

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO.83 OF 2011

[Appeal from the decision of the High Court (The Hon. Justice Rubby Aweri Opio) dated the 30th day of November 2009 in Land Division Civil Suit No.179 of 2005]

CORAM: **HON. MR. JUSTICE RICHARD BUTEERA, JA**
 HON. MR. JUSTICE KENNETH KAKURU, JA
 HON. JUSTICE PROFESSOR LILLIAN TIBATEMWA E., JA

1. THE REGISTERED TRUSTEES OF }
 KAMPALA ARCHDIOCESE }
2. GRACE KAGAIGA }.....**APPELLANTS**

VERSUS

GRACE ASABARESPONDENT

THE JUDGMENT OF COURT:

This is an appeal against the judgment and decree of the High Court before the Hon Mr. Justice Rubby Aweri Opio dated 30/11/2009 in the Land Division at Kampala. The appeal is on the grounds set out in the Memorandum of Appeal as follows:-

1. The learned trial judge, erred in law and in fact when he held that the Court had no obligation to seek consent before transferring a lease in executing of a Decree.
2. The learned trial judge erred in law and fact in failing to address the issue as to whether the respondent obtained transfer of LRV 2588, Folio 12 Plot 1082 Block 15 land at Nsambya with the consent of the 1st appellant.
3. The learned trial judge erred in law and fact in holding that the respondent was a bonafide purchaser without notice of any fraud.
4. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record hence reaching a wrong decision.

The appellant is seeking the following orders from this Court:-

- (a) That this appeal be allowed.
- (b) The Judgment and Decree of the High Court dated 30/11/09 be set aside.
- (c) That the remedies sought in the High Court be granted to the appellant.
- (d) The appellant be awarded costs on this Court and the Court below.

The background facts to the case as found by the trial judge at the High Court were the following.

5 The first appellant leased land comprised in LRV 2588 Folio 12 Plot No.1802 Block 15 at Nsambya to the second appellant for a term of 49 years. The second appellant was subsequently sued by Emmanuel Kaweesa in HCCS No.223 of 1997, **Emmanuel Kaweesa v Grace Kagaiga**. An *ex parte* judgment was entered against her in the Civil Suit and the suit land was attached and sold in execution.

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The respondent obtained transfer into her names from Joyce Lamwaka, Harriet Asea and Grace Asaba who were registered on the title by order of Court pursuant to execution of the court order in HCCS No. 223 of 1997 in May 2000. The transfer into the
15 respondents' names was done without first obtaining the consent of the first appellant.

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Learned counsel, Mr. Gilbert Nuwagaba, argued the case for the appellants whilst learned counsel, Mr. Alex Kaboyo, held brief for
20 learned counsel, Mr. Wycliffe Birungi and argued the appeal for the respondents.

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Counsel for the appellants had filled detailed conference notes which he adopted at the oral hearing and chose to highlight main issues of the same.

5 Counsel for the respondents filed his list of authorities at the oral hearing and made oral submissions in reply.

Counsel for the appellants submitted, on the first ground of appeal, that the trial judge erred in law and in fact when he held that the
10 court had no obligation to seek the consent of the first appellant before transferring the lease in execution of its decree. He submitted that the Court is obliged to follow the Civil Procedure Act and the Rules and look at the terms of the lease. He argued that the attached property was under a lease agreement with a clause that
15 barred the second appellant from selling the land without the consent of the first appellant and the trial judge should not have ruled that the clause does not take away the jurisdiction of the Court to attach and order a sale. He argued that under section 38(a) of the Civil Procedure Act, the Court may order execution subject to
20 conditions and limitations as may be prescribed. Counsel submitted that the terms of the lease agreement should have been considered. He also submitted that the trial judge should have considered the

provisions of section 105 of The Registration of Titles Act, which in his view, obliges the transfer to be effected after the consent in the lease agreement has been sought.

