

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CORAM:**

**HON. JUSTICE S.G. ENGWAU, JA**

**HON. JUSTICE. A. TWINOMUJUNI, JA**

**HON. JUSTICE C.N.B. KITUMBA,JA**

**CIVIL APPEAL NO.35 OF 2006**

**CRESENSIO MUKASA ::APPELLANT**

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**VERSUS**

- 1. YAKOBO M.N. SENKUNGU**
- 2. JAMES KENJURA**
- 3. JOHN RWAKAMURANGA**
- 4. MISAKI RWAMPIGANE**
- 5. GIRADESI KATONYA**
- 6. YOHANA RWAKAANO ::**

**RESPONDENTS**

*[Appeal from the Judgment of the High court of Uganda at Masaka (V.F. Musoke Kibuuka, J) dated 31<sup>st</sup> January 2006 in HCCS No.383/1987]*

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**JUDGMENT OF ENGWAU, JA**

This is an appeal against the decision of the High Court of Uganda sitting at Masaka in which a civil suit filed by the appellant for cancellation of the respondents' certificate of title and other consequent orders was dismissed.

The case has got a long history spanning over two decades. It has also been handled by a number of lawyers making various amendments to the pleadings as noted by the learned trial judge.

The facts of the case are as follows;-

The appellant is a holder of Letters of Administration of the estate of the late Gusite Nakaima who he undisputedly claims was his grandfather. Nakaima died on 13<sup>th</sup> June 1941 leaving behind two pieces of land, the subject of this appeal, situate in Mawogola Block 30, Plot No.1 at Kabagoma of about 641 acres and Block 31, Plot No.1 at Ntyazo of about 623 acres. In 1986, the appellant on obtaining the letters of administration sought to transfer the land into his names only to discover that it had long been dealt with by other people. The Certificate of Title which was exhibited in court showed that on 3<sup>rd</sup> August 1978, under instrument No.MSK 54168, a one Peter Ssekasiko became registered proprietor with an alleged transfer from Nakaima. Three months later, on 27<sup>th</sup> November 1978, Ssekasiko transferred the land to one Eugene Ssonko under instrument No.MSK 54497. On 25<sup>th</sup> January 1980, under instrument No.MSK 6000, the land was transferred and registered in the names of Yakobo Mutendwa Senkungu, the first respondent. Finally on 30<sup>th</sup> August, 1989 the first respondent transferred the land to the other respondents.

Interestingly, the second piece of land was also allegedly transferred first from Nakaima to the same Ssekasiko, to Eugene Sonko again, and then to the first respondent. The chain of transfer is similar to the first case except that the first respondent transferred this particular piece to a one Ezekiel Rwankanyuzi.

These series of transfers prompted the appellant to file a suit in the high Court at Kampala on 31<sup>st</sup> March 1987 before it was transferred to Masaka High court Circuit.

At the trial, the first respondent did not file a defence but the case proceeded against him exparte under Order 9, rule 8 of the Civil Procedure Rules. The second and fourth respondents were reported dead before the trial commenced. It is thus only the 3<sup>rd</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents who filed a joint defence.

Five issues were identified and agreed upon, to wit:-

- a) *Whether or not the late Gusite Nakaima transferred the suit property to anyone?*
- b) *Whether the plaintiff has a cause of action against the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants?*
- c) *Whether any fraud was committed and if so, by who?*

**d) Whether there is a nexus between that fraud and the defendants?**

**e) Whether the plaintiffs are entitled to the reliefs which they seek in the plaint?**

The learned trial judge resolved the first, third, fourth and fifth issues in the negative while the second one was resolved in the affirmative. He then dismissed the plaintiff's case.

In his memorandum of appeal, the appellant raised two grounds namely;-

- 1. That, the learned trial judge erred in law and fact when he answered issue No.1 in the negative, disbelieving the evidence adduced in support of the claim.**
- 2. That the learned trial judge erred in law when he failed to evaluate the evidence before him, thus he arrived at a wrong finding. There was no evidence to show how Ssekasiko got registered on the land, of which also the trial judge had made a finding that there was fraud.**

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When the matter came up for hearing before this court, it was agreed that the parties would file conferencing notes from which court would proceed to dispose of this matter. In their conferencing notes, the sticking point to be resolved by this court was agreed to be the issue of fraud. Thus, was fraud proved or not?

