THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 217 OF 2013

1. KINALWA FRED

2. ANGELLO KASIRYE.....APPELLANTS

VERSUS

ALBERT BANDA KAMULEGEYA.....RESPONDENT

CORAM:

HON. JUSTICE S.B.K. KAVUMA, DCJ (E)

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA JA

HON. MR. JUSTICE F.M.S EGONDA NTENDE JA

JUDGMENT

This is an appeal from the judgment of the High Court (Owiny Dollo J.) (As he then was) delivered on 27 August 2017.

Background

The Respondent filed a suit against the appellants jointly and severally for recovery of eleven acres of land that he claimed the appellants curved out of his land fraudulently and without his consent or knowledge. The facts as found by learned trial judge were that respondent, who was the plaintiff in the trial court, was the registered proprietor of the lands comprised in Mengo Block 306, Plot 127 and Block 306, Plot 222 at Kireka Bira, Mumyuka.

On 27 January 2006, he sold five acres of this land to the 2nd appellant. He handed the two titles over to the appellants for purposes of carving out the five acres. Instead the appellants fraudulently and without the respondent's consent or knowledge carved out eleven more acres therefrom, making a total of sixteen acres in all and registered them in the 2nd appellant's name.

The learned trial Judged gave judgment for the respondent and issued an order directing the Registrar of Lands to cancel the registration of the land comprised in Block 306 Plot 1297 at Kireka Bira, registered in the name of the 2nd appellant, and restoring the name of the respondent on the certificate as owner. The learned trial Judge also: ordered the appellants to pay shs. 10m/= (ten million only) as damages for trespass and stress caused to the respondent; issued a permanent injunction restraining the 2nd appellant, his agents, assignees, and or anyone acting under him, from further trespassing on the suit land; issued a declaration that the 2nd appellant had no claim onto the suit land; and ordered that the 2nd appellant vacates the said land and removes any property that could be on the suit land. He further ordered the appellants to pay costs of the suit.

The learned trial Judge also dismissed the counter-claim against the respondent for trespass, lodgment of a caveat on the suit land, and causing the prosecution of the appellants for fraud.

The appellants have appealed against the whole of the above-mentioned decision on the following grounds:

1. That the learned Judge erred in law and in fact in finding and holding that the 2nd appellant had no claim at all in the suit land comprised in Busiro Block 3026 Plot 1297 at Kireka for which he had paid valuable consideration.
2. The learned Judge erred in law and in fact in finding and holding that the respondent had proved fraud with regard to the transfer of the suit land.
3. The Learned Judge erred in law and in fact in finding and holding that the 1st appellant was the agent of the 2nd appellant in the transaction that culminated in the transfer of the suit land to the 2nd appellant.
4. The Learned Judge erred in law and in fact when he directed the Registrar of Titles to cancel the registration of the suit land comprised in Busiro Block 306 Plot 1297 at Kireka BIra in the names of the 2nd appellant, and restores the name of the respondent on the certificate of title as proprietor.
5. The Learned Judge erred in law and in fact when he ignored the appellant's Exhibits (the two cheques issued to the respondent by the 2nd appellant in part payment of the suit land).
6. The Learned trial Judge erred in law and in fact in awarding damages in the sum of shs. 10m/= (ten million only) to the Respondent for trespass on his land and stress he had suffered as a consequence thereof.
7. The learned Judge erred in law and in fact when he failed to properly evaluate the evidence before the court

thereby coming to the wrong conclusions and occasioning a miscarriage of justice.

8. The learned Judge erred in law and in fact in dismissing the appellants' counterclaim.

At the hearing, Counsel Kimuli Moses appeared for the appellants and Counsels Hilary Roger Nzige and Kavuma Geoffrey appeared for the respondent.

Before we resolve the grounds of appeal, we have reminded ourselves that as a first appellate Court, we have a duty to re-evaluate the evidence and come to our own conclusion regarding the matter before us in accordance with *Rule 30* of *the Court of Appeal Rules*. We have to subject the evidence as a whole to a fresh and exhaustive scrutiny (see the case of *Pandya v. R, [1957] EA 336)*.