5 On ground one, counsel for the respondent, Mr. Kaboyo, argued that the trial judge rightly held that the court had no obligation to seek the consent of the first appellant before transferring the lease in executing a decree. It was the view of counsel for the respondent, that the provisions of the lease agreement on consent referred to a
10 sale by a lessee which was not the case in the instant case since the sale was ordered by court and the clause would not take away the court powers of attachment and sale to a third party. According to counsel, the trial judge did no fault in his finding on this issue.

15 On ground two of the appeal, the submission of counsel for the appellant was that under Clause 2(c) of the lease agreement the consent of the first respondent should have been sought for the transfer of the suit land from Joyce Lamwaka, Harriet Asea and Grace Asaba to Grace Asaba. Failure to procure the consent and the
20 resultant transfer without the consent, would according to counsel, vitiate the transaction.

Counsel for the appellant argued ground three and ground four of the appeal together. He submitted that the learned trial judge erred in law and in fact in holding that the respondent was a *bona fide* purchaser for value without notice and that the learned trial judge
5 erred in law and fact when he failed to properly evaluate the evidence on record hence reaching a wrong decision.

Counsel further submitted that the sale of the suit land was fraudulent and could not be a *bona fide* sale to the respondent. The
10 property, he submitted, in this case was advertised for a sale to take place at Nsambya Gogonya Zone on the 11th of March 2000. According to the sale agreement the sale was conducted allegedly on the 26th day of February 2009 contrary to the advertisement in Exh. P.10. This according to counsel was in breach of 0.22 r 62 of the Civil
15 Procedure Rules as the sale was not by a public auction on the advertised date as the law requires.

On the issue of fraud, counsel submitted, was that the Agreement of Sale of land between Rubaga Enterprises, the bailiff and the
20 respondent was made on the 26th January, 2000 and for 23,000,000/.

While the return to court by the Court Bailiff filed on 31st March 2000 showed that the property was sold by public auction to Joyce Lamwaka, Grace Asaba and Harriet Asaba at 25,000,000/=. The three registered were as proprietors on 5th May 2000. They later transferred their interest to Grace Asaba on 1st June 2000. Counsel submitted that in addition to discrepancies described above, the actual purchase price was never deposited in court which is contrary to 0.22 r. 78(2)(c) of the Civil Procedure Rules.

Mr. Kaboyo, counsel for the respondent, in response argued grounds three and four together.

He submitted that the suit property was sold by Court Order to Joyce Lamwaka, Harriet Asaba and Grace Asaba and subsequently the three ladies transferred the property into the names of Grace Asaba the respondent. He submitted that she acquired the property as a result of a process of a court execution. She had not acquired the land through a sale by a lessee which would be subject to terms of the contract between the 1st appellant and the 2nd respondent.

According to counsel, there is an order of court ordering the property to be transferred into the names of the purchasers of the

suit land, Joyce Lamwaka, Grace Asaba and Harriet Asaba and later into the names of the respondent. Counsel's submission is that the respondent was not a party to the suit. She was merely a purchaser of the property on sale by court. He, argued that she purchased the
5 suit land on 26/02/2013 which was within 30 days of the advertisement as stipulated by the law. Counsel submitted that if there were any irregularities they resulted from orders of court over which the respondent has no control and the irregularities could not be attributed to her.

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Counsel submitted that the trial judge properly evaluated the evidence adduced in court when he found that the respondent was a bona fide purchaser for value without notice. Counsel, further submitted that the respondent purchased from a Court Bailiff; the
15 sale was conducted through an advert and was a proper sale by court order without fraud.

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We shall now proceed to analyse the evidence on the record, the submissions and the way the trial court handled the matter in the
20 High Court for us to resolve the issues raised and the grounds of the appeal before Court. This is a first appeal to this Court.

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We shall first of all remind ourselves of our duty as a first appellate court to re-evaluate evidence. Following the cases of **Pandya vs R (1957) EA 336**; **Kifamunte Henry vs Uganda Criminal Appeal No.10.1997**, **Bogere Moses and Another v Uganda Criminal Appeal No.1/1997**, the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04 at Mengo from CACA 47/20000 [2004] KALR 236**.

