

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 42 OF 2016

GALINA KYOBE

(Administrator of the Estate of the Late of Dan Kyobe).....APPELLANT

10

VERSUS

1. DANIEL G.B. KIBUUKA-MUSOKE

2. COMMISSIONER LAND REGISTRATIONRESPONDENTS

15

[An appeal arising from the Judgment of the High Court of Uganda at Kampala (Land Division) in Civil Suit No. 108 of 2011 before Justice J. W. Kwesiga dated 25th August, 2014]

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Christopher Madrama, JA

20

JUDGMENT OF THE COURT

The appellant is the administrator of the estate of the Late Dan Kyobe, who was the plaintiff in High Court Civil Suit No. 108 of 2011 (Land Division). Dan Kyobe died in August 2017 before this appeal could be heard and determined.

25

An order was made substituting the name of Dan Kyobe deceased with that of the appellant as the administrator of his estate.

5 **Brief Background**

The first respondent and the Late Dan Kyobe executed agreements in which the Late Kyobe is said to have paid money to the first respondent covering several plots of land at Kawuku, Bunga, Makindye and Kampala.

10 The Late Kyobe filed a suit at the High Court to remove caveats on those properties lodged by the first respondent. The first respondent denied having sold the said properties to the late Kyobe contending that the same or some of them had been surrendered to the Late Kyobe as security for money received from him by the first respondent.

15 The trial Judge found for the first respondent. The appellant now appeals against the decision on the following grounds.-

1. *That the trial Judge erred in law and in fact when failed to properly evaluate the evidence on record thus arriving at a wrong conclusion that the transfer of the suit land by the plaintiff was done fraudulently.*
2. *The trial Judge erred in law and in fact by concluding that the transaction*
20 *between the appellant and the respondent leading to the transfer of the suit land to the plaintiff was a money lending transaction and not a sale of land.*
3. *The trial Judge erred in law and in fact by wrongly concluding that there was no valid and lawful acquisition of the suit plots by the appellant.*
4. *The learned trial Judge erred in law and in fact when he ordered the*
25 *cancellation of the Certificate of Title belonging to David Martin Kibuuka Kyobe who was not a party to the suit*
5. *The trial Judge erred in law and in fact when he ordered for the cancellation of title for all the Suit Plots in total disregard of the testimony of "DW3" (Registrar of Titles).*

5 6. *The trial Judge erred in law and in fact when he disregarded the deliberate falsehoods and grave inconstancies in the testimony of the First Defendant regarding whether or not the Certificates of Titles to the Suit Land were lost or whether he handed them over to the Plaintiff.*

Representations

10 At the hearing of this appeal learned Counsel Mr. Paul Kawesi appeared for the appellant while Ms. Karungi appeared for the respondent. Upon application by both Counsel, Court allowed the parties to proceed by way of written submissions. It is on that basis that this appeal has been determined.

The Appellant's appeal

15 By way of back ground Counsel for the appellant submitted that, by an agreement in writing executed on the 23rd of November, 2006 the appellant purchased from the respondent land comprised in Block 248 Plots 206, 207, 213, 214 and 215 Kawuku, Bunga pursuant to which the respondent duly executed Transfer forms in favour of the appellant and handed over the Duplicate Certificates of Title for the above.

20 Further he submitted that, subsequently on the 21st of December, 2006 the appellant and the first respondent executed another agreement wherein the appellant purchased more land from the respondent comprised in Block 248 Plots 197, 198, 199, 200, 201, 202, 203, 2011 and 2012 Land at Kawuku, Bunga pursuant to which the respondent handed over all the Duplicate Certificates of Title and duly
25 executed Transfer forms for the purchase of the land.

Upon the conclusion of the transactions mentioned above and paying the full purchase price to the respondent, the appellant transferred the suit plots into his names and then proceeded to sale some of the land to third parties. The appellant sometime in 2011, he discovered that the respondent had lodged caveats on some of

5 the suit plots. It was then that he filed a suit in the land division of the High Court seeking an order for the cancellation of the caveats and other reliefs. It is from that suit that this appeal arises.