Counsel for the appellant argued grounds 1,2,3,5 and 7 together. He submitted that the learned trial Judge failed in his duty to properly evaluate the evidence on record, thereby arriving at a wrong conclusion that the 2nd appellant had no claim at all in the suit land. Indeed the gist of the said grounds is that the learned trial Judge erred in finding that the 2nd appellant had no claim at all on the suit land. According to Counsel, the appellant bought the suit land and the transaction was concluded on the phone. The respondent was paid by cheques, which were exhibited as D2, DE2 and DE3. The money was remitted to the 2nd appellant's account. There was nothing strange about the cheques written by the 2nd appellant.

Counsel also argued that the 2nd appellant took possession of the suit land in 2007 and from 2007 up to 2012, there was no complaint at all until after 5 years. He therefore submitted that the alleged fraud could not stand.

We note that the 2nd appellant's claim on the suit land is based on the cheques alleged to have been paid to the respondent, the transfer allegedly signed by the respondent for 16 acres, and the 2nd appellant's occupation of the land. We further note that although there is no dispute regarding the first sale of five acres, the transaction is relevant in indicating the differences in the way two sales were conducted.

We now turn to the evidence on record concerning the sale of 11 acres and its payment therefor. The 1st appellant testified as witness DW1 and stated that he introduced the 2nd appellant to the respondent when Walulya (DW3) and the respondent approached him and said that they had land to sell. The 2nd appellant then bought the five acres from the respondent. There was a sale agreement written by the respondent and witnessed by a number of people. All the parties and witnesses appended their respective signatures to the sale agreement.

For the settlement of the outstanding installments, the 2nd appellant testified that the respondent used to come personally to the office of the 2nd appellant in Nateete and the payment would be made to him and endorsed on the agreement. The 2nd payment made to the respondent on 10 February 2006 was

acknowledged by the respondent in writing and witnessed as demonstrated by Ex. PE1.

All the parties agree that the respondent sold to the 2nd appellant 5 acres of his land comprised in Block 306 Plot 222 land at Bira, Mumyuka, Busiro, and measuring 9.422hectares on 27 January 2006. By consent of the parties, the agreement of sale was tendered as Exh. PE1. The respondent testified that the 2nd appellant paid him for the land in two installments of shs. 6,000,000/= and shs. 3,000,000/=. He gave out the title to the 2nd appellant, together with a mutation and transfer form to carve out the five acres.

The learned trial judge found that there was no dispute about the sale of the initial five acres of land by the respondent to the 2nd appellant.

Regarding the sale agreement of eleven acres, we observe that it was conducted in casual manner compared to how the parties conducted the first sale of 5 acres. This casual manner raises serious questions about the genuineness of the whole transaction. Counsel for the appellant has conceded that there was no written agreement because the parties trusted one another. In fact, according to Counsel, the agreement was concluded on phone.

We also observe that it is the 1st appellant who insisted that there was a written agreement that he allegedly signed on behalf of the respondent. The 2nd appellant denies the existence of the agreement. The evidence of the appellants is therefore contradictory on the question of the existence of the written

agreement for the sale of eleven acres. It is also contradictory about whether the respondent was involved in the transaction.

The first appellant (DW1) testified that he knew the respondent, through James Walulya his nephew. At the time, the respondent had a case in court and needed money to pay the lawyers in that case. He therefore sold five acres to the 2nd appellant but the money was not enough so the respondent agreed to sell 11 acres more at 3.5 million shillings per acre. He introduced the 2nd appellant to the respondent when Walulya (DW3) and the respondent approached him and said that they had land to sell. The 2nd appellant then bought the five acres. Subsequently, in May 2006, the respondent indicated that he wished to sell more land, hence the sale of the eleven acres. In this transaction, he acted for the respondent as surveyor, although he was not a surveyor but a surveyor assistant.

The 2nd appellant and the respondent agreed on the purchase of 11 acres. The negotiations took place in the 2nd defendant's office in Nateete. No payment was made after the negotiations because the 2nd appellant had no money. He made the agreement with the 2nd appellant in the presence of Walulya. He initially states that for this sale, the respondent sent him and Walulya to the 2nd appellant, who gave them a cheque for shs. 12.5 m/= (twelve and half million only) in the name of the respondent drawn on Stanbic Bank Nakivubo Branch. He gave the cheque to the respondent. The 2nd appellant subsequently gave them another cheque for shs. 10m/= in the name of the respondent, drawn on Tropical Bank

Limited, Kampala Branch. He tendered a photocopy of a sale agreement for the eleven acres and stated that the wife of the 2nd appellant made the agreement of sale. On his part, he signed as surveyor for the respondent. He handed over all the money indicated in the agreement to the respondent in the presence of James Walulya. He then carved out the land in the presence of the respondent and Walulya. He handed the title to Walulya. He also stated that he handed over the title to the respondent in 2007 and he got a transfer form from him for 16 acres.

