

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KABALE**

**CIVIL APPEAL NO 43 OF 2008**

*(From Kabale Chief Magistrate's Court Civil Suit No. 20 of 1985)*

1. BAZIRAKE YEREMIYA }  
2. KANYONYOZI EPHRAIM } :::::::::::::::::::::::::::APPELLANTS

**VERSUS**

MUTABA BARISA KWETERANA LTD :::::::::::::::::::RESPONDENTS

**BEFORE HON. MR. JUSTICE J.W. KWESIGA**

**JUDGMENT**

This Appeal arises from a protracted land disputes that dates as far back as 1977 and has been entertained in Court since 1985 and as observed by the Trial Magistrate several of the original parties to this Suit have since died. Although the Suit was first filed in 1985 it commences in 1994 on a basis of an Amended Plaintiff. The records between 1985 and 1994 are not part of the proceedings to be evaluated by this court.

This Court being the first appellate Court shall evaluate the evidence on record afresh, bearing in mind that it had no opportunity to see the several witnesses who testified to have the benefit of assessing their demeanor. Several witnesses

were called by each side and several exhibits were tendered and formed the basis of the trial Magistrate's Judgment. Her Worship, Ms Nakitende Juliet, Grade One Magistrate, dismissed the plaintiff's case and declared that the suit land belonged to the Defendant/Respondent hence this Appeal. The memorandum filed by **M/S BIKANGISO & CO. ADVOCATES** has (4) four grounds of Appeal. These grounds will not be reproduced in this Judgment for reasons that they amounted to splitting hairs and can be reduced to only one ground namely;

***“That the trial Magistrate erred in Law and facts when she failed to evaluate the evidence as a whole and arrived at a wrong conclusion when she dismissed the plaintiff's suit and declared that the suit land belonged to the Defendants.”***

At the time of submissions, Counsel for the Appellants reduced what he called grounds 1,2, 3 and 4 arguable as one. This reflects on bad draftsmanship that is clear on going through the memorandum of Appeal in light of what is in dispute. Before 1984 the land dispute existed as between individuals as the Plaintiffs /Appellants. This is reflected in

the several correspondences such as **Exhibits P.14** that names; Kanyasi, Byamaka and Besigomwe. P.2 and P.3 also prove that the land dispute existed before the Defendant/Respondent was incorporated on 18<sup>th</sup> March, 1980 as shown by **Exhibit D1**.

Defence exhibits D1, serve the purpose of proving the legal existence of the Defendant with effect from 18<sup>th</sup> March, 1980. While there other correspondences dating much earlier referring to the group that was contenders for the suit land as Mutaba Barisa Kweterana, there is no proof that they were the same people as the Defendant who came in existence on 18<sup>th</sup> March, 1980. The Defence exhibits did not include Memoranda and Articles of Association of this Private Limited Company to indicate who were the shareholder or subscribers to the company to help trace their interests in the land before incorporation and before being offered lease for the suit land. This gap in evidence clearly depicts the Respondents as applicants for the land to which they **had no** historical customary claim as opposed to the Plaintiffs/Appellants claims for customary tenure interests that they allege to own by customary succession or inheritance from their forefathers.

The constitution of The Republic of Uganda, 1995, which was in place at the time of the determination of the suit, preserved under Article 237(3) The customary ownership of land. This Article does not create but declares what existed before. Article 237 (3) states:

**“(3) Land in Uganda shall be owned in accordance with the following land tenure systems;**

**(a) Customary,**

**(b) Free hold,**

**(c) Mailo, and**

**(d) Lease hold”**

Under consideration in this Appeal is a conflict between the Appellants who claim the suit land by virtue of customary tenure vis-avis the Respondents who claim the same land by virtue or lease-hold tenure. It is true that the circumstances that gave rise to the dispute existed before the coming in force of the constitution in 1995 but the constitution incorporated land tenure systems that existed before. Land could not be offered for leasing unless it existed or was available for that purpose. The availability of land for purposes of leasing depends on whether, depending on facts of each case, the

controlling authority has any free land to offer, free of any incumberences or disputes. The Plaintiffs/Appellants case as stated in the amended plaint on which this case is based, the suit was filed by the two Appellant in their representative capacity, on behalf of several people pursuant to the authority of a court order dated 30th November, 1984. The Defendant had attempted to survey the suit land at Bunagana, Kagunga , Bufundi, Ruband County which was resisted as an act of trespass. The Plaintiffs/Appellants claimed that they lost crops in course of the attempts to survey on behalf of the respondent. The land was subsequently registered as lease hold register volume 1624 Folio 20 plot 1 Kigezi Block 197. The plaintiffs contended this was fraudulent registration and seek court orders for the following:

- (a) Cancellation of the Land Title on grounds that it was obtained fraudulently.
- (b) Special damages of 26,000/=
- (c) Costs of the suit.

