**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**HCT – 01 – LD – CA – 002 OF 2017**

**(Arising from KAS – 00 – CS LD No. 019 of 2015)**

**1. ASIIMWE ERISA**

**2. KIKUNDI EMMANUEL ...................................................................APPELLANTS**

**VERSUS**

**YOSITAS MUKIRANIA........................................................................RESPONDENT**

**BEFORE: HIS LORDHSIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE**

**Judgment**

This is an appeal against the decision of His Worship Matenga Dawa Francis, Chief Magistrate at Kasese delivered on the 6/12/2016.

**Background**

The Respondent sued the Appellants on allegations of trespass on the suit land. The 1st Appellant denied the allegations and averred that he was a bonafide purchaser for value having bought the suit land from the 2nd Appellant and a sale agreement executed to that effect.

**Issues for determination in the lower Court were:**

1. Whether the Defendants have locus to bring a counterclaim against the Plaintiff?
2. Who is the lawful owner of the suit land?
3. Whether the Certificate of title was procured through fraud?
4. Whether the sale by D2 to D1 was valid?
5. Whether there is trespass to the suit land by either party?
6. What are the remedies available to the parties?

The trial Magistrate found that the Appellants had no locus to bring a counterclaim, that the Respondent was the lawful owner of the suit land, that the Certificate of title was not fraudulently acquired, the Appellants were found to be trespassers, an eviction order was issued, counter claim dismissed and costs awarded to the Respondent.

The Appellants being dissatisfied with the above decision lodged the instant appeal whose grounds as per the memorandum of appeal are;

1. That the trial learned Magistrate failed to and did not properly or at all evaluate the evidence on record and as a result he came to a wrong and erroneous decision thereby occasioning miscarriage of justice.
2. That the trial learned Magistrate erred in law and fact when he held that the 1st Appellant was not a bonafide purchaser for value without notice.
3. That the trial Magistrate erred in law and fact when he failed to consider the fact that the 2nd Appellant was not a party to the suit where execution was carried out.
4. That the learned trial Magistrate erred in law and fact when he held that the Respondent was not fraudulent in acquiring the Certificate of Title.

**Representation:**

Counsel Chan Masereka appeared for the Appellants and Counsel Komunda Ambrose for the Respondents. By consent both parties agreed to file written submissions.

**The duty of the 1st Appellate Court:**

The duty of the first Appellate Court is to re-evaluate the evidence on record and come to its own conclusion bearing in mind that it never saw or heard the witnesses in the lower Court.

In the case of **Kifamunte Henry versus Uganda, SC, (Cr) Appeal No. 10 of 2007**, it was held that;

*“...the first Appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The Appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it...”*

**Resolution of the Grounds:**

**Ground 1: That the trial learned Magistrate failed to and did not properly or at all evaluate the evidence on record and as a result he came to a wrong and erroneous decision thereby occasioning miscarriage of justice.**

Counsel for the Appellants submitted that the evidence of the 2nd Appellant was not challenged when he mentioned that he got the suit land from his late father Isambiro Kiiza who was a ridge leader. That the Respondent himself told Court that Isambiro Kiiza was the ridge leader and father to the 2nd Appellant. That subsequently the Respondent acquired the Certificate of title without the permission of the 2nd Appellant who is the owner of the suit land.

Counsel for the Respondent on the other hand submitted that the Appellants had no locus standi to institute the Counter claim and even allege fraud yet the 1st Appellant is even still in occupation of the same. **(See: Madhivan Group Limited versus Alexander David Simbwa, Moses Walugembe, Hajji Abdu Karim Saava, Walugembe Godfrey & 73 Others, by Counterclaim Alexander David Simbwa & 77 Others versus Madhivani Group Limited and Another, HCCS No. 615 of 2012 (unreported) and Section 176(c) of the Registration of Titles Act).**

In addition Counsel for the Respondent submitted that there was no proof of fraud adduced by the Appellants, thus, the Certificate of title of the Respondent cannot be impeached and it is conclusive proof of ownership of the suit land. **(See: Sections 59 and 176 of the Registration of Titles Act, David Acar versus Alfred Acar – Aliro [1982] HCB 60 and H. R. Patel versus B.K. Patel [1992 – 1993]HCB 137).**

On the other hand that if the 1st Appellant had checked with the line ministry, he would have found that the suit land was registered in the Respondent’s name, so he would have contacted the Respondent for compensation or alternatively ask for a refund of the purchase price. Thus, no due diligence was exercised.

Counsel for the Appellants in rejoinder submitted that the Appellants were unjustly being denied to Counterclaim against the Respondent who had fraudulently acquired a Certificate of title to the suit land depriving them of their customary right on the same.

That the **Madhivan case (Supra)** is distinguishable from the instant case where the 2nd Appellant had been on the suit land since the 1950’s and the Respondent registered in 1993 to defeat the 2nd Appellant’s interest in the same and the Respondent has never occupied the suit land.