The 1st appellant then contradicted himself regarding the person to whom he handed the title, and on whether the respondent participated in the transaction. In the end, he stated that it is he, who handled the transaction orally on behalf of the respondent because the respondent trusted him.

On his part, the 2nd appellant testified that he never met the respondent for the sale of eleven acres, but met him later when he called the respondent on the phone, and the respondent came to his office in Mutundwe and talked about the payments the 2nd appellant made through the 1st appellant. The respondent then transferred the titles into his (2nd appellant's) names. After the transfers had been made, the 1st appellant came back to him and claimed that the respondent was claiming that he had not been paid. According to the 2nd appellant, the money had been remitted to the respondent's account.

According to Walulya, he handed the cheques for payment of the land to the respondent but there was no written agreement.

The respondent categorically denied receiving payment for the 11 acres. He testified that he sold five acres of mailo land comprised in Block 306 Plot 222 at Bira, Mumyuka, Busiro Kireka, Wakiso District measuring 9.4222 hectares at to the 2nd appellant in 2006. He wrote the agreement of sale and he and the 2nd appellant signed it. Witnesses included the 1st appellant and Walulya. The agreement was tendered as an exhibit PE1. The respondent later gave the certificate of title to the 1st appellant as surveyor for the 2nd appellant to carve out the five acres. He also gave him a signed mutation form. The 1st appellant remained with the respondent's certificate of title until the year 2011. He resisted handing it back to the respondent until he reported the matter to the O/C Jinja Road Police. It is then that he discovered that more land than five acres had been taken from his land. He denied entering into any agreement to sell eleven acres to the 2nd appellant. He saw a purported agreement for the first time in 2011, when he confronted the 2nd appellant. The agreement indicated that it is the 1st appellant who sold to the 2nd appellant the eleven acres. He made a search in the Land Office and found two titles in the name of the 2nd appellant, namely Block 306-10 Plot 222 measuring 1.149 hectares and Block 306 Plot 1297 measuring 5.170 hectares. Both titles were transferred on 5 October 2007. Photocopies of both titles were tendered in evidence as Exh. CE1 and CE2.

PW2 D/IP Matovu Nathan confirmed that the respondent reported to him illegal transfer of his eleven acres out of Block 306 by the 2nd appellant and the 1st appellant vide CRB 619/2012.

He summoned both appellants and he recovered the original title from the 1st appellant and handed it over to the respondent. A criminal case against both appellants was ongoing at Nakawa Court.

The learned trial Judge found that the respondent knew the 1st appellant as the 2nd appellant's surveyor, when the 1st appellant processed the land the 2nd appellant had bought from the respondent's brother. He also found that the respondent and the 1st defendant were formally introduced to each other by James Walulya (DW3), when the respondent and James Walulya went to the 1st appellant and informed him that they had land to sell. The 1st appellant then introduced the 2nd appellant to the respondent with the result that the respondent sold five acres to the 2nd appellant. He stated and we quote:

"The testimonies of the defendants and Walulya (DW3) regarding the circumstances under which the transactions over the eleven acres were executed, are manifestly littered with serious discrepancies and contradictions as shown herein above. In fact the testimonies of the 1st Defendant and Walulya are first of all each respectively inconsistent, and then contradictory of each other's as well as the 2nd Defendant's. These inconsistencies, discrepancies, and contradictions render their evidence highly suspect. It is quite clear that at the time of initiating the transaction regarding the five acres, the Plaintiff was quite close to Walulya who introduced him to the 1st Defendant; following which the 1st Defendant then, in turn, introduced the two to the 2nd Defendant. Prior to this, the Plaintiff knew the 1st Defendant as the 2nd Defendant's surveyor, and had not done any business with him at all. From the evidence adduced by the Defendants regarding the last payment for the five acres, the circumstances

under which the transactions regarding the eleven acres were done, the irresistible conclusion I am compelled to reach is that from the time of the alleged payment of the last installment for the five acres, the 1st and 2nd defendants, together with James Walulya who had the ulterior motive to do so, carried out surreptious dealings with the Plaintiff's land. There is absolutely no evidence at all that the Plaintiff, after the sale of the five acres, cultivated any trust in the 1st Defendant or DW3 or that he authorized either of them to transact the sale of his land on his behalf. Accordingly, the balance of probability weighs heavily against the Defendants in their contention in this regard."

