THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

Civil Appeal No. 70 of 2010

(Arising from High Court Civil Appeal No. 14 of 2009)

BETWEEN

1. SSEWANYANA JAMES
2. KISENYI WILLIAM :::APPELLANTS

AND

MAKANGA BENJAMIN ::: RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Uganda, [Murangira, J.], dated 25th June 2010)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] This is a second appeal against the judgment of the High Court in Civil Appeal No. 14 of 2009.The respondent instituted Civil Suit No. 026 of 2007 against the appellants in the Chief Magistrate's court in Luweero seeking for orders for the cancellation of the entry of the 2nd appellant's name as a registered proprietor of land comprised in Bulemezi Block 402 Plot 261, an order for the registration of the respondent's name as the proprietor of the said land, an injunction, damages, interest and costs of the suit. This case was originally filed at the Luweero District Land Tribunal and partly heard by the tribunal.

[2] The trial court decided the case in favour of the appellants. It held that the first appellant had no title to pass to the respondent by the time the suit land was purchased because the first appellant had not yet obtained letters of administration for the estate. Being dissatisfied, the respondent appealed to the High Court which reversed the decision of the trial court, entered judgment in favour of the respondent and granted the orders sought by the respondent. Being dissatisfied with the decision of the High court, the appellants have appealed on the following grounds:

'(1) Contrary to ss. 180 and 270 of the Succession Act, the High Court judge erred in law when he held that the 1st Appellant and Mary Wanyana without letters of administration in 1994 transferred to the Respondent legal and registrable interest in the suit land comprised in certificate of title for Bulemezi Block 492 Plot 266. (2)The High Court Judge erred in law when he held that the 2nd Appellant was guilty of fraud in terms of S.176 of the Registration of Titles Act.'

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing, the appellants were represented by Mr. Kaweesa Abubaker and the respondent by Mr. Shwekyerera Philemon.

[5] In answer to the first ground, Mr. Kaweesa submitted that the learned appellate judge did not establish if there was a contract of sale between the first appellant and the respondent before arriving at the decision that the first appellant had transferred a legal and registrable interest to the respondent. The respondent in his pleadings claimed to have bought 12 acres of land from the first appellant, that is, land comprised in Bulemezi Block 402 Plot 261 which is different from the land described on the transfer forms. The appellant contends that the size of land claimed by the respondent and the one recorded on the transfer form is different. And these contradictions indicate that there was no purchase agreement or a deed of gift.

[6] Mr Kawesa further submitted that should this court find that there was a contract between the parties, the contract of sale is void because the first appellant did not have letters of administration at the time of sale in 1994 contrary to section 180 of the Succession Act. The suit land is part of the estate of the late Merekezedeki Kalinimi Mukasa and the first appellant admitted to have obtained the letters of administration in 2003. The sale cannot be validated under Section 192 of the Succession Act because it was not done for the purpose of preserving and protecting the estate. Rather the sale was aimed at reducing the size of the estate and cannot be validated as provided by section 193 of the Act.

[7] Mr. Kaweesa further submitted that the transfer form was not attested as required by law and the land that was purchased by the second appellant is different from the one indicated in the transfer forms.

[8] In support of ground 2 counsel for the appellant submitted that the respondent did not prove fraud to the required standard and therefore the appellate court erred in law by holding that fraud was strictly proved. He relied on the case of Kampala Bottlers Ltd vs Damanico (U) Ltd, (Supreme Court Civil Appeal No. 22 of 1992), [1993]UGSC1, for the definition of fraud as any dishonest act done in connection with land. The second appellant did not commit any fraud. He purchased the land from the first appellant in 2004 without any knowledge of the purported sale as he was not a party to the sale agreement. Further that no caveat was lodged against the land to notify the public. And the respondent was merely a trespasser on the suit land. Counsel for the appellants also relied on the authority of Florence Namuli Matovu vs Hellen Onyeru [2008] HCB 99 for the proposition that fraud must be attributable either directly or by necessary implication to the transferee. He submitted that there is no evidence attributing fraud to the second appellant.

[9] Mr Kaweesa further submitted that the second appellant testified that he purchased the reversionary interest in the first appellant's land. Section 35 (c) of the Land Act gives the first option to a kibanja holder to purchase the reversionary interest in the land in case the land owner opts to sale. He prayed that this appeal is allowed with costs in this court and the lower courts, the judgment of the High Court be set aside and the judgment in the Chief Magistrates' court be upheld.

[10] In reply Mr. Shwekyerera for the respondent submitted that the discrepancies in the size of the land and the plot number were properly evaluated and the learned appellate judge came to the right conclusion that the suit land was the same. The suit property was originally Plot 261 but was changed to Plot 266 upon sub division. The first appellant did not indicate the plot number on the land that was the subject of the sale agreement in bad faith. Counsel for the respondent admitted that the transfer forms were not registered but was of the view that since the co-administrators signed the forms, an intention to transfer the title to the respondent was demonstrated.

[11] He further submitted that sections 190 and 193 of the Succession Act validated the sale that took place when the first appellant did not have letters of administration. He relied on the case of Israel Kabwa vs Martin Banoba Mugisha Supreme Court Civil Appeal No. 52 of 1995 [1996] UGSC 1.

