lived on the disputed land from 1962.
6. The learned judge erred in law and in fact when he found that the respondents had, proved their occupancy of the disputed land.
7. The learned judge erred in-law and in fact when he held that the second appellant obtained registration through fraud.
8. The learned judge erred in law and in fact when he ordered for the cancellation of the second appellant's certificate of title.
9. The learned judge erred in law and in fact when he failed to take into account the size of the land and the respective parcels occupied by the parties, in relation to the land registered.
10. The Learned judge erred in law and fact when he applied the wrong Law to the facts thereby drawing a wrong conclusion.
11. The learned judge erred in law and fact when in reaching his decision he engaged in conjuncture and speculation thereby basing his decision on erroneous assumptions not supported by the evidence on record.

It was the appellants' prayer that the judgement /Decree of the High Court dated 10th May 2001 in favour of the respondents against the appellants be set aside and the appeal be allowed with costs to the appellants.

an< At the hearing of the appeal, Mr. Mbabazi who represented the appellants combined the grounds d I will treat them in like manner. He first argued grounds 1,2 and 3 together. The gist of these grounds is the evaluation of evidence by the appellate judge. Learned counsel submitted that the testimony of Baluku (P. W.1) was to the effect that he bought his land in 1986. This was after the

second appellant had already acquired his registered interest. If the appellate judge had evaluated the evidence properly, counsel argued, he would have disallowed the claim. The other Limb of his argument was that the second respondent claimed to own 300 acres of land. The second appellant owned 431.9 hectares of land according to the certificate of title. Mr. Mbabazi submitted that the appellate Judge ought to have subtracted the 300 acres from the 432.9 hectares. As for the 4th respondent, the evidence given by his brother, Timeteo Bagenyi (PW3) was to the effect that he owned 50 acres of land. Again counsel submitted that these acres should have been deducted from the second appellant's acreage. He also pointed that the appellate judge made a declaration in favour of a deceased person the fourth respondent.

In reply, Mr. Muhimbura learned counsel for the respondents supported the appellate judge's evaluation of the evidence. He submitted that he arrived at the correct decision. He argued that other than the second respondent, who acquired land by purchase in 1986, the rest acquired their land in 1962. He claimed that this evidence was not challenged. He contended that the size of the land was not relevant.

In order to resolve the issue in the first grounds, I think it is necessary to evaluate the evidence that was adduced in the lower court. The plaintiffs called a total of ⁵ witnesses namely Timothy Baluku (P. W.1), Baguma Vicent (P. W.2), Timeteo Bagenyi (P. W.3), Yohana Matte (P. W.4) and Kanyama Saddi (P. W.5). Baluku's testimony was to the effect that he came to stay in the area in 1982. He started buying land in 1986 from people that he did not name. This purchase obviously was after the second appellant had already been registered as proprietor. His total acreage was 300. He had no sale agreements because the documents were burnt. Bagenyi on his part testified that he came in the area in 1962 together with his brother Daudi Bengozi (now deceased). They acquired 50 acres of land. He too claimed to have bought *Kibanja* but the documents or the agreements of purchase were burnt. Yohana Matte testified that he knew all the respondents as owners of land in the area now under dispute. The last witness Kanyama stated that he was an elder and knew all the respondents. He stated that as an elder he had the responsibility of allocating land to the respondents. He also testified that he did not know the second appellant.

It is clear to me from the above summarised evidence that apart from the second respondent, the rest of the respondents did not attempt to prove their claim. Therefore, none of them can be said to have been deprived of land by the second appellant's acquisition. In order for them to succeed they had to bring themselves within the ambit of section 176 of the Registration of Titles Act, The section provides as follows:-.

(i) No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases

(a) the case of ^a mortgagee as against a mortgagor in default;

(b) the case of ^a lessor as against a lessee in default;

(c) the case of ^a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as ^a transferee bonafide for value from or through a person so registered through fraud;

(d) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or against the registered proprietor of that land or its boundaries as against the registered proprietor of that other land - not being a transferee of the land bonafide for value;

(e) the case of ^a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land;

and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be absolute bar and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding".

The provisions of this section have been judicially held in numerous authorities to operate as a bar against ejectment of a registered proprietor unless the case falls under any of the above cases.

The above section has to be read together with section 59 of the same Act. The section states as follows:-

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

** At the time material to this appeal, the law governing the grant of leases; on public land was the/ now repealed Land-Reform Decree. The **section 3** of the Decree provided as follows:- /

"(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 a lease of any such land not granted by the commission to any person, including the holder of the tenancy in accordance with this Decree", (emphasis* added)

The legal effect of these provisions is that the Uganda Land Commission as the controlling authority had the power to lease the land in question to anyone and any customary land holder/occupying the same land would be entitled to compensation for the developments. The respondents in filing their claims were not seeking any compensation for their developments but rather an eviction order among other reliefs. They were of course alleging that the second appellant obtained registration by fraud for lack of inspection and lack of surveying the land. The

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provisions of section 59 (supra) seem to be clear in that a title issued in bringing land under the operation of the Act cannot be impeached because of irregularities or informalities. I do not think that the particulars of fraud pleaded in the amended plaint would be used to defect the registered interest.

