

5

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(LAND DIVISION)

CIVIL APPEAL NO.21 OF 217

(ARISING FROM WAKISO MAGISTRATES COURT CIVIL SUIT  
NO.140 OF 2012)

10

SSEMPALA ERIA :::APPELLANT

VERSUS

NTAGANIRA JOSEPH:::RESPONDENT

*(Appeal from the judgment of Magistrate Grade 1 at Wakiso  
dated 28<sup>th</sup>February 2017 in Civil Suit No.140 of 2012)*

15

BEFORE: HON.MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT:

Ssempala Eria (*hereinafter referred to as the "Appellant"*) brought this appeal against Natganira Joseph (*hereinafter referred to as the "Respondent"*) challenged decision of His Worship Kirya Martins Magistrate Grade 1 of Mpigi at Wakiso (*hereinafter referred to as the "trial court"*) delivered on 28/02/2017.

20

**Brief background:**

The Respondent, a money lender, acquired land comprised in Busiro Block 358 Plot 4 at Sumba Nsangi Sub-county (the "suit land") in December 2009. This followed a compromise between him and the then registered proprietor who had pledged the suit

25

CERTIFIED TRUE COPY OF THE ORIGINAL  
*[Signature]*  
REGISTRAR LAND DIVISION  
DATE: 21/08/18

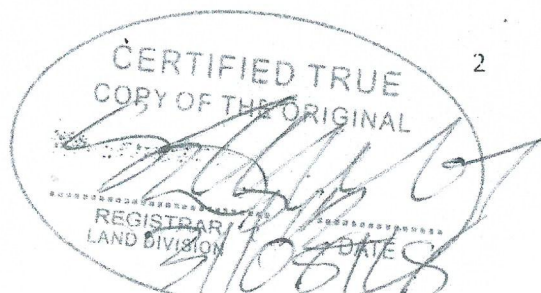
1

FEE PAID: 25,000  
RECEIPT NO: 217/18  
HIGH COURT OF UGANDA  
LAND DIVISION  
DATE: 21/08/18

5 land to the Respondent as security for a loan. The suit land was  
occupied by Kibanja owners who included the Appellant. After  
acquiring the suit land the Respondent sought to evict the  
Appellant on the grounds that he is not a lawful Kibanja owner.  
The Appellant resisted and the Respondent sued him in the  
10 Wakiso Magistrate Grade 1 Court. The trial court held in favour  
of the Respondent. Being aggrieved by that decision, the  
Appellant filed this appeal and advanced the following grounds:

***1. The learned trial magistrate erred in law and fact  
when he failed to properly evaluate the evidence  
adduced at the hearing and arrived at a wrong  
15 conclusion that the Appellant was not a Kibanja  
owner on the suit land but a trespasser.***

***2. The learned trial magistrate erred in law and fact  
when he failed to consider the fact that the  
20 appellant acquired and possessed the Kibanja on the  
suit land right from 2006 before the Respondent  
acquired registration of the land in 2009 and that  
the Appellant had been recognized as a Kibanja  
holder by the previous owners.***



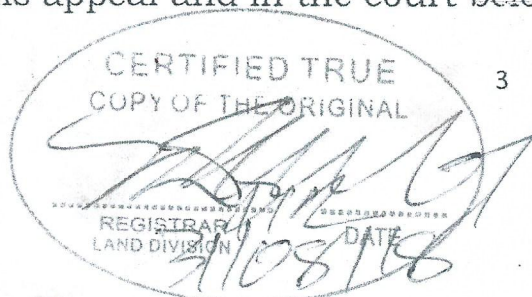
5        **3. The learned trial magistrate erred in law and fact to  
rely and base his decision on the findings of the  
criminal trial against the appellant which was  
contested and subject of a pending appeal**

10       **4. The trial magistrate erred in law and fact to find  
that the appellant's purchase agreements for the  
Kibanja were forged whereas not**

15       **5. The learned trial magistrate erred in law and fact to  
consider extraneous matters and make them the  
basis of his findings when such matter did not form  
part of the evidence adduced at the hearing**