The particulars of fraud pleaded include the following:-

- (a) Applying for the land in dispute well knowing that it was in occupation and possession of the Plaintiffs.
- (b) Obtaining registration well knowing that the plaintiffs had interest in the land in dispute.
- (c) Applying for the land well knowing that the same was not free from disputes.
- (d) Obtaining Title to the land with full knowledge that the same was in dispute.
- (e) Obtaining registration of the land in dispute without limiting claims.
- (f) Failure to compensate the plaintiffs.

The Defence case, simply states the land in dispute was public land as declared in a Saaza Chief's letter and it was free for leasing.

The Plaintiffs/Appellants evidence given in the testimonies of PW1 Bazirake and PW 4 Batura 53 years is that the land in dispute was their customary holding for the period running from 1945 to the present time. The land was inherited from the group's grand-parents.

PW 3 James Katabazi, who was a County Chief of Rubanda in 1979 testified that he attended to this dispute he confirmed two important facts, that there was a dispute over the land in 1979 and that this land did not fall under Kigezi District land Board and therefore it was not Public Land as claimed by one of the parties. Stanely Kamuhanda (PW 4) a retired Sub-County Chief of Bufundi where the disputed land is situate testified that he met the disputing parties and read to them the land Register containing Kigezi District Administration Land and confirmed the land in dispute was not in the list and therefore the District land Board was not its controlling authority on behalf of K.D.A. The extract from the list of Kigezi District Administration Land in Bufundi was admitted as **P.15**. This exhibit Ref. 6/Land 1 dated 8<sup>th</sup> July, 1983 excludes the land in dispute. This evidence corroborates the evidence of James Katabazi. That this land was not available for leasing under the authority of District Land Board.

P.13 a letter from Bufundi Sub-County Chiefs office, The District Commission dated 29<sup>th</sup> October 1984 shows that the land in dispute was surveyed by force. P.13 a letter from The

District Commissioner dated 25<sup>th</sup> October 1984 was ordering that no Survey should take place because there was a dispute over the land. All plaintiff's exhibits from P.3 to P.15 prove that there was a dispute over the land and that it was not public land or under control of Kigezi District Administration or Uganda Land Commission.

Section 77 of RTA (Cap 230) provides that “***Any certificate of title, entry, removal of incumbrance .....shall be void as against all parties or privies to the fraud.***” Fraud once proved can invalidate a certificate of title. The fraud must be by the person whose title is being impeached. It was settled in the decision of **MUSISI VS GRINDLAYS BANK AND OTHERS (1983) HCB 39.** That a person registered through fraud is one who becomes a registered proprietor through a fraudulent act by him or to which he is a party or with full knowledge of the fraud.

A fraudulent Act is any act done designed to cheat a man or woman of a known existing right and this includes acting in bad faith to defeat interest of the victim or a deliberate and dishonest trick causing an interest not to be registered and



thus keeping clear as if such interests did not exist. The decisions in **KATARIKAWE VS KATWIREMU & ANOTHER (1977 ) HCB 187 AND MATOVU & 2 OTHERS VS SEVIRI & ANOTHER (1979) HCB 174** clearly state that fraud for purpose of Land Law includes dishonest dealings in land such as depriving a purchaser for value in occupation of the land of his unregistered interests. It also perfectly includes dishonestly dealings in land, registration of land depriving occupants of the land unregistered interests in the said land. The test would include proof that the prejudiced person had registrerable interests. From the evidence on record it is clear from the overwhelming correspondence that the suit land was in dispute. The plaintiffs interests had been voiced through their protects against survey of the land, protests to the Sub county Chiefs, protests to the County Chiefs and to The District Commissioner all of whom acknowledged and communicated these interests to the Respondents. The Respondents proceeded to procure registration of the land with full knowledge of the plaintiff's/Appellant's unregistered interests and therefore the intention to defeat the Appellant's unregistered interests is very clear.