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

The Court with approval, quoted the Court of Appeal of England which stated the Common Law position in Coghlan v Cumberland (1898) 1Ch.704 as follows:-

5 ***“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other; materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully***
10 ***weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... When the question arises which witness is to be believed rather than another and that question turns on***
15 ***manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances***
20 ***may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”***

In Pandya vs R i1957) EA 336, the Court of Appeal for Eastern Africa quoted the passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction.

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We shall, therefore, in the course of this judgement re-appraise the evidence on record.

According to the evidence on record; the first appellant is the registered proprietor of land interest comprised in Freehold Register Volume 57 Folio 14 Kibuga Block 15 Plot 1802 at Nsambya. The first appellant leased out the above stated plot to one Grace Kagaiga, the second appellant for 49 years leading to her registration as proprietor under Leasehold Register Volume 2558 Folio 12. There was a condition in the Lease Agreement that the lessee would not assign, sublet or part with possession of the whole or any part of the premises without the written consent of the lessor.

The second appellant was sued by Emmanuel Kaweesa in HCCS No.233 of 1997. Emmanuel Kaweesa versus Grace Kagaiga, whereby an *exparte* judgment was entered against her after which the suit land was attached and sold in execution of the court decree. The respondent

bought the property and subsequently the property was registered in her names.

As submitted by counsel for both parties the sale was by a court order.

5 There was no consent from the first appellant to the transfer from the 1st appellant to the first registered owners – Joyce Lamwaka, Harriet Asaba and Grace Asaba. This is the basis for the first ground of appeal. The trial judge held that the court which ordered the attachment and sale was not obliged to seek consent from the first or second
10 respondent for the court to attach and sell the suit property.

We do agree with the trial judge that Clause (2)(c) of the Lease Agreement is a covenant between the lessee and lessor and does not take away the power of court to order attachment and sale and the
15 court was not obliged to seek consent from the first or the second respondent. In view of that finding, ground one of appeal fails.

We shall handle grounds two and three together since they are closely related. After court ordered the attachment and sale there were two
20 transactions of transfer.

The first transfer was into the names of Joyce Lamwaka, Harriet Asaba and Grace Asaba. The effect of this transfer was by a Court Order of attachment and sale. This transfer did not need the consent of the first appellant. This issue has been handled above in our resolution of the
5 first ground of appeal.

The second transfer was from Joyce Lamwaka, Harriet Asaba and Grace Asaba to Grace Asaba. This transaction of transfer is different from the first one. This second transfer should be looked at together with other
10 evidence on how the whole transaction of attachment and sale was conducted.

The evidence on record is that the land was sold on a court order of attachment and sale. Counsel for the appellant was of the position that
15 the attachment and sale were not properly conducted. He submitted that the respondent was part and parcel of the fraudulent attachment, sale and transfers of title and she was not a bona fide purchaser for value without notice. Counsel for the respondent on the other hand maintained that the errors in the attachment, sale and transfers were
20 by court order and they should not be visited on the respondent. We shall re-evaluate the evidence in respect of the court order, the attachment, sale and transfer of the suit property.

The first appellant was the registered land owner of land comprised in LRV 2588 Folio 12 Plot No.1802 Block 15 at Nsambya having leased the same from the first respondent for 49 years. Pursuant to the exparte decree in **HCCS No.223 of 1977, Emmanuel Kaweesa vs Grace Kagaiga,**

5 a warrant of attachment was granted against her for attachment of property comprised in Block 15 Plot 1802 at Nsambya which according to counsel for the appellant was not her property. This was property different from what she leased from the first appellant.

10 The property that was advertised for sale in the New Times Newspaper of 26th January - 4th February 2000 was Freehold interest comprised in LRV 57 Folio 14.