20       **6. The learned trial magistrate erred in law and fact  
when he failed to consider the fact that the  
respondent and one Musisi Rogers never acquired the  
suit land through outright purchase but by virtue of  
a consent order passed in court.**

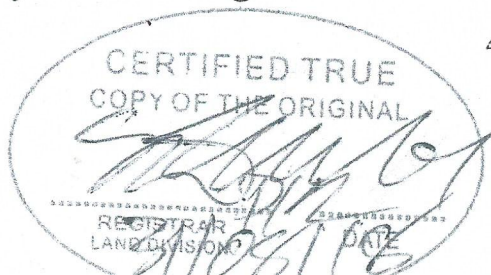
The Appellant prays that his appeal be allowed and the judgment of the trial court be set aside; that he be declared a Kibanja owner on the suit land; and that the Respondent pays the costs of this appeal and in the court below.



5 The Appellant is represented by Mr. Tumwebaze Lawrence and  
Mr. Kazungu Apollo represents the Respondents. They filed  
written submissions to argue the appeal and supplied authorities  
for which I must thank them.

The duty of this court as the first appellate court is to review the  
10 evidence and the materials afresh and draw its own conclusions  
and inferences. In so doing, however, this court must bear in  
mind that it neither saw or heard the witnesses as they testified  
and should therefore, make due allowance for that fact. See:  
***Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972)***  
15 ***E.A. 32; Kifamunte Henry vs. Uganda SCCA No.10 Of 1997***  
which cited ***Fr. Narsensio Begumisa &Ors vs. Eric Tibebaga***  
***SCCA No.17 of 2002.***

It is also important to note that in ordinary civil cases, such as  
the instant one, the plaintiff bears the burden to prove his or her  
20 case on a balance of probabilities. See: ***Uganda Petroleum Co.***  
***Ltd vs. Kampala City Council (Land Division)HCCS No.***  
***No.250 of 2005.***Therefore, the Respondent who was the plaintiff  
at the trial was duty bound to discharge that burden to the  
required standard. Nevertheless, owing to the allegations of  
25 forgery of sale agreement which raise the issue of fraud, it



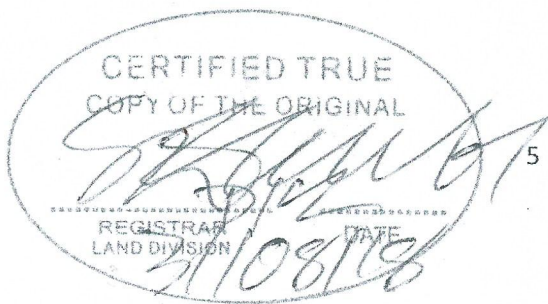
5 required a higher standard of proof than the balance of probabilities but lower than proof beyond reasonable doubt required in criminal cases. See: ***Kenya & 2 Ors vs. Nabikolo & 4 Ors HCCS No. 771 of 2007.***

In ***Kampala Bottlers Ltd vs. Damanico (U) Ltd, SCCA No. 22 of 1992*** the position is that even where fraud is proved, it must be attributable directly or by necessary implication, to the transferee. Wambuzi, C.J stated at page 7 of his judgment;

“***...fraud must be attributable to the transferee.....it must be attributable either directly or by necessary implication....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 as he then went further and stated that;

“***...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.***”

In ***Fredrick J.K Zaabwe vs. Orient Bank Ltd &5 others SCCA No.4 of 2006***the Court adopted the definition of “fraud” in



5 *BLACK'S LAW DICTIONARY 6<sup>TH</sup> Edition* at page 660, and went on to define the word fraudulent as follows;

*“To act with “intent to defraud” means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.”*

10

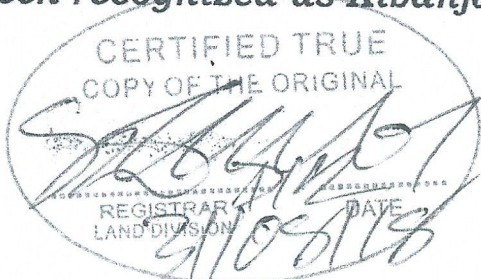
I will follow the definition and principles enunciated above in the consideration of the grounds in this appeal. Ground 1 and 2 are interrelated and shall be resolved jointly.

