

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
[Coram: Kakuru, Egonda-Ntende & Barishaki Cheborion, JJA]

CIVIL APPEAL NO. 110 OF 2014

**[Arising from the High Court of Uganda [Land Division] Civil Suit No. 279
of 2010]**

VICTORIA BEST LTD=====APPELLANT

VERSUS

**UGANDA INVESTMENTS AUTHORITY
SURGPHAM(U) LTD =====RESPONDENTS**

*[On appeal from the judgment of the High Court of Uganda,
(Mulangira J.,) of 3 July 2013]*

JUDGMENT OF THE COURT

Introduction

1. The respondents filed an action in the High Court seeking seeking— multiple reliefs including cancellation of the defendant's certificate of title comprised in leasehold register volume 4107 Folio 12 Plot 154, general damages and costs of the suit. The action succeeded. The High Court ordered cancellation of the said certificate of title. The appellant now appeals to this court seeking to reverse the judgment and orders of the High Court.
2. The facts of this case are fairly straightforward. A significant part of them were agreed upon in the agreed facts and agreed documents. Uganda Land Commission acquired by purchase several mailo titles of land in Luzira. Such land included land described as Block No. 234, Plots 150 and 151. The Government of Uganda decided to transfer this land to Uganda Investment Authority for the creation of an industrial park. This was done in 1998 and a freehold title was issued to the Uganda Investment Authority, comprised in Freehold Register Volume 425 Folio 16, Plot 2125 at Luzira measuring 25.58 hectares. This certificate of title was issued on the 15th day of December 2005. For some unexplainable

reason, whether inadvertent, or an account of malfeasance, or nonfeasance, Block No. 234, Plots 150 and 151 was never cancelled, setting the scene for latter events.

3. The Uganda Investment Authority, 1st Respondent, subdivided this land into many plots and granted leaseholds to different developers including the 2nd Respondent. The 2nd Respondent received a three year lease extendible to 99 years from the 1st Respondent, comprised in Leasehold Register Volume 3830 Folio 16 Plots 2A-- 4A, Ring Road, with effect from the 6th day of September 2007. The certificate of title was issued on the 6th February 2009.
4. On 5 September 2006 the appellant wrote to the Uganda Land Commission seeking to be allocated Block 243 Plots 150 and 151, situate at Luzira for industrial development. The appellant received a lease offer dated 2nd March 2010 granting him an initial lease of 5 years with effect from the 1st July 2009, extendible to 49 years. The appellant was issued with a certificate of title LRV4107 Folio 12 Plot 150 on 8th June 2010.
5. The respondents on learning of the foregoing developments filed a suit, inter alia, seeking the cancellation of the above certificate of title as it had been issued in error.
6. The appellant in his defence in the court below initially contended that the land that the respondents claimed was different from his land. However on the agreed facts and agreed documents this position was abandoned and it agreed that the land referred to in its certificate of title was the same land as comprised in the 2nd Respondent's certificate of title.

Judgment of the High Court

7. The learned trial judge held that the 2nd Respondent's title having been issued earlier than the appellant's title was the correct title following section 48 of the Registration of Titles Act. And that the Uganda Land Commission having transferred its title to the 1st Respondent in respect of the said land, it had no further interest in the land, and could not pass any good title to appellant. The learned trial judge made the following orders,

‘(a) the 2nd Plaintiff's certificate of title to the suit property was validly issued by the Commissioner Land Registration. The 2nd Plaintiff is the proper registered proprietor of the suit land.

- (b) The certificate of title in respect of the suit land in possession of the defendant was issued in error by the Commissioner, Land Registration. It ought to be cancelled and it is hereby cancelled.
- (c) A declaration that the property comprised in LRV 3830 Folio 15, Plot 2A-4A 3rd Ring Road, (suit property) belongs to the the 2nd plaintiff is granted.
- (d) An order for cancellation of the defendant's certificate of title over property comprised in LRV 4107 Folio 12 Plot 154 by the Commissioner Land Registration within 10 days from the date of the delivery of this judgment is granted.
- (e) An order for the defendant to give vacant possession of the suit land to the 2nd Plaintiff immediately after delivery of this judgment but in any event not later than 10 (ten) days from the date of delivery of this judgment is granted.
- (f) An order of a permanent injunction restraining the defendant, its agents and all those claiming an interest in the suit property under it, from conducting any activities on the suit property or interfering in any way in the suit property / land is granted.
- (g) the defendant shall pay costs of the suit to the plaintiffs.'

