THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 0164 OF 2012

1. **NILE AGRO PROJECTS CO. LTD**
2. **MORRIS ONEN OBONG ..... APPELLANTS**

VERSUS

MRS. ROSE OKOT ..... RESPONDENT

(An appeal from the judgment of the High Court of Uganda at Gulu by Hon. Mr. Justice Remmy Kasule dated 29th April, 2011 in High Court Civil Suit No. 45 of 1999)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

This appeal arises out of the decision of Hon. Remmy Kasule, J *(as he then was)* in High Court Civil Suit No. 45 of 1999 delivered on the 29th day of April, 2011 in which judgment was entered in favour of the respondent.

Background

The respondent instituted a suit against the appellants seeking a declaration that she is the owner of the suit property comprised in Plot 11B Nehru Road, Gulu Municipality and other consequential orders. The suit property comprised in Leasehold Register Volume 208, Folio 19, Plot 11, Nehru Road, Gulu Municipality, originally belonged to Asians before they were expelled by President Idi Amin from Uganda in 1972. At the time the suit was filed it had not been reclaimed by the original Asian owners. The suit property was at the time managed by the

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Government of Uganda- Ministry of Finance through the Departed Asians Custodian Board (DAPCB). In 1996, the suit property was advertised for sale and priority was given to the sitting tenants at the time of bidding to purchase. The respondent was a co-tenant on the suit premises with the appellants, the 2nd appellant being a Director of the 1st appellant.

The respondent occupied a portion of the property known as 11B from 1st May 1992 by virtue of being married to the late Okot Ray who was a tenant thereon having been granted a tenancy by the DAPCB. She occupied 11B together with her husband, her co-wife and a sister to her husband. Her husband passed on but had paid rent in advance from 1992 to 1996. The appellants came into occupation of 11A in 1996 when the original tenant left. Upon advertisement of the suit property 2nd appellant discussed with the respondent and her co-wife and agreed on how to bid for the purchase of the property. They all decided to present one bid in order for it to be successful and it was agreed that the bid be done by the sitting tenants under the 1st appellant. The respondent paid Ug. Shs. 297,000/= to acquire bidding papers and they were filed by the 1st appellant as the sole bidder.

The purchase price at the bidding was Ug. Shs. 19,500,000/= the bidders were as a pre-requisite required to make a 10% down payment. The respondent paid Ug. Shs. 1,000,000/= and the appellants paid Ug. Shs. 950,000/= to make Ug. Shs. 1,950,000/= being the 10% deposit. It was agreed between the respondent and the 2nd appellant that rent would be collected by the 1st appellant from all tenants and it would be used to pay the balance to the Custodian Board for the purchase of the property. The respondent carried out repairs on portion 11B of the suit property and the Custodian Board agreed to turn the cost of repairs into part payment of the purchase price. After completion of the payment, the 1st appellant acquired a certificate of purchase in its names. On 30th August 1999, the respondent communicated to both appellants to regularize the agreement of ownership of the suit property but they wrote to her saying the company would discuss and make a

resolution on that matter. The appellants wrote through their lawyers that the suit property had been solely acquired by the appellants and they tried to evict the respondent but she resisted eviction. . The learned trial Judge entered Judgment in favour of the respondent.

Being dissatisfied with the decision of the learned trial Judge, the appellants filed this appeal on the following grounds;-

1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and consequently came to the wrong conclusions on all the issues framed for trial.*
2. *The learned trial Judge erred in law and fact when he misdirected himself on the definition of a sitting tenant and the application of the principle of estoppel and consequently reached the wrong conclusions on all the issues framed at the trial.*
3. *The learned trial Judge erred in fact and law when he held that the defendants committed fraud to the prejudice of the plaintiff in respect of the purchase of the suit property in the names of the 1st defendant.*
4. *The learned trial Judge erred in law when he failed to grant remedies sought by the appellants.*

Representation

When this appeal came up for hearing, *Mr. Alfred Okello Oryem* learned counsel, appeared for the appellants while *Mr. Gabriel Byamugisha* learned Counsel appeared for the respondent. The parties agreed to proceed by way of written submissions but were also permitted to make brief oral arguments. It is on the basis of the written submissions and the brief oral arguments that this appeal has been determined.