Furthermore the provision of section 178 of the RTA also has provision for payment of compensation to a person who is deprived of land as a consequence of fraud or through the bringing of the land under the operation of the Act. The section provides as follows:-

*"Any person deprived of land or of any estate or interest in land in consequence of fraud or through the bringing, of the land under the operation of this Act or by registration of any other person as proprietor of the land, estate or interest or in consequence of any error or misdescription in any registered certificate of title or in any entry or memorial in the Register Book may bring and prosecute an action for the recovery of damages against a person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the estate or interest through fraud, error or misdescription but-

- *(a) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of the person to bring such land under the operation of this Act or to be registered as proprietor of the land, estate or interest or in any instrument signed by him or her, that person shall upon a transfer of the land bona fide for value cease to be liable for payment of damage which but for the transfer might have been recovered been recovered from him or her under the provisions herein contained; and in the last mentioned

case, and also in case the person against whom the action for damages is directed to be brought as aforesaid is dead or has been adjudged bankrupt or cannot be found within the jurisdiction of the High Court, then and any such damages with costs of action may be recovered from the Government; and*

- *(b) in estimating the damages the value of all buildings and other* improvements *erected or made subsequently to the deprivation shall be excluded"* (emphasis added)

The above provisions are clear in that a person who is deprived of land as a result of bringing it under the operation of the Act as happened in the matter now before us; the person who is affected is entitled to compensation. It seems to me that on a proper reading of the provisions of this section that fraud is not available as a ground to a person who is deprived of land that is brought under the operation of the RTA. It seems such a person by merely occupying the land could not be said to have an interest in land which the law recognises or which was capable of being registered as a charge in the Register Book. The situation of course seems to have been changed by Article 237 of the Constitution and the Land Act.

[Therefore, even if one was to accept that there was no inspection or survey of the land, this in itself would not lead to the cancellation of a title. With respect, I think the appellate judge was wrong to find as he did that failure to carry out survey of the land and inspection was intended by the second appellant to defeat the unregistered interest of the respondents, in any case there was evidence that the land was actually surveyed.

Baguma Vicent (P. W.2) who was stated to be a surveyor testified that when he requested to survey the same piece of land in 1989 he found mark stones and he had to stop the exercise. If the appellate judge had considered this piece of evidence he would have found that the land was surveyed- before the second appellant was registered as a proprietor thereof. Consequently I would allow the grounds of appeal.

I will now deal with grounds 8 and 9. These two grounds concerned the appellate judge's decision in ordering the cancellation of the certificate of title. In submitting on this ground Mr. Mbabazi stated that the High Court had no power to order the cancellation of the certificate of title because the case began in the Chief Magistrate's court. He argued that the memorandum of appeal that was filed in High Court did not contain a prayer for cancellation of title. He also pointed out that before ordering cancellation, the appellate judge should have first considered the size of each claim to be deducted from the second appellant's title in accordance with section 177 of the RTA. Lastly he submitted that on an appellate level the High Court could not order cancellation of title.

Mr. Muhimbura did not agree. He supported the appellate judge's decisions to cancel the certificate of title because it was obtained fraudulently.

I do not agree with the submissions of Mr. Mbabazi that the appellate judge had no power to order the cancellation of the certificate of title. The section under which the cancellation was ordered gives the power to the High Court to make such an order. I think it is

immaterial whether the order is made at the trial or appellate level. However, the order made by the appellate judge was incomplete. The section gives power to the High Court to direct cancellation of certificate or entry and make a substitution of the certificate. The section states as follows:-

"Upon the recovery of any land, estate or interest by any proceeding from the registered proprietor thereof the High Court may in any case in which the proceedings is not expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order".*

While the appellate judge was within the powers conferred by the above section to order the cancellation of the second appellant's certificate after being satisfied that fraud was proved, he was wrong to de-register the land all together. It seems fairly obvious to me that once land has been brought under the operation of the RTA, it cannot be de-registered. The respondents had no lease offer from the Land Commission. All that they claimed to have were developments on the land for which they could have been paid compensation. To order for cancellation, it had to be proved that the second appellant had knowledge actual or constructive about the interests of any of the respondents and ignored it. Even if it could be said that the respondents were in occupation of the land, the Commission had the power to lease it. There was no evidence to show - that before the second appellant applied for the lease, the respondents or any of them had also applied for the grant of a lease on the same piece of land. There was no fraud proved and as such the appellate judge erred in ordering the cancellation of title. Consequently I would allow the grounds of appeal.

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Grounds 5 and 6 complained that the appellate judge erred in finding that all the respondents had been in occupation of the suit land since 1962. These two grounds have already been dealt with earlier in this judgement when I dealt with the evaluation of the evidence. From the evidence on record, the appellate judge could not have found that all the respondents had been in occupation of the land since 1962. He seemed to have been persuaded by the testimony of P. W.5 who testified that he settled the respondents on the land. There was no evidence from the first respondent.

The second respondent settled in the area in 1982 and claimed that he started purchasing land in 1986. The 3rd respondent died on a date that was not disclosed and the 4th did not testify to prove his claim to the land. ¹ therefore agree with the submissions of counsel for the appellant that the learned judge erred in finding that all the respondents settled in the land in 1962 except Timothy Baluku. These grounds would succeed.

In the result, I would allow the appeal. The judgement and orders of the High Court would be set aside. The judgement and order of the Chief Magistrate would be reinstated. The appellants would have the costs of the action both here and in the courts below.

JUDGMENT OF A. E. N. MPAGI-BAHIGEINE, JA.

I have read the draft judgement of C. K. Byamugisha, JA. ¹ entirely agree with it and have nothing to add.

As Twinomujuni, JA, also agrees, the appeal succeeds with orders as proposed by Byamugisha, JA.

JUDGMENT OF TWINOMUJUNI, JA

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^I have read in draft the judgment of Hon. Lady Justice C. K. Byamugisha. ¹ agree with her including the orders proposed by her. ^I have nothing useful to add.

Dated at Kampala this 26th day of May 2005.

C. K. Byamugisha JUSTICE OF APPEAL

A. E. N. Mpagi-Bahigeine JUSTICE OF APPEAL

Hon. Justice Amos Twinomujuni JUSTICE OF APPEAL

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