Grounds of Appeal

- 8. The appellant set forth 5 grounds of appeal which we set out below in full.

- '(1) The learned trial judge erred in law and in fact in failing to find that the respondent had no locus standii to sue the appellant.
- (2) The learned trial judge erred in law and in fact in holding that the suit property belonged to the 2nd Respondent on account of having registered its interest in 2008.
- (3) The learned trial judge erred in law and fact in holding that the appellant's land title for land comprised in LRV 4107 Folio 12 Plot 154 was issued in error.
- (4) The learned trial judge erred in law and fact in ordering the cancellation of the appellant's land title for land comprised in LRV 4107 Folio 12 Plot 154 within 10 days from the date of judgment.
- (5) The learned trial judge failed to properly evaluate the evidence on record thereby arriving at the wrong results.'

9. The appellant seeks this court to set aside the orders of the learned judge, a declaration that the suit land belongs to the appellant, and that the respondents bear the costs of this appeal and suit below.

Submissions of Counsel

10. Mr Emmanuel Emolu and Mr Abbas Bukenya appeared for the appellant while Mr Isaac Walukaga appeared for the respondent. Mr Emolu abandoned ground no. 1 of the appeal. He argued ground 2 singly. He argued grounds 3, 4 & 5 together.

Ground 2

11. Mr Emolu submitted that the learned trial wrongly invoked section 48 of the Registration of Titles Act to hold that the 2nd respondent's title had been registered earlier in time than the title for the appellant for the appellant and therefore the 2nd respondent's title was the correct title and the appellant's title had been issued in error. He submitted that section 48 of the Registration of Titles Act refers to instruments for registration having priority in time rather than to certificates of title. It would apply where there are 2 instruments for registration on the same title. In the case under consideration there were two different titles, and therefore this section 48 was wrongly applied.

Grounds 3, 4 & 5

12. Mr Emolu submitted that the respective titles of land held by the parties did not relate to the same piece of land as had been accepted and set out in the agreed facts. The land was different in size. The appellant's land was rooted in title on the mailo register while the respondent's land was rooted in title on the Freehold register.
13. Mr Emolu submitted that the learned trial judge ignored all the evidence submitted by the appellant that clearly showed how it processed its title. The respondents did not attack the appellant's title for fraud or any of the grounds permitted under section 176 of the Registration of titles Act. It was improper therefore for the learned trial judge to order the cancellation of the appellant's certificate of title. The parent title to his land was in the names of the Uganda Land Commission and it was still existing up to the time of the trial. The Uganda Land Commission was entitled to lease out this land as it held a title to it. The Uganda Land Commission never transferred this plot of land to the 1st Respondent. And this land could not exist both in Mailo and Freehold registers.

14. Mr Isaac Walukaga argued ground 2, 3 and 4 together. He submitted that the learned trial judge came to the right conclusion after evaluating both the evidence for the plaintiff and defendant and the agreed facts in the case. It was agreed by the parties at conferencing that the certificates of title refer to the same piece of land though it varied in size. The Uganda Land Commission had transferred to the land in question to the 1st Respondent and failed to cancel the mailo certificate of title. Exhibit D3 explained the scenario. In law the Uganda Land Commission had no further interest in this land and could not transfer the same to any other person.

Duty of first Appellate Court

15. It is the duty of a first appellate court to subject the case below to a re-evaluation of the evidence adduced in the case so as to reach its own conclusions. This is in line with Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, hereinafter referred to as the Rules of this Court. It provides,

'1. On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may--
(a) reappraise the evidence and draw inferences of fact;
and'

16. This duty has been echoed in many previous decisions of the Supreme Court of which Fredrick Zaabwe v Orient Bank Ltd and others S C Civil Appeal No. 4 of 2006 [unreported] is one of the more recent decisions.

Analysis

17. The trial below was conducted with the witnesses supplying witness statements that were adopted as evidence in chief at the trial following which they were cross examined. The plaintiffs had one witness, Saradeep Singh Nayer. The defendant had two witnesses, Mayanja Nkangi, (RIP) and Christopher Niko. The parties agreed on some facts as well as documents in addition to documentary exhibits adduced in evidence.