I have addressed my mind to the submissions of both Counsel and find that the 2nd Appellant’s testimony in regard to how he acquired the suit land was not challenged, meaning that he had good title that he passed on to the 1st Appellant.

In regard to the Counter-claim, I am of the view that only a party who is being denied a right has the locus standi to institute one. In the instant case the Appellants though in occupation of the suit land were being threatened with eviction by the Respondent thus had a right to institute a counter claim to protect their interests and were right to institute one.

The 1st Appellant having purchased land from a person that had lived on the suit for a very long time unchallenged and had neighbours witness on the sale agreement in my view did a reasonable search expected of a lay man. The arguments of Counsel for the Respondent that the 1st Appellant should have gone to the line ministry is not practical with all due respect in instances that involve persons that are ignorant of the law, it would have been a different case if the 1st Appellant had an advocate that helped execute the transaction. Otherwise, inquiring from neighbours and having them witness during the transaction in the instant case was sufficient due diligence.

This ground therefore succeeds.

**Ground 3: That the trial Magistrate erred in law and fact when he failed to consider the fact that the 2nd Appellant was not a party to the suit where execution was carried out.**

Counsel for the Appellants submitted that the 2nd Appellant was not party to Civil Suit No. MFP 08/83 where execution was carried out. That his house was even never demolished and it was wrong for the trial Magistrate to rely on that judgment yet the 2nd Appellant was not party to the suit and the Respondent was at liberty to sue whoever he thought he had a claim against but did not add the 2nd Appellant as per the case of **Kalemera and Others versus Unilever (U)Limited [2008] HCB 137** where Court held that a Plaintiff is at liberty to sue anybody he or she thinks that he or she has a claim against and cannot be forced to sue anybody else.

Counsel for the Respondent submitted that even though the 2nd Appellant was not party where there was execution, he never protested because he had no interest in the land. Otherwise he would have challenged through objector proceedings or sued the Respondent for the destruction of his property or even lodged a caveat but rather he entered the land forcefully and later sold two pieces of land to the 1st Appellant without permission.

Counsel for the Respondent in rejoinder submitted that the Appellants in their lay man understanding protested the execution by reoccupying the suit land and the same was not challenged by the Respondent until 2015. That interest in land cannot be lost through wrongful eviction and the ignorance of the law by the 2nd Appellant can be cured under **Article 126 (2) (e)** of the Constitution of the Republic of Uganda, 1995.

In the instant case the Respondent did not institute any legal action against the Appellants until 2015 which could only mean that he was aware that they did have customary interests in the suit land otherwise he would have ensured that there were no encroachers on his alleged land immediately after registration or after execution which he never did.

It is evident that the 2nd Appellant was not party to the suit where execution was conducted and thus the trial was wrong in failing to consider the fact that the 2nd Appellant was not a party to the suit where execution was carried out.

This ground therefore succeeds.

**Ground 4: That the learned trial Magistrate erred in law and fact when he held that the Respondent was not fraudulent in acquiring the Certificate of Title.**

Fraud was defined in the case of **Fredrick Zabwe versus Orient Bank and 5 Others, SCCA No. 4 of 2006**, to mean;

*“An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing...”*

And in the case of **John Katarikawe versus William Katwiremu and Another [1977] HCB 187** fraud was defined as:

*“Fraud, though not defined under the Registration of Titles Act, covers dishonest dealings in land such as depriving a purchaser for value in occupation of the land of his unregistered interest.”*

Counsel for the Appellants submitted that DW2 told Court that he got the suit land from the ridge leader as per the Bakonzo culture and the same was confirmed by the Respondent. The 2nd Appellant also testified that he had been the ridge leader since 1960 and the same was not challenged. Thus, the 2nd Appellant has customary interest in the suit land even though the same was offered to another person by the Uganda Land Commission; he was entitled to compensation for his developments on the land.

Further, that the Respondent at Bwera Court testified to the effect that in 1968 he was given land by the ridge leader measuring 200 acres who is the father of the 2nd Appellant. Yet on the record of proceedings from which the instant appeal arises he told Court that he inherited the suit land in 1980 and got the Certificate of Title in 1993. The Respondent also stated that he bought 13 acres from the father of the 2nd Appellant but no sale agreement was tendered in Court.

Furthermore, that exhibit “P” is not proof that the suit land was inspected before survey and no inspection report was tendered in Court by the Respondent to prove that the neighbours were present when the Respondent acquired the suit land. Thus, the Respondent with full knowledge of the Customary rights of the 2nd Appellant went ahead to apply for the suit land well knowing it was not vacant.

**In the** **Matter of Ruzhwengyibwa and in the Matter of Ruzigana, Miscellaneous cause No. 48 of 1976**, Court held that knowledge of other people’s rights or claims and the deliberate acquisition of a registerable title in the face of such knowledge is fraud. And **Section 77** of the Registration of titles Act is to the effect that a certificate of title procured by fraud is void.