Counsel argued grounds 1, 2 and 3 together. He submitted that:-

10 In arriving at a conclusion that the transfer of the suit land was done fraudulently and that there was no valid acquisition of the suit plots by the appellant the learned trial Judge acted on a misdirection of both the law and facts.

The record of proceedings will reveal that neither party requested for an interpreter throughout the proceedings in the lower Court. This goes to show that both parties were conversant with the English Language. The Respondent in his testimony
15 informed court that he had lived abroad for some time and that at the time he met the appellant he needed some money to clear his goods.

The testimony of the respondent proves that the first respondent was a man who has carried out transactions not only in Uganda but foreign jurisdictions as well and is therefore not an illiterate and ignorant person as he led the lower court to believe
20 in his testimony.

Further that the respondent was at all material times alive to the circumstances surrounding the transaction between himself and the appellant and later on tried to feign ignorance with the intention to unjustly enrich himself by taking benefit of both the money paid to him by the Late Dan Kyobe and also returning to himself the
25 land sold to Mr. Kyobe by feigning ignorance of the transaction.

Counsel invited Court to find that this is a transaction where there was a meeting of the minds, what in law is termed as consensus ad idem.

- 5 At the time that the sale agreement dated 23rd November, 2006 was executed both parties were aware of the fact that the respondent needed money to secure the repayment of money advanced to the respondent, the parties executed the above - mentioned agreement. The respondent's wife Perpetua K. Kibuuka Musoke signed the said agreement in her capacity as a witness
- 10 He submitted that, the vendor was at the execution of this agreement alive to the fact that the amount advanced to him by the appellant was protected and secured by this agreement subject to the repayment of the sum advanced in the event that he got a buyer with a good price then he would sell the land and repay the amount failure of which Mr. Kyobe would take the property. Therefore the original
- 15 transaction evolved from the advancement of money and crystalized into a sale of land upon failure by the first respondent to repay the debt. So the first transaction was hinged on two issues. The first being that in the event that the buyer found a buyer willing to offer a higher price, he would sell the land and repay the loan and in the event that this option failed the transaction would crystalize into a sale of land.
- 20 The vendor was also alive to the fact that the amounts advanced him were to be secured by collateral which he provided subject to the repayment of the loan a fact admitted by the first respondent. The late Kyobe agreed with the respondent that in the event that the respondent got a buyer with a higher price he would sell the land and refund the money.
- 25 The parties later executed another agreement on the 21st of December, 2006 the second sale agreement was a clear sale agreement within the meaning of the law and the respondent sold his land to the late Kyobe under the clearest of terms and consideration was furnished. The respondent who is not an illiterate man appended his signature to every page of the Agreement and consideration of Uganda Shillings,
- 30 One Hundred and Twenty Million was paid. (Ushs.120 million). There were two

5 separate transactions on two separate time frames and there is no element of money lending in the second transaction in the second transaction.

Counsel invited this Court to find that at all material times there was a meeting of the minds by the parties and that in as much as the original transaction could have commenced as a money lending transaction it later crystalized into a valid sale transaction and met all the requirements of a valid sale of land transaction.
10

Counsel cited as his authority *Fredrick J. K Zaabwe vs Orient Bank Ltd & 5 Others, Supreme Court Civil Appeal No. 4 of 2006 [2007]* for the proposition that:- an allegation of fraud needs to be fully and carefully inquired into. Fraud is a serious matter, particularly where it is alleged that a person lost his property as a result of fraud committed upon him by others.
15

Regarding grounds 4 and 5, Counsel submitted that the learned trial Judge erred in law and fact when he ordered cancellation of all the suit titles in total disregard of the testimony of DW3 (the registrar of titles) as well as ordering the cancellation of the title of David Martin Kibuuka Kyobe who a third party to the transaction. He referred us to the testimony of DW5 which he contended was to the effect that the illegality in the transfers as a result of effecting a transfer using a scanned transfer form affected only 197, 198, 200 and 2012 and that the rest appeared genuine.
20

The evidence of the Registrar of titles (DW3) affected only plots of land mentioned above to wit: Plot 197, 198, 200 and 2012 as the evidence of the Forensic Examiner of hand writing expert and not all the suit plots.
25

He submitted further that, using scanned copies of documents is not of itself sufficient to impute fraud especially where it has been established that the rest of the transfers were done in a genuine manner.