The Respondents, as far as can be seen from the arguments of their counsel, strongly contend that one KATUMBA, a Saaza Chief in 1977/79 or thereabout wrote a document stating this was “Lukiko land” or Public land. The Appellants contested this documents on grounds that this document found its way in the proceedings as an identification exhibit. In my view, a document not formally proved or identified does not become part of the proceedings because it is not admitted in evidence as an Exhibit. In absence of Katumba or another competent witness to give oral account of its contents, this document which alleges that the Suit land is Lukiko land has no evidential value for these reasons. Secondly the document purports to prove what is contrary to the extract of the official record, plaintiffs’ exhibit P.15 a list of “Lukiko” land. The only conclusion derived from this evaluation notwithstanding its inadmissibility, it is a pack of lies. It’s contents are not true as proved by P.15. P.W 3 James Katabazi who replaced Sgt. Katumba as the Saaza Chief gave evidence that the suit land did not belong to Government.

Mr. Murumba, Counsel for the Respondents invited this court to disregard or dismiss Katabazi's evidence because he was a UPC Chief. This argument was misleading and appears to have influenced the Magistrate when she rejected Katabazi's evidence without assigning any reasons for it and preferred a statement of Sgt. Katumba in a document not formally proved, made by Katumba who was never called to testify just because one witness stated that Katumba was a truthful man the truthfulness of a person should have been a decision of Court. He could have been a truthful man who was mistaken and this court can not take what he wrote in his letter as Gospel truth. I find it appropriate to deal with this witness evidence "Katabazi testified that in his capacity as a Saaza Chief administratively entertained these litigants over the Suitland. It is irrelevant as to which political party he belonged. For purpose of this case it is also irrelevant that he did not adjudicate over the dispute to final conclusion. His testimony is important in so far as it proves that a dispute existed at the time the Respondent procured its registration despite the knowledge they had from this meeting with Katabazi among other sources that the Appellants had a claim of interest in the

land. Secondly his testimony and Appellants exhibit **P.2** are a proof that this land did not belong to the District Administration. This evidence is corroborated by the several correspondences and particularly exhibit **P.15** Katumba's letter (P1/D1) is false. On balance of probabilities this proves that the land was not available for leasing because it was not public land and the plaintiffs/Appellants and their families were using the land. This community derived livelihood from cultivating the land. Customary tenure can be proved by establishing that the claimants planted seasonal crops or grazed their livestock on the land. It is immaterial that they had no houses on the land or at that very season they had no crops on the land. I have no doubt that the Appellants had unregistered interests in the land as customary owners of the land. I have found guidance in the Supreme Court decisions of **Kampala District Land Board Vs Babweyaka & others. C.A 3 of 2007 (SCU) and Kampala District Land Board & another Vs National Housing and Constuction Corporation C.A 2/2004 (SCU).** Where it was held that a party who had been in possession of the suit land for along time and utilized it was entitled to have its interests recognised and protected.

Section 178 of RTA further shows protection of unregistered interests of a customary tenants. Knowledge of other person's rights or claim over land and deliberate acquisition of a registered title in the face of protests amounts to fraud. See **Marko Matovu vs Mohamed Ssevini & Another (Supra)**. I have already referred to definition of fraud which are further settled in the decisions of **David Seffaka Nalime Vs Rebecca Musoke C.A 02 of 1195 (SCU)**.

Considering this case as a whole I find that the Respondents at the time of acquisition of the certificate of title acted fraudulently with intention to defeat and deprive the Appellants of their interests in the suit land. I therefore allow this Appeal with the following orders:-

- (a) Pursuant to Section 177 of The Registration of Titles Act (Cap 230). The certificate of Title for the Suit land LRV 1624 Folio 20 KIGEZI BLOCK 197 Plot 1 at Bunagana, Kagunga, Bufundi, Rubanda, Kabale measuring approximately 4.3 Hectares shall be cancelled.

- (b) The Appellants are entitled to costs incurred in this Appeal and the courts below.
- (c) There was no cogent proof of any special damages and therefore no orders for special damages.

Dated at Kabale this **3<sup>rd</sup>** day of **August 2011**.

.....  
**J.W KWESIGA**  
**JUDGE**  
**3/8/2011**

**Read in open court in the presence of :**

Mr. Murumba for Respondent

All the parties absent.