*Ground 1: The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence adduced at the hearing and arrived at a wrong conclusion that the Appellant was not a Kibanja owner on the suit land but a trespasser.*

15

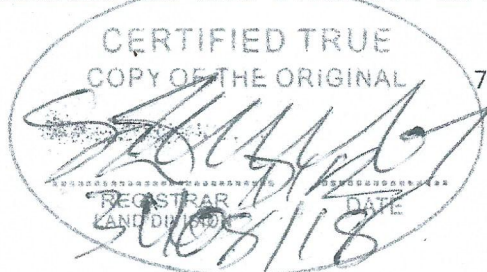
*Ground 2: The learned trial magistrate erred in law and fact when he failed to consider the fact that the Appellant acquired and possessed the Kibanja on the suit land right from 2006 before the Respondent acquired registration of the land in 2009 and the Appellant had been recognized as Kibanja holder by previous owners.*

20



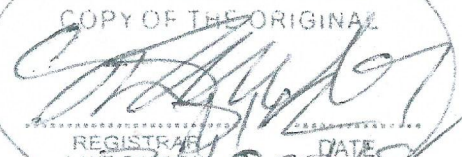
5 The record of appeal, at page 108, the Appellant as DW1 gave evidence that he owns a Kibanja on the suit land which he acquired by purchasing it in pieces in 2006, 2008 and 2009 from one Fred Magemo, Ddamulira Tebusweke and Nassanga Rose, respectively. At page 148-158 (supra) the Appellant  
10 exhibited the sale agreement. At pages 110-113(supra)Christopher Sebuliba and his wife Harriet Nakayiira who are the former registered proprietors of the suit land testified and confirmed that the Appellant was a Kibanja owner on their land. The trial court also visited the *locus in quo* and at  
15 page 73(supra)made a sketch plan that shows existence of the Kibanja holding with houses and gardens. Dhamulira Tebusweke and Magemo Fred from whom the Appellant claims to derive his Kibanja interest did not testify. However, one of their sons DW5, at page 115(supra) and page 65-66 testified  
20 that Dhamulira Tebusweke sold part of his Kibanja to Fred Magemo who later sold it to the Appellant. Further, that the Appellant has been their neighbor for a long time and has houses and gardens on the Kibanja.

Counsel for the Appellant submitted that the trial court did  
25 not consider all this evidence in its evaluation of the evidence.



5 That the trial court ought to have also considered the evidence  
that whereas the existence of the Kibanja dates back to 2006,  
the Respondent only acquired the suit land in 2009; which  
means that his acquisition of the registered interest was  
subject to the existing interests of the Kibanja owners who  
10 included the Appellant.

The Respondent, at pages 25-40(supra) contended that the  
trial court adequately evaluated the evidence before it and  
concluded that the Appellant was not a Kibanja owner. That  
the trial court also rightly considered the fact that the  
15 Appellant fraudulently acquired the Kibanja and that the  
Appellant, at page 108(supra) tendered in evidence three  
agreements which were found to be faulty. That the first  
irregularity was that they were all witnessed by the Appellant's  
relatives to wit; his wife Irene, his father - in - law Fred  
20 Magemo, his elder brother Kigwanyi Joshua and cousin  
Kiyimba Edward. That no local official or neighbor were  
involved or signed the agreement; which is an indicator of  
connivance. Further, that the named relatives were convicted  
together with the Appellant for forgery in 2015 and therefore  
25 the trial court rightly found that the Appellant connived with

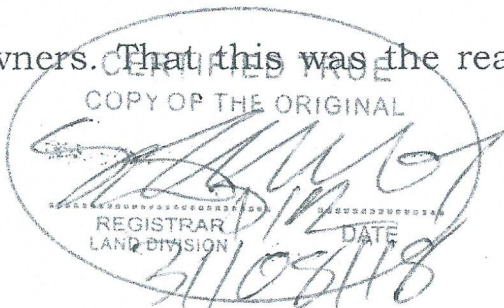
CERTIFIED TRUE  
COPY OF THE ORIGINAL  
  
REGISTRAR  
LAND DIVISION  
DATE 21/08/18



5 relatives to defraud the Respondent of his land.