5 He invited this Court to find that, the trial Judge acted on a misdirection when he ordered the cancellation of all the suit plots including those belonging to third parties that were not affected by the testimony of DW3 (the registrar of titles) or DW1 (the Forensic Expert).

10 In respect of ground 6, Counsel submitted that the trial Judge erred in law and fact when he disregarded the deliberate falsehoods and inconsistencies in the testimony of the first defendant as to whether the Certificates of Title to the suit land were lost or he handed them to the appellant. The first respondent testified that he handed over security of 5 plots. Further that, he agreed to hand over certificates of title as security and not for sale.

15 Counsel went on to submit that, the appellant had testified that he did not give the titles to the late Kyobe and that he always believed they were in his house and by the time he realised they were missing they had been transferred into the names of the plaintiff. Counsel invited Court to find that the first respondent was deliberately untruthful in his testimony. Counsel also invited us to find that the first respondent
20 was untruthful when he stated that the times he went to sign for the money he was alone yet his wife witnessed the agreements.

Counsel invited Court to allow the appeal and set aside the decision of the High Court.

The Respondent's reply

25 Counsel submitted that, the Late Kyobe in his testimony at the trial had admitted having completed the filing of blank land transfer form himself and that, it was the testimony of DW1 the handwriting expert that the signatures on the transfer forms had been scanned and pasted on the various transfer forms and were not actually signed by the first respondent.

5 Counsel submitted further that, there were a number of material contradictions in
the two sale agreements exhibited in Court by the first respondent. The agreements
were not contracts of sale as contended by the appellant but rather, the land titles
had been deposited as security for money borrowed. The transaction therefore was
a money lending agreement and not agreement for sale of land as contended by the
10 appellant. The intention of the parties to enter a money lending agreement is clearly
set out in paragraph 7 of the agreement dated 23rd November 2006.

The appellant admitted that the first respondent owed him money confirming that
the purpose of the agreements was to secure the loan he had obtained from the
appellant and not to sell the properties in question to him.

15 There was no proof that the appellant ever paid to the respondent
Ug. shs.120 million as alleged. The lawyer who is said to have witnessed this
agreement was never called to testify.

The appellant never paid 84 million shillings to the first respondent but rather
advanced him 70 million shillings with interest at 20 percent per month for one
20 month. That interest amounted to 14 million shillings making a total of 84 million
shillings, which is said to have been the purchase price for the several plots of land.

The learned trial Judge properly evaluated the evidence and came to the correct
conclusion that the whole transaction was a money lending agreement. That the
appellant committed fraudulent acts when he purported to transfer the titles into
25 his names using forged transfer forms and as such fraud was therefore properly
attributed to him.

The transfers to third parties who included the appellant's son and daughters were
part of the fraud as no consideration had been paid for those transactions. The
children of the appellants could not have been innocent purchasers for value

5 without notice. The Judge properly evaluated the evidence before arriving at the conclusions that he did. There is no merit in the appeal and pray that it is dismissed.

Resolution of the grounds of appeal

We have carefully considered the submissions of both Counsel and perused the Court record. We have also studied the authorities cited to us by Counsel and
10 provided in their respective list of authorities.

We are alive to the duty of this Court to re-evaluate the evidence and to come to its conclusion on all issues of law and fact. *See: Rule 30 (1) of the Rules of this Court, Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses vs Uganda Supreme Court Criminal Appeal No. 1 of 1997 and Fr. Narcensio*
15 *Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002.*

We shall proceed to do so.