We have carefully examined the evidence and the findings of the learned trial judge. We consider that the evidence of the appellant is contradictory regarding the manner in which the sale was agreed on. It casts doubt about whether the 2nd appellant and the respondent met to discuss the sale of the eleven acres and whether they were ever of the same mind about the alleged sale.

The 1st appellant initially stated that the respondent sent him and Walulya to the 1st appellant to negotiate the sale. He then contradicted himself and stated that it is the respondent who indicated that he wished to sell 11 acres and the respondent and the 2nd appellant negotiated for the 11 acres in the 2nd appellant's office in Nateete and no payment was effected at the time of the negotiations because the 2nd appellant had no money.

He also lied to the police that he was a surveyor when he was only a survey assistant.

We find the 1st appellant's evidence incredible and unbelievable in light of the evidence of the respondent that the 1st appellant

remained with the title after the sale of five acres for some time and resisted giving it back to the respondent until 2011, when DIP Matovu Nathan (PW2) the Officer in Charge Jinja Road Police intervened and secured for him the title, after lodging a complaint that his title had been fraudulently transferred to the 2nd appellant vide file No. CRB 619/2012. In fact the prosecution of the appellants was ongoing at the time of the hearing of the matter in the High Court. It is PW2 who recovered the title from the 1st appellant and not the 1st appellant who handed it back to the respondent. It is at that time that the respondent discovered that the 2nd appellant had fraudulently converted eleven more acres of his land to his use.

The 2nd appellant and Walulya denied the existence of the agreement of the sale of eleven acres that the 1st appellant asserts to exist. The 2nd appellant testified that it is the 1st appellant and Walulya who asked him for shs. 5m and that they would give him eleven more acres at shs. 3.5m each. He agreed with this on phone with the respondent. It is the 1st appellant and Walulya who would pick the installment payments from him and take them to the respondent. He never met the respondent about the eleven acres. The respondent only came when he called him on phone and he came to his office in Mutundwe and they talked about the payments he had been making through the 1st appellant.

The 2nd appellant also denied writing any agreement with the respondent on the eleven acres, while the 1st appellant stated that there was an agreement signed by the 2nd appellant's wife.

According to Walulya, the respondent and the 2nd appellant first met on the land and then agreed on the purchase price. This contradicts the evidence of the 2nd appellant that he never met the respondent regarding the eleven acres and that he (the 2nd appellant) dealt with the 1st appellant and Walulya.

Walulya also contradicted the 1st appellant when he agreed with the 2nd appellant that they never made any agreement for the eleven acres as the transaction was based on trust.

These contradictions in the appellants' evidence raise credibility issues regarding their evidence. Like the learned trial Judge, we wonder why the respondent and the 2nd appellant departed from the meticulous procedure they followed during the sale of the first 5 acres of making a written agreement, signed by both parties, duly witnessed, and acknowledgement of all the payments in writing.

Given the meticulous nature in which the sale of the first five acres was handled, it is not credible that the respondent could have concluded the sale of eleven acres, which involved more money and land, over the phone. It is also significant that the respondent never signed any document with regard to this sale.

The appellants and the spouse of the 2nd appellant handled the transaction of sale in the absence of the respondent. The 1st appellant conceded that he and Walulya and the wife of the 1st appellant, Edith Nansamba witnessed the first agreement of five acres (Exh.PE1). For the eleven acres however, there were no witnesses to the agreement and receipt of the money. Edith

Nansamba, who wrote the agreement for the eleven acres, did not sign it.

The above evidence also contradicts the 1st appellant's assertion that he was acting as agent for the respondent. It is difficult to believe the assertion of the 1st appellant that he was acting as agent for the respondent in the circumstances of this case.