Appellants' case

Mr. Okello Oryem for the appellants argued that, the 1st appellant company applied for the property from the Departed Asians Custodian Board. After a successful bid the property was sold to it. He contended that the said property was not jointly purchased with the respondent as she alleged and there was never any agreement for the joint bid, all the bid forms and documents were in the sole name of the 1st appellant. He submitted that the burden of proving existence of an agreement for a joint bid between the appellants and the respondent rested on the respondent under *Section 101* of the Evidence Act and such agreement had to be in writing for the respondent to discharge this duty. Counsel cited *Giuliano Graiggo Vs Claudio Casadion Supreme Court Civil Appeal No. 16 of 2014*, in which the Supreme Court held that in evaluation the appellant's assertion that he had an oral agreement with the respondent to set up a joint venture to run a carpentry workshop, the Court upheld this Court's decision that there was no evidence of an oral contract and that there was no joint venture agreement. This was because no documentary evidence was adduced by the appellant.

Counsel further submitted that, there was no proof that the respondent paid any money towards the purchase of the property. There was no acknowledgment of receipt of the Ug. Shs. 297,000/= that the respondent claimed to have paid to the 2nd appellant for the bid documents. The respondent asserted that, she wrote Ug. Shs. 297,000/= in her book. However, the said book was never adduced in Court. Counsel argued that the assertion of facts by the respondent of advancement of money to the appellants and joint agreement were mere statements to impose a debt upon the 2nd appellant and forcefully impose joint ownership on the suit property. He submitted that the burden of proving such an agreement for joint purchase or advancement of money lay upon the respondent on a balance of probabilities which burden she failed to discharge.

Counsel faults the learned trial Judge for having found that the appellants committed fraud to the prejudice of the respondent by purchasing the suit property

in the names of the 1st appellant. The respondent's claim that the actions of the appellant were fraudulent was not proved at the trial. Counsel relied on *Kampala Bottlers Ltd Vs Domanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992* where the Supreme Court stated that where fraud is pleaded, particulars of the fraud must be given and the burden of proof in fraud cases is heavier than on a balance of probabilities generally required in civil cases.

While addressing the issue of whether the respondent was a sitting tenant, Counsel relied on *Section 10 (3)* of the Expropriated Properties Act which imposes upon a sitting tenant an obligation to continue paying rent on such property. Regarding the respondent, she came into occupation of the suit property in 1992 and was paying rent to the Custodian Board but no receipt was tendered in as evidence of payment. There was no evidence that the respondent was a sitting tenant or that money was advanced from her to bid for the purchase of the suit property. There was no evidence that the respondent even qualified to submit a bid jointly with the 1st appellant. Counsel asked Court to allow the appeal and grant the remedies sought in the appellants' counter claim.

Respondent's reply

Counsel for the respondent submitted that, the trial judge properly evaluated all the evidence on the record and came to the correct conclusion that the respondent was a co-owner of the suit property. The evidence of PW1, PW2, PW3 and PW4 proved that the respondent had an oral arrangement with the appellants to co-own the property at the bidding even though the documents were in the names of the 1st appellant as the sole bidder.

On the issue of sitting tenant, the trial Judge pointed out that it was an agreed fact during the scheduling that the respondent was co-tenant with the appellants. Counsel argued that the renovation of 11B of the suit property was done by the respondent and not the 2nd appellant as Counsel for the appellant implies.

He asked Court to dismiss the appeal with costs.

Resolution

This Court as a first appellate Court is, to re-evaluate all the evidence on record and to make its own inferences on all issues of the law and fact. *See: Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002, Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

Rule 30 of the Rules of this Court provides as follows;-

> *"30. Power to reappraise evidence and to take additional evidence*
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> *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*
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> *(a) Reappraise the evidence and draw inferences of fact; and*
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> *(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."*

I shall proceed to do so.

The background to this appeal has already been set out earlier in this Judgment and I shall not reprise it. The main issue to guide Court in resolving this appeal is whether the appellants and the respondent are co-owners of the suit property.

PW1 testified that, she handed over Ug. Shs. 297,000/= to the 2nd appellant for purposes of purchasing bid documents and that she wrote the same in her book. There was however no acknowledgment of receipt of the said money from the appellants. The respondent also tendered in a ledger entry and testified that the 2nd appellant received Ug. Shs. 1,000,000/= from Gray Traders. However, the ledger entry does not show who received the Ug. Shs. 1,000,000/= from the respondent. It states; *"7th/2/96 received from Labongo shs 1,000,000/=".*

PW2 testified that, PW1 gave a 10% contribution to the 2nd appellant but during cross-examination, PW2 contradicted himself when he stated that, he was actually not there when PW1 made the 10% contribution. PW3 also testified that he was not there when the respondent paid the 1,000,000/= to the 2nd appellant.

The 2nd appellant denied ever having received the 1,000,000/= from the respondent to acquire the suit property. He testified that the handwritten note dated 20th March, 1997 was written by him to the respondent to forward the letter dated 30th August, 1996 together with the schedule of works and by the date of the note was written, the suit property had already been sold to the 1st appellant. He stated that the note was to clear the misunderstanding signifying that rent was going to be increased in order to purchase the property. He testified that the 1st appellant company bid for the purchase of the suit property solely and did not distinguish between 11A and 11B.