18. We have examined the evidence adduced by the parties as well as the agreed facts and documents. Much as the Defence Witness No. 1 Mayanja Nkangi in his testimony maintained that the Uganda Land Commission was seized with title to land in dispute an earlier letter, prior to his testimony suggests to the contrary. This exhibit, PD3, addressed to

the Executive Director of the 1st Respondent dated 6th October 2010 states,

'RE: Land at Luzira Allocated to M/S Victoria Best Limited.

I wish to refer to your letter dated UIA/ED/8/2010 of 13th August 2010 and the several communications thereafter between your staff and our staff.

First of all I regret to inform you that I will not be in position to attend to the joint meetings as earlier on agreed as I am indisposed and may not be in office till mid November.

I however wish to provide the following information.

- (1) That when M/S Victoria Best Ltd made application to Uganda Land Commission, a search was made in our records and a title in the names of the Uganda Land Commission was found intact. It was on the basis of this that a lease was granted to them.

It has been realized that apparently at the time of transferring the entire parcel to UIA many titles were not cancelled or never had the transfer reflected. This seems to be the major cause of the mix up and this embarrassing stand off between our sister organisations. I have since ordered the cancellation of any other titles for land passed on to UIA to avoid any further hiccups of that nature. Back to the subject matter. (Emphasis is ours.)

I was further informed that M/S Victoria Best Ltd mortgaged this land and actually initiated development until when they were stopped following a petition by M/S Surgipharm Ltd.

As you must be aware all the Institutions and offices that have been petitioned by either parties i.e. the Court, the President's office, the two responsible ministries, the Police, etc have all advised that the two institutions find an amicable solution to the matter.

It is in this regard that I earnestly appeal to you consider shifting M/S Surgipharm to another place with in the Industrial Park and let M/S Victoria Best Ltd proceed with their planned developments.

.....?

19. Exhibit P6, from the Ministry of Lands to the Executive Director of the 1st Respondent, dated 2nd November 2010 clearly establishes that the land in question or dispute with concurrent titles, is clearly one and the same. This is the report issued on opening up boundaries. It states in part,

**‘RE: Report on Boundary opening for Plots 2A-4A
Third Ring Road, Luzira Industrial Park and Plots 150
& 154 Kyadondo Block 243 at Luzira.**

You will recall your instruction to us late last week concerning the above subject. This is to bring to your attention that the above exercise is now complete.

Problem Identification

To establish the location of Plots 2A-4A First Ring Road vis-a-vis Plots 150 and 154 Kyadondo Block 243.

Control Extension

The UTM control was extended from Corner mark stones 109 orienting to CM 110, both of Luzira Industrial Park and then moved to the site by a traversing procedure. The Instrument used was a Leica Total station TC 1800 in the horizontal mode. Initially during the subdivision survey of the Park, three plots i.e. 1 & 2 Third ring Road, Plot 116 Bell Road plus a lane connecting First Ring Road and Bell Road were made. Later, these plots were merged together with part of the Access Lane to form Plots 2A-4A Third Ring Road.

Findings:

1. Plot 2A-4A is available and all the corner mark stones are in place.
2. Plot 150 was falling in the newly merged plot with a portion falling in the Third Ring Road. Plot 151 was subdivided into plots 2600 & 2601. Plot 2601 completely falls in the Third Ring Road. Plot 2600 is where the Prisons furniture work shop is located. (See annex A)
3. The location of Plot 154 is not clear.

4. A search from the Registry indicates that Plot 150 belongs to ULC, but the land was allocated to Uganda Investment Authority way back in 1998 to develop the Luzira Industrial Park. Therefore, ULC, ceased to own the land and it cannot turn out now to allocate the same land to another person. (Emphasis is ours.)

Recommendation

1. The Uganda Land Commission (ULC) should counsel (*sic*) the title of plot 150 in their possession since it has already been overtaken by events.
2. Further more all Mailo Plots falling in the Luzira Industrial Park were compensated and merged to produce Plot 2125 and a title was issued from which the current subdivisions were made. Details of compensation may be traced from the office of the Chief Government Valuer.'