We believe the respondent's evidence that he first knew 1st appellant when he processed for the 2nd appellant land he bought from the respondent's brother, one John Johnson Kamulegeya (deceased).

Counsel for the respondent submitted that Exh. PE1, the sale agreement of the first five acres was endorsed by both the 2nd appellant and respondent and by the witnesses. According to Counsel, the sale of the 11 acres was endorsed on the agreement for the sale of the 5 acres on 14th April 2006. We find that the 2nd appellants evidence that there was no written agreement of sale contradicts this assertion. Furthermore, it is difficult to believe that the parties would endorse on a prior agreement concluded in April (Exh. PE1) concerning 5 acres of land, the sale of eleven acres transacted in May of the same year. This demonstrates further that the alleged agreement (Exh.CE1) tendered by the 1st appellant is a forgery.

We therefore conclude that the learned trial judge rightly found that there was no agreement of sale, written or oral, of the eleven acres by the respondent to the 2nd appellant and that the 1st appellant was not the agent of the respondent during the

transaction relating to the eleven acres. The above evidence further demonstrates that the alleged agreement (Exh.CE1) that the 1st appellant tendered as evidence of the transaction of sale of the eleven acres is a forgery, and we so find. In conclusion on this matter, we find that there were inconsistencies and contradictions in the evidence of the appellants and their witness, which could not be reconciled and which pointed to a fraudulent intention on the part of the appellants to deprive the respondent of his eleven acres.

We now turn to the transactions of payment and transfer of the eleven acres. The 1st appellant testified that the respondent gave him mutation forms for the 16 acres. He is however the one who wrote 16 acres in the mutation form. He further testified that he received the last installment for the eleven acres on 13 December 2007 but he transferred the land on 5th October 2007 before receiving full payment for the land (Exh. CE1).

We find it strange that the 1st appellant would transfer the eleven acres to the 2nd appellant, without first ensuring that the respondent, for who he allegedly acted as agent, received full payment. The 1st appellant did not give a valid explanation regarding his actions in this regard. We consider this to be another pointer to the fraudulent nature of the transaction and to the fact that the 1st appellant was not acting as agent for the respondent.

With regard to how the land was surveyed and transferred, the 2nd appellant testified that at the stage of carving out the land, he was not in touch with the respondent because a transfer had

been signed. Yet the 1st appellant testified that he surveyed the land in the presence of the respondent.

According to Walulya, the land was surveyed when the respondent was present. The respondent testified that he gave the mutation form to the appellants when they bought the 5 acres (Exh. PE1) in April 2006.

We do not believe the 1st appellant that the land was surveyed to carve out the eleven acres in the presence of the respondent in light of the respondent's evidence that he gave the appellants the mutation form at the time of the sale of 5 acres in April.

Walulya further contradicted both appellants concerning how the appellants secured the titles to the respondent's land. He testified that although the land was in the respondent's name, he did not get the title from the respondent but from the family. This contradicts the evidence of the 1st appellant that he and Walulya got the mutation form and title from the respondent and he processed three titles in the name of the respondent. He then gave two titles to the 2nd appellant and then one in the names of the respondent to Walulya.

The inconsistencies and contradictions in the appellants' evidence are fundamental and cannot be reconciled. They demonstrate that the evidence of 1st appellant, the 2nd appellant and Walulya is not credible when weighed against the evidence of the respondent that he never sold his land comprised in the eleven acres, that he only got back his title after the intervention of the police, and that

that is when he realized that the 2nd appellant had been registered as owner of eleven acres, more than five acres he had sold to him.

In this regard, we concur with the learned trial Judge that the testimonies of the 1st and 2nd appellants and their witness James Walulya (DW3) were inconsistent and contradictory regarding the transaction relating to the eleven acres.

The fact that the appellants refused to handover the respondent's title for a very long time and were only forced to do so when the police intervened speaks to the fraudulent intention of the appellants to convert the respondent's land to their use. We therefore find that the 2nd appellant has no claim of right to the respondent's eleven acres of land, which he acquired fraudulently, with the connivance of the 1st appellant and Walulya.