From the above analysis, I find that, there was no evidence adduced by the respondent at the trial to show that the suit property was jointly purchased by both the appellants and the respondent. Exhibit P.1 which was relied on by the learned trial Judge to find that the respondent paid 1,000,000/= to the 2nd appellant was not sufficient evidence. Exhibit P.1 does not bare the 2nd appellant's signature as having been the person who made an agreement to receive the 10% of the bid initial payment from the respondent. The appellants' witnesses denied ever having made that agreement with the respondent. Unfortunately, no handwriting expert was brought in by either party to prove that the 2nd appellant actually had an arrangement with the respondent to co-purchase the suit property.

Regarding the issue of whether the respondent was a sitting tenant on the suit property, the appellant relied on *Section 10(3)* of the Expropriated Properties Act which imposes upon a sitting tenant an obligation to continue paying rent on the property. It was the evidence of the respondent that, she was not up to date on rent

payments and that explains why she didn't bid with the 1st appellant. She also testified that her late husband had paid rent upfront from 1992 to 1996 however, no receipt was tendered in to this effect. It is however not in dispute that the respondent is in occupation of the suit property on 11B.

In all civil matters, a Plaintiff bears the burden to prove his/her case on a balance of probabilities. The Plaintiff/respondent in this case therefore by virtue of *Section 101, 102* and *103* of the Evidence Act had the burden to prove the facts alleged by her in the plaint; as per *Section 101* of the Evidence Act. The Act provides therein that;

> *"Whoever desires any Court to give Judgment as to any legal right or liability, dependent on the existence of facts which he or she asserts must prove that those facts exist".*

In *Miller vs Minister of Pensions [1947] 2 ALLER 372*, Denning, J stated as follows;-

> *"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not."*

The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied. See: *Bradshaw vs McEwans Pty Ltd, (1959) I0I C.L.R. 298 at 305.*

In *J.K Patel vs Spear Motors Limited, Supreme Court Civil Appeal No. 4 of 1991*, the supreme discussed the significance of adducing evidence to prove facts of a case and remitted the file back to the lower Court. It held as follows;-

"As there has been no evidence on these two matters. I would remit the case to the lower court for such evidence to be taken and findings made on the evidence..."

In this particular case the respondent had to prove that she jointly purchased the suit property with the appellants from the Departed Asians Custodian Board, however she failed to discharge the burden on a balance of probabilities.

The respondent also alleged fraud in part of the appellants. The burden to prove the alleged fraud falls on he who alleged it. The allegations of fraud have to be strictly proved and attributed directly or by implication to the transferee. In *Kampala Bottlers Ltd vs Damanico (U) Ltd, Supreme Court, Civil Appeal No. 22 of 1992,* Wambuzi, C.J stated at page 7 of his judgment held that, it must be attributable directly or by implication to the transferee.

".....fraud must be attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."

The learned Chief Justice went further to find that,

"I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters."

The particulars of fraud from the respondent's amended plaint are as follow;-

1. *"Collecting all the rent from the premises and failing/refusing to account to the plaintiff.*
2. *Obtaining the certificates of purchase and concealing the fact from the plaintiff.*

3. *Directing the plaintiff to go to them to enter a tenancy agreement for rent with them yet the plaintiff is a beneficial owner.*
4. *Threatening to evict the plaintiff from the premises.*
5. *Refusal to consult with, discuss, inform, and act together or corporate with the plaintiff in procuring the ownership of the property.*
6. *Attempting to take sole and exclusive ownership and possession of the suit property without the plaintiff who had paid them."*

As already stated above, the respondent had to discharge her duty to prove fraud against the appellants which, in my view, was not done. The respondent laid out a set of facts without evidence to support the same. I find that the trial court wrongly imputed fraud on the appellants, the same not having been proved by the respondent. I also find that the respondent was not co-owner of the suit property, as none of the documents on record indicates that, she purchased the property jointly with the appellants.

For the reasons given above, I find that this appeal succeeds. I set aside the judgment and orders of the High Court in Civil Suit No. 45 of 1999 and substitute with this judgment in effect dismissing the respondent's claim at the High Court. The respondent's suit at the High Court is dismissed with costs. The respondent will bear the costs of this appeal.

As Kiryabwire and Madrama, JJA agree, it is so ordered.

Dated at **Kampala** this ....29th.... day of ....June..... 2020.