Counsel further submitted that the trial court could not rely on Sebuliba because he was still annoyed for losing his land. That at page 62(supra) it is shown that the agreement relied on by the Appellant was signed in 2008 and the LC1 stamp was only put on it in 2011. That even DW4 who stamped it admitted that he was not the LC1 Chairman of the area at the time and that he merely stamped the agreement just to convince the bank to advance the Appellant a loan. Counsel also pointed out that DW2 denied receiving a Kanzu or any Busuulu payment from the Appellant as a Kibanja owner. That the trial court in its evaluation of the evidence, at page 91(supra) found that the Appellant's evidence was full of grave inconsistencies and contradictions in that it was not logical to pay Busuulu to the landlord who denied the same.

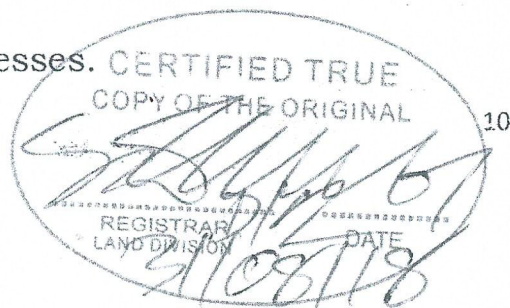
20 Counsel for the Appellant submitted in rejoinder and denied that the Appellant ever acted as broker when the Respondent was purchasing the suit land. That the Respondent never purchased the suit land but acquired it through compromise in a civil suit where he had been involved with the previous owners. That this was the reason why it was difficult for the



5 Respondent to know the encumbrances (Bibanja owners) that existed on the suit land and took the suit land as it was.

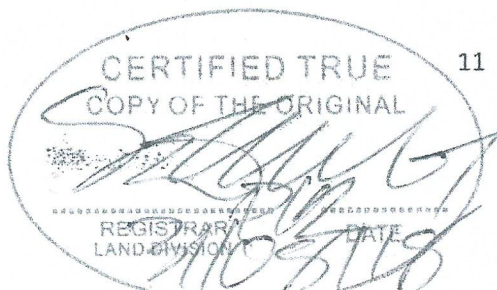
Further, that the Appellant had no obligation to disclose to the Respondent that he had a Kibanja on the suit. That the Respondent having acquired interest in the suit land that  
10 interest was subject to that of all the Bibanja owners. Counsel also disputed the claim that the Appellant constructed houses on the suit land only in 2010. That instead his Kibanja interest in the suit land dated back to 2006 and that this was even the observation at the *locus in quo* visit. That it is also not true  
15 that the witnesses on the sale agreement are relatives of the Appellant as no such evidence is on record. That even if they were, they are not precluded by law from witnessing an agreement.

Regarding the Busuulu, counsel argued that the same was  
20 paid to Sebuliba Christopher who was husband to Harriet Nakayira and so the land was family land and the Busulu was received for family as a whole and as such all the necessary Busuulu was paid. Counsel also denied that there are contradictions in the evidence of the Appellant and or his  
25 witnesses.



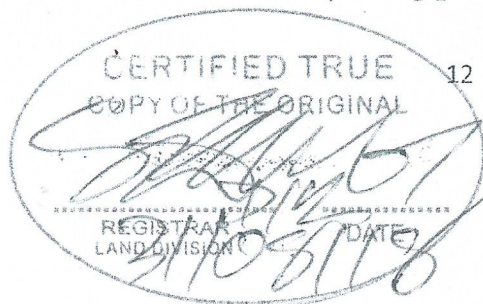
5 After evaluating all the evidence on the record as a whole, this  
court finds hardly any merit in the Appellant's case. He failed  
to satisfy the trial court because his evidence was weak that he  
is a Kibanja owner. Overwhelming evidence of forgery and  
dishonesty and therefore fraud had been adduced against him  
10 in the acquisition of the alleged Kibanja interest on the suit  
land and the trial court also found as such. This is evident  
from the judgment of the criminal court where it was proved  
beyond reasonable doubt that the Appellant was involved in  
fraud on the suit land and was as a result, along with others,  
15 convicted and sentenced. It is in no doubt that the trial court  
came to the right decision premised on evidence of such a  
conviction of the Appellant.