Concerning the alleged payments by cheque, Counsel for the appellants submitted that the respondent was paid for the suit land by cheques exhibited as D2, DE2, and DE3. Learned Counsel also submitted that the 2nd appellant lawfully bought and paid consideration and the allegation of fraud cannot stand. The respondent had no lawful claim on the suit land, having sold it to the 2nd appellant. He further submitted that the 2nd appellant went into possession and from 2007 to 2012 there was no complaint at all and that the appellants tendered certified cheques to prove that payment was made to the respondent.

In this regard, the learned trial Judge found as follows:

"However regarding the payment of the outstanding sum of shs. 3,000,000/= (three million only), alleged to have been made on 14 April 2006 for the eleven acres, the payment was not made personally to the respondent but instead made to the 1st appellant, on behalf of the respondent. The 1st appellant signed for it, without it being witnessed by anyone. The appellants did not give any explanation for departing from the earlier made of payment."

The learned Judge further found that:

"The defendants presented evidence of cheque payments to the plaintiff, to prove that the plaintiff did sell the eleven contested acres to the 2nd defendant; and received payments for it. The 2nd defendant testified that the 1st defendant and Walulya used to pick cheque and cash payments from him for the eleven acres; and they would acknowledge receipt of it as shown by Exhibit CE3. He also testified that the plaintiff would call him on phone acknowledging receipt of, and thank him for the payments. The plaintiff however denied receipt of any payment from the 2nd defendant for the eleven acres when he recovered his title from which he had authorized the curving out of the five acres he had sold to the 2nd defendant.

When confronted with copies of cheques, drawn by the 2nd defendant to his benefit, for shs. 12.5m/= (twelve million five hundred thousand only), dated the 2nd of May 2006, and shs. 10m/= (ten million only) dated the 19th of June 2006 respectively, he denied knowledge of such cheques. He explained that his bank, Housing Finance Bank, only furnishes statements of account upon request; and he had only made such request once, when the Uganda Revenue Authority requested for it. He explained further that his tenants always notify him when they deposit money into his bank account; but that unlike his tenants, the 2nd defendant never informed

him of any deposit made on his (plaintiff's) bank account to the defendants.

I find some matters regarding the alleged cheque payments rather disturbing. First, the 1st defendant claims that the plaintiff and 2nd defendant negotiated over the eleven acres in May 2006; but that no payment was made for it as the 2nd defendant had no money at the time. However, the first cheque, drawn by the 2nd defendant for shs. 12,500,000/= (twelve million five hundred thousand only), for the benefit of the plaintiff (exhibit 'DE2'), is dated the 2nd May 2006; and yet it was not stated that this cheque was to be cashed at a later date from the one on the face of it. Second, evidence of the 1st defendant's collection of that cheque was inexplicably entered on the first agreement (exhibit PE1). This was quite strange in the light of the fact that that the agreement presented by the defendants for the purchase of the eleven acres is not exhibit 'PE1" but is instead exhibit 'CE3'.

Third, the 2nd defendant testified that it was after completing the payment for the five acres, when he was approached that the plaintiff wished to sell him more land. This would logically have been after the 14 April 2006 when, from exhibit PE1, the 2nd defendant allegedly paid the final installment of shs. 3m/= (three million only) to the 1st defendant. Indeed the 1st defendant is definite that it was in May 2006 that the plaintiff expressed his wish to sell him more land. However, the endorsement on the agreement (exhibit PE1), for the payment of the shs. 3m/= (three million only) to the 1st defendant for the five acres, states clearly that this payment was "as a balance for the first five acres". It is utterly inconceivable that the parties could have in April referred to the five acres sold as the 'first' five acres as this was before the month of May when the plaintiff allegedly indicated his wish to sell more land.

Fourth, while the 2nd defendant testified that the 1st defendant and Walulya used to pick the cheque and cash payments from him, for which the 1st defendant would acknowledge receipt, this contradicts his and 1st defendant's assertion that the transactions with regard to the eleven acres were carried out between the parties to the suit orally on the basis of trust. Fifth, a copy of the 2nd defendant's bank statement from Tropical Bank, (annexture 'F' to the written statement of defense) was shown to the plaintiff in cross-examination as proof that shs. 10m/= (ten million only) was cleared therefrom on the 19th June 2006. However, the reference in the bank statement instead shows that the shs. 10m/= (ten million only) was an inward remission to that account, rather than an outward remission therefrom.