[12] In reply to the second ground, counsel for the respondent submitted that the second appellant's testimony confirmed that at the time he purchased the suit land, the respondent was already in occupation of the suit property and that he had tenants on the land. When court visited the *locus in quo*, the second appellant

confirmed that the respondent had a building on the suit property that was constructed in 1995. He relied on the cases of David Sejjaaka Nelima vs Rebecca Musoke, (Court of Appeal Civil Appeal No. 12 of 1985) [1986] UGSC 12, and Kampala District Land Board & another vs Venansio Babweyaka & 3 Others, Court of Appeal Civil Appeal No. 57 of 2005 (unreported). He further submitted that despite the second appellant having knowledge of the respondent's occupation of the suit land, he went ahead and carried out a survey without informing nor inviting him. The parties previously raised claims over the suit land in the local courts therefore the second appellant was under notice of the respondent's interest. There is no doubt that the certificate of title was issued to the second appellant amidst protests. He concluded by submitting that the first appellate court applied the right principles with regard to fraud and arrived at the proper conclusion.

[13] In conclusion counsel for the respondent prayed that the appeal is dismissed with costs in this court and the lower courts.

Analysis

[14] This Court has limited jurisdiction while determining second appeals. Rule 30 (1) of the Rules of this Court imposes a duty on the Court to re-appraise the evidence only on first appeals. Except where the first appellate court fails in its duty to re-appraise the evidence this court would not ordinarily engage in a fresh review of the evidence before the trial court. Sections 72 and 74 of the Civil Procedure Act limit second appeals to this Court to only questions of law. We shall set out below those provisions.

> '**72. Second appeal.**
> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an 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— the decision is contrary to law or to some usage having the force of law; the decision has failed to determine some material issue of law or usage having the force of law; 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.
> **74. Second appeal on no other grounds.**
> Subject to section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in section 72.'

Ground 1

[15] The appellants contend that the first appellate court erred in law in holding that the first appellant and Mary Wanyana transferred a legal and registrable interest in the suit land to the respondent contrary to sections 180 and 270 of the Succession Act. From the evidence on record, the first appellant on 21st August 1994 sold to the respondent 10 acres of land situated at Kigegge at a consideration of UGX 600,000. (Exhibit P.1). Other than the land being situated at Kigegge, there was no other description of the land that was the subject of sale. On 7th March 1996, the first appellant borrowed a sum of UGX 100,000 from the respondent for the purpose of enabling the former to retrieve the title of the land situate at Kigegge from the bank. The parties agreed that either the respondent would opt to be refunded the money in cash or instead given 2 more acres of land the respondent entered into another agreement with the first appellant for the purchase of two more acres. The respondent opted for the latter option. (exhibit P.2)

[16] It should be noted that at the time of these transactions, the first appellant was acting as a beneficiary to the estate of the late Merekezedeki Kalinimi Mukasa. He had not yet acquired letters of administration to the estate. Ssewanyana James and his sister Mary Wanyana eventually acquired letters of administration in 2003 (exhibit D1) and subsequently in 2004 signed consent and transfer forms for land situate at Kigegge-Nakaseke comprised in Block 402 Plot 261 to the respondent. The respondent alleged that before the transfer could be effected, the same land was sold to the second appellant who hurriedly and hastily registered himself as the owner of the said land.

[17] Section 180 of the Succession Act cap 162 provides:

> 'The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such.'

[18] Section 270 of the Succession Act provides:

> 'An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he or she may think fit, subject to section 26 and the Second Schedule.'

[19] Basically letters of administration give the administrator the legal power necessary to deal with the assets of the intestate in accordance with the law. The powers are in relation to the administration of the estate of the deceased. Before the grant, such persons have no power to deal in any transaction relating to the estate of the deceased. However, Section 192 of the succession Act provides:

> 'Letters of administration entitle the administrator to all the rights belonging to the intestate as effectually as if the administration has been granted at the moment after his death.'

[20] Therefore intermediate acts of the holder of the letters of administration that were carried out before the grant are rendered valid as long as the effect of the transactions is shown not to have diminished or damaged the estate. See Israel Kabwa vs Martin Banoba Mugisha Supreme Court Civil Appeal No. 52 of 1995 (supra). Section 193 states that:

> 'Letters of Administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.'

[21] Therefore, in light of the above, there may have been valid contract of sale between the respondent and the first appellant, if it is shown that this contract of sale did not diminish or damage the estate of the deceased. Decreasing the size of an estate would on the face of it incline towards diminishing or damaging the estate unless there is some explanation as to the purpose of the transaction which would negate that. This aspect was not canvassed in evidence. Secondly there was no transfer of title from the first appellant to the respondent. The instrument of transfer was neither registrable nor duly registered under the law. Section 54 of the Registration of Titles Act provides that instruments are not effectual until registered. It states:

> 'No instrument until registered in the manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render the land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in the manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the

same time presented to the registrar for registration, he or she shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title.'