Ntende, Owor & Co Advocates who represented the appellant stated, in their conferencing notes that fraud had been pleaded, particularized and proved. They pointed to various instances to constitute fraud as;-

**a) Ssekasiko's entry on the Register plus the transfers that followed.**

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**b) The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents' offer to purchase the suit land from the appellant before they eventually purchased it from the first respondent. This pointed to prior knowledge by the respondents that the appellant had a claim of right in respect of the land.**

**c) The respondents' knowledge that the appellant was actually in possession and lived on the land.**

They also sought to rely on S.176 of the Registration of Titles Act which stipulates fraud as one of the instances where an action for recovery of land or ejectment can lie or be sustained against a registered proprietor.

To pinpoint the respondents, S.59 of the same Act was quoted with counsel submitting that a party could be guilty of fraud by participating in it at whatever level which was the case in as far as the respondents were concerned.

Referring to S.77, it was argued that the respondents' benefit from transfers designated to cheat the appellant of his inheritance inculpated the respondents as parties to the fraud.

10 Finally, on proof of fraud, reference was made to S.38 of the Evidence Act which provides that all facts may be proved by oral evidence. Counsel pointed to evidence which showed fraud as including;

- a) *The Certificates of Title which showed dishonest transfers/dealings.*
- b) *The various transfer instruments.*
- c) *The testimony of the various parties which was not controverted.*

The respondents never and have not challenged the proprietorship of the land having known their dishonest dealing. Appellant's counsel prayed to court to hold that the appellant is entitled to the remedies sought.

20 Praying to court to dismiss the appeal, M/S Kawanga and Kasule Advocates who represented the respondents argued that there was no concrete irrefutable proof of dishonest dealings. They relied on sections 77 and 176 of the Registration of Titles Act on fraud to submit that no fraud was proved against the respondents to warrant impeachment of their Title. They stated that the fraud referred to in the Act is actual fraud and not constructive fraud and that it must reside in the person whose registered title is to be impeached or his agents. Further, that having failed to establish fraud in the initial transfer of the land to Peter Ssekasiko, there is no way fraud could be traced in the subsequent transfers. There was no allegation of fraud in the transfer to Eugene Ssonko and to the 1<sup>st</sup> respondent. On the bonafides of the respondents, no evidence was led by the respondent and finally, waiting for 45 years to assert their interest raises estoppel by the doctrine of laches.

The Black's Law Dictionary, Sixth Edition at pg.660 defines fraud in the following terms;-

***“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture.”***

10 The relevant sections of the law variously quoted by both learned counsel with regard to fraud are reproduced below;-

S.77, Registration of Titles Act,

***“Certificate void for fraud.***

***Any certificate of title, entry, removal of incumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.”***

S.176

***“Registered proprietor protected against ejectment except in certain cases.***

***No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases;***

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a) -----

b) -----

c) ***The case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bonafide for value from or through a person so registered through fraud.***

d) -----

***and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding.***

In addition to the above provisions, counsel also cited various decisions of court with regard to fraud. Two notable ones were Kampala Bottlers Ltd Vs Damanico (U) Ltd, SCCA No. 22 of 1992 to the effect that ***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.*** and Fam International Ltd & Anor Vs Mohamed Hamird El – Fatih SCCA No.16 of 1993 to the effect that ***fraud must be strictly proved on a standard more than a mere balance of probabilities though less than proof beyond reasonable doubt.***

It was agreed by both counsel that the sanctity of a Certificate of Title can only be questioned or investigated if there is proof of fraud. To this end, the Certificate of Title now in the hands of the respondents can only be questioned if fraud is proved on their part. The learned trial judge in dismissing the appellant's case observed that failure to prove fraud on the part of the first respondent meant that the 2<sup>nd</sup> to 6<sup>th</sup> respondents could not be privy to an unproved fraud. Further, that any imputation of fraud on the respondents in obtaining transfer when a case was pending in court and not being vigilant enough became substantially inconsequential because they did not commit proven fraud.