Sixth, the endorsement on the face of the cheque for shs. 10m/= (ten million only), (exhibit DE3), issued by the 2nd defendant to the plaintiff on the 15th June 2006 out of that account, shows that it was deposited in the receiving bank on the 19th June 2006; and yet at the back of the cheque is an endorsement that this cheque was received by Housing Finance Bank on the 16 June 2006, and "Payees Account Credited Receipt and Endorsement Confirmed". I must confess I am unable to make sense out of this, as it would suggest that the payee's Account was in fact credited by the bank with the amount stated in the cheque before the cheque was even deposited in it! Thus, to establish its authenticity, there was need for the original rather than the photocopy of that cheque to be place before Court, as well as direct evidence by an official of the bank on which that cheque was drawn..."

We agree with the pertinent observations of the learned trial judge. We find it curious that the respondent acknowledged all payments for the first sale of 5 acres, which involved a smaller amount of money, in writing on the agreement. It is incredible

that when it came to the sale of a bigger piece of land of eleven acres for an even bigger amount of money, the respondent did not acknowledge receipt of any payments in writing but would only do so on the phone. It is a marked departure from the way he conducted the first sale. We therefore do not believe the appellants' evidence that that the respondent acknowledged the payments by phone.

We further observe that the banks that are alleged to have credited the money to the respondent's account were not called as witnesses to confirm this fact, given the categorical denial of the respondent of receipt of the money. Even the lone bank statement on which the respondent was cross-examined was not tendered in evidence. Moreover, the alleged payment appearing in the said statement was found to be an inward remission to that account by the learned trial Judge.

We also observe that the payments allegedly made for the sale of eleven acres through the cheques tendered do not add up. If the agreed price for the eleven acres was shs. 3.5m/= (three and half million only) per acre and the 2nd appellant bought 11 acres, he should have paid a total of 38.5m (thirty eight and half million only) and not only shs. 23m/= (twenty three million only).

We totally agree with the findings of the learned trial judge that the alleged payments raised suspicion and were not proved on a balance of probabilities.

In light of all the above, and having reviewed all the evidence on record, and all the authorities cited to us, we concur with the

finding of the learned trial Judge that the respondent has proved on a balance of probabilities that he did not sell the eleven acres and did not receive payments therefor. Also, he did not sign any agreement in respect thereof.

We find therefore find that there was no consideration for the transfer of the eleven acres to the 2nd appellant. Accordingly, we find no merit in grounds 1, 2, 3, 4, 5 and 7. The said grounds of appeal are accordingly dismissed.

On the evidence before him, we also find that the learned trial Judge was justified in awarding damages in the sum of shs. 10,000,000/= for trespass and for the stress the respondent suffered. It is a reasonable amount and we find no reason to interfere with it. Ground 6 of the appeal is also dismissed.

Regarding the counter-claim, we agree with the learned trial Judge that there was no factual basis established for the counter-claim. We accordingly dismiss ground 8 as well.

Conclusion

In the result, this appeal is dismissed in its entirety with costs. We uphold the judgment of the learned trial Judged. We confirm all the orders he gave namely:

1. Issue an order directing the Registrar of Lands to cancel the registration of the land comprised in Block 306 Plot 1297 at Kireka Bira, registered in the name of the 2nd appellant, and restore the name of the respondent on the certificate as owner

2. Order the appellants to pay shs. 10m/= (ten million only) as damages for trespass and stress caused to the respondent
3. Issue a permanent injunction restraining the 2nd appellant, his agents, assignees, and or anyone acting under him, from further trespassing on the suit land
4. Issue a declaration that the 2nd appellant had no claim onto the suit land
5. Order that the 2nd appellant vacates the said land and removes any property that could be on the suit land; and order the appellants to pay costs of the suit in this Court and in the High Court.

We also uphold the order dismissing the counter-claim against the respondent for trespass, lodgment of a caveat on the suit land, and causing the prosecution of the appellants for fraud.

We order accordingly.

Dated this 12th day of JAN. 2018

Signed by:

Hon. Justice S. B. K Kavuma, DCJ (E) _____

Hon. Solomy Balungi Bossa JA _____

Hon. Justice F. M. S Egonda-Ntende JA _____

Judgment read and dated this 12th day of JAN. 2018 by

_____

Judge/Registrar