In the first three grounds of appeal Counsel for the appellant faults the learned trial Judge for having found that the transfer of suit properties by the appellant into his names and those of other persons was fraudulent. Further that, agreements
20 between the first respondent and the Late Dan Kyobe since deceased and now represented by the administrator of his estate was a money lending transaction and thirdly that the appellant did not lawfully acquire any legal interest in the suit properties.

We would consider that the determination of the 2nd ground of appeal would go a
25 long way in determining the rest of the grounds.

The appellant's case is that this transaction between him and the first respondent was that of a straight forward land purchase. In paragraphs 5 of the plaint he sets the facts giving raise to his cause of action as follows:-

5 5. The cause of action against the Defendants jointly and severally arose
as follows:

10 a) On the 23rd of November, 2006 by an agreement in writing, the
Plaintiff purchased from the First Defendant Land comprised in
Block 248, Plots 206, 207, 213, 214 and 21 [A copy of the Sale
"Agreement is annexed and marked "A"].

15 b) The First Defendant on the 21st of December 2006 offered the
Plaintiff more land for purchase subsequent to which, the parties
entered another separate Sale Agreement for purchase of the Land
comprised in Block 248, Plots 197, 198, 199, 202, 203, 211 and 212
[A copy of the Purchase Agreement of the said land is attached
and marked "B"].

20 c) The Plaintiff, upon payment of the purchase price for the two (2)
transactions mentioned in paragraphs 4(a) and (b), was handed
Duplicate Certificates of Titles of the said plots of land and duly
executed transfer forms in his favour.

25 d) Consequently the Plaintiff transferred the said Land to his names
and proceeded to sale some of the said land to different
purchasers.

30 e) Recently the Plaintiff was informed that the First Defendant had
lodged caveats on the Suit Land to wit; Block No 248 Plot Nos. 197,
198, 199, 200, 201, 202, 203, 209, 210, 211, 212, 213, 214 and 215
claiming among others, that he had never signed transfer forms in
favour of the Plaintiff. [Copies of Instruments creating the said

5 *Caveats and Affidavit in support are attached annexed and marked "C"].*

10 *f) The second Defendant acting on the First Defendant's application went ahead and erroneously registered the said caveats on the Plaintiff's land.*

15 *g) Owing to the Defendants' actions, the Plaintiff has failed to effect any dealing in his land thus leading to great loss of income for which he shall seek General damages.*

Annexure 'A' to the plaint is an agreement of sale of land between the first respondent as the vendor and Dan Kyobe who was the appellant now deceased as the purchaser. It is dated 23rd November 2006.

In the preamble to the agreement it is stated that:-

20 *'The vendor is indebted to the purchaser in the sum of shs. 84 million which he wishes to repay by sale of his land constituted above.'*

Paragraph 1 of the agreement describes the purchase price as follows:-

PURCHASE PRICE

25 *IN CONSIDERATION of a sum of Ushs. 84 million [Uganda Shillings Eighty-four Million Only] which is a debt owed by the Vendor to the Purchaser and which constitutes the purchase price herein and in consideration of the Vendor performing and complying with the covenants laid down in these presents, the*
30 *Vendor has sold, assigned, conveyed and transferred to the*

5 *Purchaser ALL THAT LAND DESCRIBED AS BLOCK 248 PLOTS
206, 207, 213, 214 AND 21.5 TOGETHER with all his proprietary
rights to hold unto the purchaser for Vendor's interest therein
UNEQUIVOCALLY, UNCONDITIONALLY and ABSOLUTELY.*

10 The terms of payment are set out as follows in paragraph 2.

TERMS OF PAYMENT

15 *The purchase price of Ug.shs. 84 million [Uganda Shillings Eighty-four
Million Only] has been paid by the Purchaser to the Vendor by converting
the same amount owed by the Vendor to the Purchaser as the purchase
price. By signature hereof, the Vendor acknowledge receipt of the full
purchase price.*

20 The agreement is drawn by M/s. Muwema & Mugerwa Advocates and signed by the
parties. The first respondent's wife is a witness to her husband's signature together
with Kawuku LC1 Chairperson. The second sale agreement is annexure 'B' to the
plaint, it is dated 21st November 2006. The relevant paragraphs are set out as
follows:-

25 *1. DESCRIPTION OF PROPERTY: Kyadondo, Block 248,
Plots No. 197, 198, 199,200,201,
202,203,211 & 212
Land at Kawuku- Bunga*

5 2. *VENDOR:* *Kibuka Musoke George Daniel .M*
P.O. Box 1369,
Kampala.
Tel: 0774-099450

10 3. *PURCHASER:* *Daniel Kibuka Kyobe*
P.O. Box 70255,
Kampala.