After considering the facts of this case and in view of the law as outlined above, it is my considered view that the learned trial judge wrongly evaluated the evidence available in coming to the aforementioned conclusion. There was fraud on the part of the first respondent which could be imputed on the 2<sup>nd</sup> to 6<sup>th</sup> respondents.

Failure to put in a defence by the First respondent both at the trial and in this appeal clearly points to a guilty and evasive mind of a person determined to act or refrain from doing anything that may lay him bare and expose him.

The Evidence Act sets the general rule on burden of proof of the existence of facts, under S.101 as resting on the person who desires court to give judgment as to any legal right or

liability. S.106 however, provides that in civil proceedings, it is upon a person with a fact within his or her knowledge to prove it. The authenticity of the transfers that gave the first respondent proprietorship could only be proved with his testimony. This, he refused to do with no explanation whatsoever.

10 The absence of proper evidence to show how the land was transferred from Nakaima to Ssekasiko and through subsequent transfers to the first respondent provided sufficient ground for court to go behind the fact of registration. When the first respondent adamantly refrains from assisting court in its investigations, it irresistibly points to his fraudulent intention. The only possibility that could be left to court's imagination is that even the transfers on the certificates, showing people who at no single point took possession of the land or more so occupied it, over a period of 11 years, is that the first respondent could have himself included the various transfers to secure protection of the law.

The first respondent, also knowing that there was a suit against him in the High Court to which he could furnish his evidence of true ownership chose instead to resort to an inferior court (Chief Magistrate's Court) that gave him a quick verdict to cement his fraud.

As for the other respondents, it was argued for them that they are bonafide purchasers for value without any notice. Evidence led at the trial however showed that they became aware of the appellant's claim and witnessed his physical occupation of the land. They actually interacted with him and offered to buy the land which he declined citing a dispute in court.

20 In pursuance of a quick fix, they ignored this notice and now argue that they had no duty to investigate the first respondent's title in spite of the notice. My view is that ordinary prudence and caution in the circumstances of this case would actually inform any reasonable person against engaging in the transaction as the 2<sup>nd</sup> to 6<sup>th</sup> respondents did. Payment was hastily made, followed by a transfer and then settlement on the land. These were not acts of an honest dealing.

The respondents again, did not seek to evict the appellant well knowing that their newly acquired interest was in bad faith. For this matter, I would hold that the 2<sup>nd</sup> to 6<sup>th</sup> respondents on receiving notice and ignoring it tainted their otherwise bonafide title. It is also worth noting, at this point that the whole trial of this matter revealed several unfortunate omissions

that seemed to help in cementing the respondent's case. One notable one was the refusal by the trial judge to allow a one Nsereko, a registry official who allegedly executed all the transfers, to appear and testify. The question of the 'Nakaima' who first transferred the land to Ssekasiko could only be answered by him.

The respondents seek to rely on all the misfortunes of the matter and the blanket protection of the law to benefit from their misdeeds. To bring to an end to this unfortunate habit of making multiple transfers on land so as to claim and disguise fraud as a bonafide, I am inclined to hold that there was fraud interplaying between the first respondent and the others that aimed at depriving the appellant of his inheritance.

10 Before I take leave of this matter, I wish to adopt the position in Lazarus Estates Ltd Vs Beasley [1956] IQB-702 at 712 in which court stated as follows;-

***“No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.”***

In the end result, I would allow this appeal with costs here, and in the court below.

Dated at Kampala this 26<sup>th</sup> day of July 2010.

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**S.G. Engwau**  
**JUSTICE OF APPEAL**

**JUDGMENT OF TWINOMUJUNI, JA**

I have had the benefit of reading, the draft judgment of my Lord Justice S.G.Engwau, JA. I agree and I have nothing useful to add.

Dated at Kampala this ...26<sup>th</sup> ...day of ....July.....2010

**Hon. Justice A.Twinomujuni**

JUSTICE OF APPEAL