Counsel for the Respondent on the other hand submitted that there was no evidence adduced on the fraudulent acts of the Respondent in acquiring the Certificate of Title and proof of fraud is slightly higher than in other civil case thus, above balance of probabilities. **(See: Ronal Kayara versus Hassan Ali Ahmed, SCCA No. 1 of 1990).**

In regard to proving fraud, Counsel for the Appellants in rejoinder submitted that the evidence of DW2 was unchallenged that he acquired the suit land in the 1950s and the testimony of the Respondent on the other hand was full of contradictions which prove that there was a customary interest on the suit land in favour of the 2nd Appellant which the Respondent sought to defeat through obtaining a title without compensating the 2nd Appellant. Counsel cited the case of **Eridad Kabagyema versus Biterwa, HCCS No. 79 of 1987**, where Court held that the Defendant was guilty of fraud when they obtained registration with proved knowledge of the existence of the unregistered interest of the Plaintiff which they wrongly and knowingly defeated.

Further, that failure to inspect the land for purposes of being brought under the Registration of Titles Act is a fatal irregularity and the Respondent acted fraudulently by processing the title well knowing he had not followed proper procedure. Thus, the title should be impeached and cancelled for lack of an inspection report that is so crucial in the process of obtaining a title.

I find that the acts of the Respondent as per the above definitions of fraud were fraudulent in as far as obtaining the Certificate of title to the suit land is concerned. The Respondent got the Certificate of title in 1993 when the 2nd Appellant was in occupation of the suit land. There was no evidence adduced that the 2nd Appellant was ever compensated for his developments on the suit land yet the Respondent applied for title well knowing the land was not vacant. There was no inspection report submitted in Court and on the alleged purchased 13 acres from the 2nd Appellant, no sale agreement was tendered in Court.

I find that the learned trial Magistrate erred in law and fact when he held that the Respondent was not fraudulent in acquiring the Certificate of Title.

This ground also succeeds.

**Ground 2: That the trial learned Magistrate erred in law and fact when he held that the 1st Appellant was not a bonafide purchaser for value without notice.**

A bonafide purchaser is defined in Black’s law Dictionary, 8th Edition, Page 1291 as;

*“One who buys something for value without notice of another claim to the property and whether actual or constructive notice of any defect or informality claims or equities against the seller’s title, one who was in good faith paid valuable consideration for property without notice of prior adverse claims.”*

A bonafide purchase for value is also defined as one without notice of fraud and without intent to wrongly acquire as per the case of **Bugoba versus Kigozi and M. Mbabali, HCCS No. 0543 of 2004.**

Counsel for the Appellants submitted that the 1st Appellant told Court that before he bought the suit land he was not a resident of the area.

The 2nd Appellant testified that he sold to the 1st Appellant land, DW3, and DW6 who are his neighbours witnessed the sale of the suit land. Thus, as per the evidence on record the 1st Appellant was a stranger to the area who found the 2nd Appellant who was in occupation of the suit land, a village chief, did his due diligence, bought the suit land, settled on the same until 2015 when his occupation was challenged. He therefore did reasonable inquiries as expected of a reasonable purchase of his class and is therefore a bonafide purchaser for value.

Counsel for the Respondent submitted that as per the tests set out in the case of **Ipolito Semwanga versus Kwizera Buchana and Others (HCCS No. 16 of 2005)** the 1st Appellant only succeeds on only one of the three grounds where he paid valuable consideration otherwise there was fraud on his part and he was not diligent. **(See: John Bagaire versus Ausi Matovu, C.A. 7 of 1996).** Thus, no due diligence was carried out and the 1st Appellant is not a bonafide purchaser for value.

Counsel for the Appellants submitted in rejoinder that the above case is distinguishable from the instant case where the registered proprietor has never occupied the suit land and the 1st Appellant was under honest belief that he was transacting on customary land and carried out all the reasonable diligence a lay man could before purchasing the suit land.

In the instant appeal the 1st Appellant was found to have done the requisite due diligence expected of a lay man and he purchased the suit land without notice. The 1st Appellant has been in occupation of the suit land since 2001 when he purchased the same without any interference until 2015 when the Respondent instituted a suit against him and the 2nd Appellant. In the circumstances I find that the 1st Appellant was a bonafide purchaser for value without notice.

This ground also succeeds.

In a nutshell this appeal succeeds on all grounds. The decision of the lower Court is set aside. Costs are awarded in this appeal and in the lower Court. I so, order.

Right to appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**

Judgment read and delivered in open Court in the presence of;

1. Counsel Acellam Collins holding brief for Counsel Masereka Chan for the Appellant.
2. Counsel Komunda Ambrose for the Respondent.
3. Respondent in Court.
4. James Court Clerk.

In the absence of the Appellants.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**