The record shows that the Respondent testified that the  
Appellant was his loans officer in the money lending company.  
20 That he would pay the Appellant a commission and allowances  
depending on the customers he brought in. He stated that the  
Respondent would also enforce payments of defaulters and  
that although had no appointment letter, the Respondent was  
the Appellant's employee. He also testified that he paid the  
25 Appellant Shs.20, 000,000 to compensate squatters on the



5 suit land in installments and had receipts of all the  
installments for the bank deposits as is indicated at page 53 of  
the record. This testimony continues at page 54 (supra) where  
other duties of the Appellant in the company were explained  
further to paint a picture of him being central in the  
10 operations of the company especially in the Kampala office.  
PW3 Musisi Rogers, at page 55(supra) testified that when he  
was buying the land the Appellant was the broker who took  
him around and that the Appellant knew the boundaries very  
well. PW3 confirmed that the Appellant was paid as broker for  
15 the land which PW3 purchased.

PW2 Mr. Tumwesigye testified that he had known the  
Respondent since childhood and that he advised the Appellant  
against using the suit land which is not his before getting  
permission of the owner but that the Appellant refused to  
20 listen. PW2 stated that he is the one who even recommended  
the Appellant to the Respondent to work in the company. PW2  
emphasized that he never saw anything owned by the  
Appellant on the suit land. PW4 Nanyenya Faith, testified that  
she has been the Chairperson LC1 Bukaluba since 2001 and  
25 that she had never seen the Appellant until when she saw him



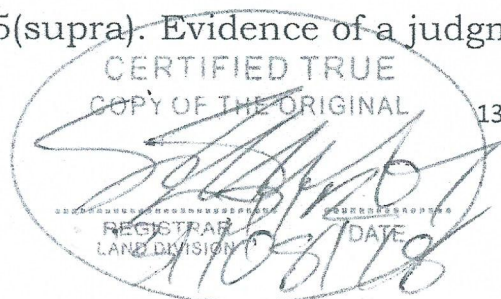
5 in court.

All the above evidence easily discounts the Appellant version as the Kibanja owner on the suit land. I find that the trial court properly evaluated the evidence and came to the correct conclusion that the Appellant was not and could not have been  
10 a Kibanja owner but rather connived with people to create a fictitious Kibanja ownership. The evidence overwhelmingly shows that the Appellant was closely working with the Respondent as the latter's agent and broker and took advantage of that to convert the suit land to his personal use.  
15 Ground 1&2 fail and they are dismissed.

***Ground 3: The learned trial magistrate erred in law and fact to rely and base his decision on the findings of the criminal trial against the Appellant which was contested and subject of a pending appeal.***

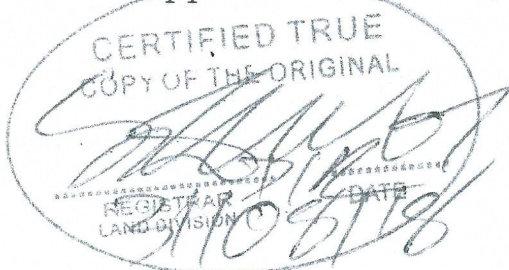
20 ***4. The trial magistrate erred in law and fact to find that the Appellant's purchase agreements for the Kibanja were forged whereas not***

The trial court dealt with this issue in its judgment, at pages 83-85(supra). Evidence of a judgment in a criminal trial can be



5 used to buttress a case in a civil court. Except, as was rightly  
observed by the trial court, the civil court must warn itself that  
such judgment is not conclusive proof and the civil court must  
do its own independent evaluation of the evidence before it to  
draw its own conclusions.