20. It is evident from the foregoing reports that the Uganda Land Commission held several mailo titles in the area now referred to as Luzira Industrial Park. The Uganda Land Commission consolidated all that land and transferred it as one parcel of land to the Uganda Investment Authority creating a free hold title for that purpose. It divested of itself an estate in fee simple and conferred upon the Uganda Investment Authority an estate in fee simple under the Freehold Register.
21. Whether on account of inadvertence, or malfeasance or nonfeasance, the Uganda Land Commission, and the office of titles failed to cancel or even to endorse the Mailo Certificates which the Uganda Land Commission had divested of itself, in spite of the clear duty to do so under Section 91 of the Registration of Titles Act.
22. The appellant was made an offer of land subject to the same being available. Obviously no such land was available any longer and it is baffling that a fresh survey was made and concluded over an existing survey. Obviously malfeasance or nonfeasance cannot be excluded given the notorious mayhem in the Registry of Titles / and or Survey and Mapping Offices.
23. Uganda Land Commission was not in a position to pass any title to any one over this land since it no longer owned it. The Supreme Court was faced with a similar question in Livingstone Ssewanyana v Martin Alikor, Supreme Court Civil Appeal No.4 of 1990 (unreported). In this case in spite of a subsisting lease over a plot of land the Uganda Land Commission granted a lease to another person. Oder, JSC, (RIP) stated in part,

'The grant to the appellant should be regarded as having been, and in my opinion it was made, in August 1982 by the decision under the minute already referred as testified by Maria (DW1). The decision granting the lease having been made in response to the appellant's application, it was not an internal matter not binding on the commission in relation to the appellant. This would, in my view,

appear to explain the reference to the minute of the decision on the approved application form and lease offer. The grant made under that minute was the root from which the offer and the appellant's certificate of title derived their validity. The grant having been made in August 1982 when the suit property was not available for leasing owing to the respondent's leasehold which was still subsisting at the time, the Commission, in my view, was justified in wanting to cancel it as communicated to the appellant's lawyers by Exh P3. Further, in my view, the appellant's application in response to which the grant was made should not have been considered and still less approved. It was invalid when it was made because the suit property which it applied for was not available for leasing. If the application had been made or approved after the expiration of the respondent's original lease, the consequences would have been different.'

24. Later on Oder, JSC, with whom the other judges concurred, stated in part,

'In the instant case the commission granted a lease and issued title to the suit property to the appellant when the respondent's title to the same was in existence and when it had no proprietary interest in the suit property until the expiration of the respondent's title. The title issued to the appellant was therefore null and void.'

25. This position seems at variance with the position taken by the Supreme Court in a later case, Kampala Bottlers Ltd V Damanico (U) Ltd Supreme Court Civil Appeal No. 22 of 1992 (unreported). In this case Wambuzi, CJ, with whom the other judges concurred, (including Oder, JSC), stated,

'In the first place and needless to say, lack of grant is not one of the grounds for impeaching the title of a registered proprietor on the wording of this section and also of section 56 to which I referred earlier in this judgment. I must, therefore reject Mr Kateera's argument that a certificate of title is meaningless unless a grant has been shown to have been made in respect of the land in question.'

26. However, in a subsequent case with a panel of five judges, the Supreme Court discussed a somewhat similar point as to the consequences of an illegal grant leading to the issue of a certificate of title. This was in the case of Justine E.M.N. Lutaya v Stirling Civil Engineering Company Ltd

Supreme Court Civil Appeal No. 11 of 2002 (unreported). Mulenga, JSC (RIP) with whom the other judges agreed, wrote,

‘That leaves for consideration, whether by virtue of its registered lease, the company had legal possession of the suit land. The circumstances surrounding the lease were not subject of much evidence in this case. However, in the judgment of the High Court in Civil Suit No.897/88, which was produced in evidence as Exh.D3, Mpagi-Bahigeine J., as she then was, found that the lessee was a non-African company, and that it did not obtain the Minister’s consent prior to the agreement, as was required by law. The learned judge held that therefore, **“the property did not vest in the company but reverted”**(sic) to the appellant. As those facts were apparently undisputed, I agree with the holding, because these facts rendered the purported lease an illegality under the Land Transfer Act (Cap.202), which the court cannot overlook. **In the instant case, the learned trial judge observed that in the earlier suit, the court made no order to cancel the lease, and she seems to have placed significance on the continued appearance of TT Company’s name on the certificate of title, as lessee. In my view, however, the omission, by the court in the earlier suit, to order cancellation of the lease, and the continued appearance of the company name on the register as lessee, did not legalise or validate the lease. It was illegal and therefore, void *ab initio*. The purported lessee could not derive any lawful benefit or right from the illegal grant or contract.** It follows therefore, that apart from failing to secure physical possession, TT Company did not acquire legal possession of the suit land either. In the circumstances, I find that while the appellant was still the registered mailo owner, no other person was in lawful possession of the suit land.’ (Emphasis is ours.)