The date of sale in the advert was stated to be 11th March 2000. The
15 second appellants property was comprised in LRV 2558 Folio 12 Plot 1802 Kibuga Block 15 at Nsambya. The sale was conducted on 26th February 2000. There is on court record an agreement of sale/purchase by public auction between Byamugisha Justus Arthur ^{t/a} Rubaga Enterprise Auctioneers and Court Bailiffs and Grace Asaba the
20 respondent. The purchaser signed the sale agreement as Grace Asaba on 26th February 2000. According to the sale agreement she brought the property at a total purchase price of 23,000,000/= . According to

the agreement she paid 15,000,000/=. The balance of 8,000,000/= was later paid by her and the bailiff acknowledged receipt of the same by another agreement of 7th June 2000.

- 5 The Court Bailiff made a return to the Deputy Registrar, High Court which the High Court received on 31st March 2000. The bailiff's report greatly differs from the agreement above.

The Court Bailiff reported to court that the attached property was sold
10 by public auction and the highest bidder was Joyce Lamwaka and others who offered 25,000,000/=. The money according to the bailiff, was received by the judgment creditor Mr. Emmanuel Kaweesa. According to the evidence on court record, the property was first transferred in the names of Joyce Lamwaka, Grace Asaba and Harriet
15 Asaba, by a transfer form dated 30th May 2000. They transferred the land to Grace Asaba the respondent for a consideration of 13,000,000/=.

Grace Asaba, the respondent, signed this transfer form on 30th May
20 2000. She signed as a buyer from the three. The suit land was transferred into her names as a result of this agreement of 30th May 2000. This is the same Grace Asaba, the respondent that signed a Sale

Agreement with Byamugisha Justus Arthur, the Court Bailiff to have bought the suit property by public auction on 26th February 2000.

5 The same Grace Asaba, the respondent signed another document on 7th June 2000 with Byamugisha Justus Arthur t/a Rubaga Enterprise Auctioneers and Court Bailiffs to have paid 8,000,000/= to conclude the purchase of the same property she had made with the Court Bailiff on 26th of February 2000.

10 She is claiming to be purchasing property from Joyce Lamwaka, Harriet Asaba and Grace Asaba when she is on record to have bought it on 26th February 2000 from the court bailiff.

15 She is also on record to have purchased from the three Joyce Lamwaka, Harriet Asaba and Grace Asaba on 30th May 2000 from 13,000,000/= when later on 7th June 2000 she concludes payment of her purchase of the same property on 26th February 2000 from the Court Bailiff.

20 It is also on record that the suit property was advertised for sale in the New Timespaper for sale on 11th March 2000. Since the sale was conducted as a result of this advertisement she could not have been aware of a sale that was conducted on 26th February 2000. Clearly the

respondent was involved in all the above described fraudulent transactions personally. She was part and parcel of the fraud. There is no way she can be described as a *bona fide* purchaser for value without notice.

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We have re-evaluated the evidence on record. We agree with counsel for the appellant that if the trial judge had properly evaluated the evidence on record, he would have found as we do that the respondent was not a *bona fide* purchaser for value without notice. The sale of the
10 suit property to the respondent was tainted with fraud. She should not be allowed to benefit from the fraud she so clearly participated in. In view of the above findings we conclude that grounds three and ground four of the appeal succeed.

15 We accordingly allow the appeal and make the following orders:-

(1)The judgment and decree of the High Court dated 30/11/2009 set aside.

(2)The sale of the land comprised in leasehold Register Volume 2558 Folio 12 Plot 1802 is set aside.

20 (3)The property and title of leasehold Register Volume 2558 Folio 12 Plot No. 1802 reverts to Grace Kagaiga, the second appellant. The Commissioner for land Registration is directed to register the

property and title of Leasehold Register Volume 2558 Folio 12 Plot No.1802 in the names of Grace Kagaiga, the second appellant.

(4) An order is granted for the respondent to vacate the suit land and hand it over to the appellants.

5 (5) Costs in this Court and in the High Court are awarded to the appellants.

25th March 2014

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL

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Hon. Justice Kenneth Kakuru
JUSTICE OF APPEAL

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Hon. Justice Professor Lillian Tibatemwa E.
JUSTICE OF APPEAL

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