10 At page 4 of his submissions, counsel for the Appellant argued  
that the trial court solely relied on the evidence of the  
judgment in the criminal court to find that the agreements of  
purchase presented by the Appellant were forged. I respectfully  
disagree with that submission. It is clear that page 91(supra)  
15 that the trial court was very much alive to the fact that  
although the Appellant claimed to have paid Busuulu to  
Harriet Nakayiira for the years 2006, 2007 and 09/04/ 2008,  
the certificate of title shows that Harriet Nakayiira was never  
the registered proprietor until 10/04/2008. The trial court also  
20 found that there was no recognition of the Bibanja owners in  
the sale agreements. At page 92(supra)the trial court also  
found that the LC1 Chairperson Nyombi James who signed the  
Appellant's agreements admitted that he merely held out to be  
the Chairman but was not. This led the trial court to conclude  
25 that the Appellant was involved in fraudulent and dishonest

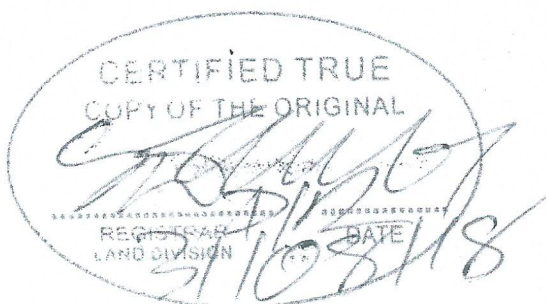


5 scheme to acquire the suit Kibanja. Indeed observed, at page  
93(supra) the trial court held that the fact that the Appellant  
and his witnesses were convicted of the offence of forgery  
weakened their testimony. The trial court thus believed the  
evidence of the Respondent as is clear at page 94 in  
10 the 2<sup>nd</sup> paragraph of the record of appeal.

At page 95(supra) paragraph 1, the trial court went on to find  
that the failure by the Appellant to call the vendors who sold to  
him the Kibanja to testify created a huge gap in his evidence  
and further weakened his case. Further, that the fact that the  
15 Appellant was involved in transactions on the suit land as  
broker and did not disclose his interest also cast doubt to his  
claim and weakened his case. I agree with these conclusions  
by the trial court and find no merit in Ground 3 & 4 of the  
appeal which must fail.

20 ***Ground 5. The learned trial magistrate erred in law and  
fact to consider extraneous matters and make them the  
basis of his findings when such matter did not form part  
of the evidence adduced at the hearing.***

No submissions on this ground of appeal were made by

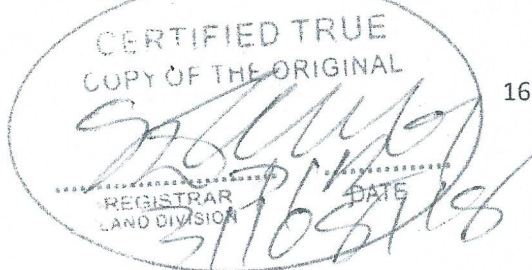


5 counsel. Nonetheless, after subjecting the evidence and the judgment of the trial court to exhaustive scrutiny, no such extraneous matters allegedly relied on by the trial court were found. There is no merit in this ground of appeal and it fails.

**Ground 6: The learned trial magistrate erred in law and  
10 fact when he failed to consider the fact that the Respondent and one Musisi Rogers never acquired the suit land through outright purchase but by virtue of a consent order passed in court.**

I do not find it necessary to resolve this ground of appeal given  
15 that the trial court's decision did not hinge on the fact that the Respondent purchased the suit land. It was never in dispute that the Respondent is the registered proprietor of the suit land. Being a registered proprietor is conclusive evidence of ownership of the land. The Appellant never adduced any  
20 contrary evidence at the trial. The case at the trial was not about ownership rights of the Respondent but rather about the rights of the Appellant. There is no merit in this ground of appeal and it fails.

Accordingly, the trial court's decision is wholly upheld. The





5 appeal fails in its entirety and is dismissed with costs in this court and in the trial court.

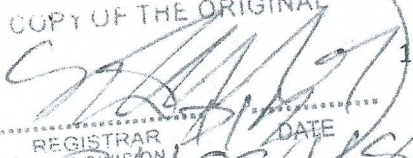


**BASHAIJA K. ANDREW**

**JUDGE**

**31/08/2018**

10

CERTIFIED TRUE  
COPY OF THE ORIGINAL  
  
REGISTRAR  
LAND DIVISION  
DATE 31/08/18

FEEs PAID: 25,000  
RECEIPT NO: 2018/0950  
HIGH COURT OF UGANDA  
LAND DIVISION  
DATE: 31/08/18