4. *CONSIDERATION*

15 *The Purchaser has agreed to pay the Vendor as the total purchase*
price for the above mentioned property a sum of Ug. Shs. 120 million
(shillings; one hundred and twenty million only).

5. *MODE OF PAYMENT:*

20 *At the execution of these presents, the purchaser shall make a*
payment of Ug. Shs. 120 million (shillings; one hundred and twenty
million only) as full payment of the purchase price and the Vendor
shall acknowledge receipt thereof in cash.

6. *DELIVERIES BY THE VENDOR AND TRANSFER*

25 *The Vendor shall avail to the purchaser the following documents to*
enable the purchaser register the said land in his names after full
payment.

- a) Title deed in his names*
- b) Signed transfer forms*

5 It is signed by the parties and witnessed by Bukenya Abbey, Matsiko Geoffrey, Arthur Mukwatanise an advocate whose law firm drew the agreement and one Ssenyange Martin as Kawuku LC1 Chairman.

In his testimony in chief the appellant stated as follows:-

10 *"I know the defendant. In 2006 he came to my office with Mr. Maganda and Masiko that he was selling land. They took me to the land... I eventually bought the land at Kawuku of 5 plots, No. 206, 207, 213, 214, 215... I paid consideration, after I paid I got the certificate of title, transfer forms and photocopy of the vendor's passport.*

In cross examination he stated as follows:-

15 *I was approached by Defendant that he had just come from USA he needed to sell the land he need money. (Refer P.I Clause 7). He owed me money at the time we executed P.I. He owed me Shs. 84 million He approached me as a person who wanted to sell the land. I first advanced him 42M/= and gave him the rest 42M/= when we signed.*

20 *At the execution we did not agree on the price, the understanding was that if he got higher price he would sell and return my money. I did not get any other document at this stage. The original transfer forms and the copy of the passport and the Certificate of title.*

25 *I filled the transfer form myself. He signed an original transfer for each Plot (Referred to photocopy of transfers for plots 197, 200, 198). These are photocopies of what I signed. I have no explanation as to why there is no consideration.*

30

5 PW2 stated as follows in examination in chief:-

*The Plaintiff bought the land. The Defendant told me he had a quick business he wanted to do. He urgently needed to clear his goods, he handed to the plaintiff land titles and he gave him 84M/=. They agreed that if the Defendant got a
10 buyer with a higher price, he would sell and refund. On payment of shs. 84M . I was present.*

It is evident that the appellant's testimony was full of falsehoods and contradictions. The appellant advanced only Ug.shs. 70 million to the respondent apparently in
15 instalments. The Ug.shs. 84 million came about because he added Ug.shs. 14 million interest to the Ug.shs. 70 million. It is therefore not true that he advanced Mr. Kibuuka Ugshs.42 million in two instalments. PW2 also told lies on oath when he stated that the appellant paid to the first respondent Ug.shs. 84 million in cash when the respondent handed to the appellant land titles to the suit land. PW2's statement
20 that "on payment of Ug.shs. 84 million I was present" is false. It contradicts the plaintiff's now appellant's own testimony that he paid the price in two instalments of Ug.shs. 42 million each which statement was also false.

Furthermore Pw3 lied when he stated that "*He (appellant) paid Ugshs. 84 million at the office of Muwema*" We say so because that statement contradicts the agreement
25 itself which states that no money exchanged hands when the first agreement at Muwema's office was signed because the agreements state that shs. 84 million the purchase price was already paid having been advanced prior to the signing of the agreement.