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Kenneth Kakuru

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0164 OF 2012

NILE AGRO PROJECTS AND ANOTHER========== APPELLANT

VERSUS

MRS.ROSE OKOT==========RESPONDENT

(CORAM: KAKURU, KIRYABWIRE, MADRAMA)

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my Brother Hon. Mr. Justice Kenneth Kakuru, JA in draft and I agree with the findings and final decisions and orders and have nothing more useful to add.

Dated at Kampala this 29th day of June 2020.

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 164 OF 2012

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

1. **NILE AGRO PROJECTS CO. LTD}**
2. **MORRIS ONEN OBONG} .....APPELLANTS**

VERSUS

MRS. ROSE OKOT} .....RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

I have had the opportunity of reading in draft the judgment of my learned Brother Hon. Mr. Justice Kenneth Kakuru, JA and I agree with facts, analysis, findings and decisions on grounds 1, 2, 3 and 4 of the appeal. I also agree that the appeal be allowed for the reasons he has stated in his judgment. I however, wish to add a few words of my own.

I have subjected some documentary exhibits in support of the Appellant's proprietorship as well as documentary evidence in support of the Respondent's suit adduced in the High Court to scrutiny. As far as the Respondent who was the plaintiff is concerned, exhibit P1 is dated 7th February, 1996 indicating that the Appellant received Uganda shillings 1 million for paying 10% of the bid price for the shop. The payment was made by Cray Traders. Secondly, it was in respect of Plot 11B. In exhibit P2 it is indicated that some monies were received including Uganda shillings 1,000,000/= on 7th February, 1996 from Labongo. The document does not indicate who received. Exhibit P3 is dated 30th August, 1996 and is a letter addressed to the Executive Secretary, Departed Asians Property Custodian Board (DAPCB) by the Appellant under the hand of the second Appellant. It

is a claim for refund of expenses used in the rehabilitation of a commercial building on Plot 11 Nehru Road. The claim is for expenditure of Uganda shillings 13,328,500/=. In that letter, Mr. Morris Onen Obong requested that the amount indicated as expenditure for rehabilitation be treated as part payment for the building which would leave them a balance to pay of Uganda shillings 4,143,270/=.

On the other hand, the Appellant's documents in exhibit D1 indicate that on 21st July, 1999 the first Appellant obtained a certificate of purchase or receipt of property from the DAPCB. It was for Plot 11 Naguru Road, Gulu. The property is described as LRV 208 Folio 19. The bid amount is Uganda shillings 9,000,000/= and is dated 25th January, 1996 in the names of the first Appellant. The sale agreement dated 1st February, 1996 is however for Uganda shillings 19,500,000/=. The 1st Appellant was required to pay an amount of 10% equivalent to 1,950,000/= within five working days from the date of the sale agreement. The full purchase price was supposed to be paid not later than 60 days from 1st February, 1996. The Appellant introduced in evidence several payment receipts showing payment to the vendor for the property.

There is no documentary evidence to suggest that the DAPCB accepted the proposal to treat expenses for the rehabilitation of the premises as part payment for the suit Plot. By letter dated 15th June, 1998 exhibit D6 the DAPCB gave notice to the first Appellant to complete payment by 30th September, 1998 or else the offer for purchase of the property shall be cancelled. Subsequently, by 23rd July, 1999 the DAPCB wrote to the Commissioner of Land Registration, Ministry of Water, Land & Environment notifying the office that Plot No 11 Nehru Road LRV 208 Folio 19 had been sold to the first Appellant. The documentation does not in any way refer to the Plot as 11A or 11B. It refers to the entire Plot as Plot 11. Even if the houses on the Plot are semi-detached having Part A and Part B, this refers to the

houses on the Plot and not to the Plot which appears, from the documentary evidence, to be one Plot. In any case, the DAPCB dealt with one applicant and DAPCB is the only one which could have been deceived that there was one applicant for the purchase of the property. An allegation that the first Appellant acquired the property fraudulently does not go to cancellation of title but to breach of promise between the Appellant and the Respondent (promisee).

If the Respondent had contributed money to the project of bidding for the property, her remedy lay in seeking refund and compensation from the Appellant. There is a clear distinction between tenancies and a lease hold for Plot 11. None of the parties produced the leasehold title. It is however a standard covenant in most leases that the lessee shall not sublet the premises without the consent of the landlord. In any case, the owner of the Plot could continue receiving rent from any tenants on the premises. If there were breach of promise to co – own the premises, it needed to be pleaded as such and proved. There is no evidence that the DAPCB could have sold Plot 11 to two applicants.

In the premises, I agree that the appeal be allowed in the terms proposed by my learned brother Hon. Mr. Justice Kenneth Kakuru, JA.

Dated at Kampala the 29th day of June 2020

Christopher Madrama Izama

Justice of Appeal