[22] In essence, execution of a sale agreement is not enough to transfer title in the land. The parties must register the instrument of transfer so as to obtain a legal interest. In this case, the parties did not duly execute the transfer forms as required by the law. Section 147(1) of the Registration of Titles Act requires instruments under the Act to be signed and attested by any one of the category of the witnesses specified thereunder. The transfer form adduced into evidence was never attested and neither was it registered. Given its defects the transfer form on which the respondent relies was incapable of registration. In essence, this instrument could not pass title to the respondent as it was not perfected. At best the respondent may have held an equitable interest as long as it is not registered. In the case of Katarikawe v Katwiremu and Another (1977) HCB 187 Sekandi J (as he then was) held that although in a contract of sale of land an unregistered instrument of transfer is not effective to transfer title, the purchaser acquires an equitable interest in the land which is enforceable against the vendor.

[23] The respondent was free to proceed against the appellant no.1 in contract to seek damages for the failed contract of sale. That earlier contract of sale could not impeach title of a subsequent buyer who perfected his title with registration of his interest unless he was guilty of fraud. See Kristofa Zimbe v Tokana Kamanza [1952-1957] ULR 69.

[24] I would allow ground no.1.

Ground 2

[25] Generally fraud is defined as an act of dishonesty in relation to land dealings. Fraud must be strictly proved, the burden being heavier than on a balance of probabilities and it must be attributable to the transferee either directly or by necessary implication. See David Sejjaaka Nelima vs Rebecca Musoke, (Supreme Court Civil Appeal No. 12 of 1985) [1986] UGSC 12, Kampala Bottlers Ltd vs Damanico (U) Ltd (supra).

[26] From the evidence on record, the first appellant and respondent while executing their agreements did not specify or describe which land was the subject matter of the agreement. All that was agreed to was the acreage and location of the land though the piece of land was never demarcated. PW1 in his testimony stated

that this land was the one that was subject to a mortgage whose certificate of title was being held by the Central Rural Development Bank. He testified that later the first appellant recovered the title from the bank and signed transfer forms for the said land. The transfer forms describe this land as land situate at Kigegge-Nakaseke Block 402 Bulemezi Plot 261. Plot 261 cannot be Plot 266 unless there is an adequate explanation. There is none.

[27] The second appellant maintains that the land he purchased from the first appellant is different from the suit property. On record there is a certificate of title for the land the second appellant purchased (exhibit D.3). It is described as Block 402 Bulemezi Plot 266. From the mutation form (annexure KW3), this parcel of land was subdivided out of Block 402 Bulemezi Plot 258.The respondent did not prove how the suit property was fraudulently converted from Block 402 Bulemezi Plot 261 to Plot 266 by the second appellant. The second appellant testified that he bought the land without the knowledge that the respondent had bought the suit land from the first appellant.

[28] In his testimony to the trial court the second appellant stated that the land he purchased was initially occupied by his father as a kibanja holder. He had commenced an action against the respondent for trespass to this land that was dismissed on the ground that he did not have letters of administration to the estate of his late father. He subsequently obtained letters of administration to the estate of his late father. It is clear that there was a dispute between the second appellant and the respondent. In effect the second appellant purchased the reversionary mailo estate from the registered proprietors, given the existing kibanja interest already possessed by his father or his father's estate.

[29] The respondent, in light of the litigation history between him and the second appellant, was aware that the second appellant claimed a kibanja interest in the land in question. Purchase of the reversionary mailo interest in those circumstances cannot necessarily be fraudulent. The claim that the second appellant fraudulently changed the plot number of the suit property from 261 to 266 is not supported by any evidence.

[30] The respondent asserts that he purchased Plot 261. The second appellant purchased and got transferred in his names Plot 266. These are two different properties unless there is an explanation to the contrary. The only explanation provided by the respondent was that the second appellant had fraudulently altered

the plot number from 261 to 266. There is no evidence to support this claim. In any case it is not the second appellant that creates these records. These records are created by the office of titles.

[31] As the respondent purchased a different property from the property that the second appellant purchased the question of fraud on the part of the second appellant in relation to plot 261 cannot arise.

[32] I would allow ground no.2 of the appeal.

[33] I would allow this appeal with costs here and below, set aside the judgment of the High Court and reinstate the judgment of the trial court.

Decision

[34] As Musoke and Obura, JJA, agree this appeal is allowed with costs here and below; the judgment of the High Court is set aside and the judgment of the trial court is reinstated.

Signed, dated and delivered at Kampala this 9th day of May 2019

Fredrick Egonda-Ntende
Justice of Appeal

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2. **KISENYI WILLIAM }** ::**APPELLANTS**

AND

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JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my brother Egonda-Ntende, JA. I agree with his findings on all the grounds and the conclusion that this appeal be allowed with costs here and below.

Dated at Kampala this 9th day of may 2019.

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Hellen Obura

JUSTICE OF APPEAL

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JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my brother, Fredrick Egonda-Ntende, JA with which I agree. I have nothing useful to add.

Dated at Kampala this ......9th...... day of ......May...... 2019.

Elizabeth Musoke

JUSTICE OF APPEAL