In respect of the second agreement executed purported at Counsel Mukwatanise'
30 chambers the learned trial Judge stated as follows at page 17-18 of this Judgment.

5 *'Save for the provisions in the second Agreement which I have examined above
in relation to the first Agreement and the rest of the evidence, no single witness
gives evidence to show that Shs.120 million was paid to the first Defendant.
This payment was denied right from the pleadings and testimony of the
10 Defendant and the Plaintiff had the evidential burden to prove that there was
such a payment. I have found that whereas the first Agreement at execution
stated that Shs.84M/= had been paid, it was proved that payment was at a later
stage and took a period as the plaintiff paid it in instalment.*

15 *It was necessary for the Plaintiff to produce a witness that witnessed the paying
of his money. I agree with the submissions of Mr. James Muwawu for the first
Defendant that Mr. Mukwatanise was such an essential witness who was
omitted by the Plaintiff. In my view where such an important witness that
would, from the proceedings, have been essential to prove this fact is omitted,
20 then it creates a presumption that if he had been called he would have given a
story not favourable to the party that chose not to call him.'*

We agree with the learned trial Judge that there was no evidence that Ug.shs. 120
million was ever paid at the law chambers of Mukwatanise by the appellant to the
first respondent as alleged. We have no reason to fault the learned trial Judge on this
25 finding of fact. It is a puzzle as how the appellant could have obtained the
respondents' land titles without having paid any money. All we can say is that, the
appellant failed to adduce sufficient evidence to prove payment of Ug.shs. 120
million in respect of the second agreement.

30 It is evident that the transaction between the appellant and the first respondent was
a money lending agreement and not a purchase of land. The appellant advanced
Ug.shs. 70 million to the respondent who deposited his land titles with him as

5 security creating an equitable loan. That money was to attract interest at 20 percent
per month. The loan was for 2 months hence the interest was shs.14 million. This
added to the cash advance amounted to Ug.shs. 84 million, forming the basis of the
first agreement. The 14 million was added on to Ug.shs. 70 million because
apparently the appellant had no money lending license and could not legally charge
10 interest. In any event such interest would have been unenforceable on account of
being harsh and unconscionable The appellant may or may not have advanced a
further loan to the respondent. As already stated above he was unable to prove this.

15 However, we have found no evidence to suggest that the first respondent paid back
the appellant the 70 million he advanced to him which is not in dispute. The
appellant is therefore entitled to this money before the first respondent can get his
land titles back because they are subject to an equitable Mortgage in favour of the
appellant. The learned trial Judge with all due respect ought to have found so. We
find that, the appellant was not justified to charge the first respondent harsh and
20 unconscionable interest of 20 percent per month. We find that the interest of
Ug.shs.14 million imposed by the appellant on the first respondent unenforceable
and we decline to grant it.

We now make the following orders:-

- 25
- (1)The Judgment of the High Court is hereby set aside and substituted
with this Judgment, allowing the appellant's claim in part and also
allowing the counterclaim in part.
 - 30 (2)An order is hereby issued directing the Commissioner Land
Registration to cancel the name of the appellant from all the suit
properties and restoring thereto that of the first respondent as
registered proprietor, as had been ordered by the High Court.

5

(3) We would award Ug.shs. 20 million as general damages to the first respondent in respect of the counterclaim with interest at Court rate from date of the High Court Judgment.

10

(4) We order that the first respondent pays to the appellant Ug.shs. 70 million being money had and received with interest at 18 percent per annum from date of filing the suit until payment in full less payments set out in paragraph 3 above.


15

(5) We order that the appellant pays ²/₃ of the costs of this appeal and the High Court.

We so order.

Dated at Kampala this 11th day of June 2019.

20


.....
Kenneth Kakuru
JUSTICE OF APPEAL

25


.....
Geoffrey Kiryabwire
JUSTICE OF APPEAL

30


.....
Christopher Madrama
JUSTICE OF APPEAL