27. There are 2 decisions of the Supreme Court, Livingstone Ssewanyana v Martin Alikor (supra) and Lutaya v Stirling Civil Engineering Company Ltd (supra) that show that an illegal grant will not give rise to a lawful certificate of title while Kampala Bottlers Ltd V Damanico (U) Ltd (supra) would suggest that a court need not look beyond the certificate of title to a grant in determining the lawfulness of a certificate of title. We are persuaded to follow the 2 decisions especially in light of the fact that the last decision, Lutaya v Sterling Civil Engineering Company Ltd (supra) was a decision of 5 judges rather than 3 judges that decided Kampala Bottlers Ltd V Damanico (U) Ltd (supra).

28. The preponderance of authority lies with the former rather than the latter position. Notwithstanding the foregoing in the case before us clearly Section 176(5) of the Registration of Titles Act is also applicable. The respondents are not simply persons deprived of land but they are also holders of title that was issued prior to the title issued to the Appellant.
29. The Uganda Land Commission, having merged different parcels of land it held under several mailo certificates of title into one parcel of land, measuring 25.58 hectares of land, and transferred its estate in fee simple, to the Uganda Investment Authority vide FRV 425 Folio 16 issued on 15 December 2005, ceased to have any interest, whether transferable or not, in the said land, notwithstanding that it failed to complete the paperwork to cancel the mailo certificates immediately it divested itself of any interest in the said parcels of land.
30. We are further satisfied that the Uganda Land Commission had no title to pass on to the appellant. What occurred between the appellant and the Uganda Land Commission was a transaction that was a nullity, having no force of law. The Registrar of Titles has special powers to correct such errors under Section 91 of the Lands Act including cancellation of such wrongly or illegally obtained certificates of title without seeking permission from court. It follows, *a fortiori*, that the High Court can order the Registrar, in appropriate cases to exercise those powers, in actions not based on fraud or under Section 176 of the Registration of Titles Act. In any case maybe Section 176 has to be read down, with **'such modifications, adaptations and qualifications as may be necessary'** to bring it in conformity with Articles 26, 28, 50 and 292 of the Constitution in terms of effective redress. Section 176 cannot trounce constitutionally protected rights.
31. We are satisfied on the evidence on record that the certificate of title of the appellant and the certificates of title of the 1st and 2nd Respondents relate to the same land though in the case of the respondents their parcels are larger in size than the appellant's parcel. The appellant's parcel is part of the parcel leased to the 2nd Respondent by the 1st Respondent prior to the appellant obtaining a lease and title to the same.
32. Both respondents' certificates of title are prior in registration to that of the appellant. The appellant therefore enjoys no protection against ejection or cancellation of his certificate of title in light of section 176(5) of the Registration of Titles Act. The learned trial judge was correct in ordering cancellation of the same but this should have been under Section 177 of the Registration of Titles Act.

33. Sections 176 and 177 are set out below.

176. Registered proprietor protected against ejection except in certain cases.

No action of ejection 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—

1. the case of a mortgagee as against a mortgagor in default;
2. the case of a lessor as against a lessee in default;
3. 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 bona fide for value from or through a person so registered through fraud;
4. the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;
- 5. the case of a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land, (*Emphasis is ours.*)**

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.

177. Powers of High Court to direct cancellation of certificate or entry in certain cases.

Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the

registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order.'

34. We agree with the appellant that section 48 of the Registration of Titles Act was not the proper applicable law to the facts of this case as this section deals with priority of instruments lodged before the Registrar and not necessarily with certificates of title that may be the subjects of those instruments. Section 48 states,

'48. Instruments entitled to priority according to date of registration.

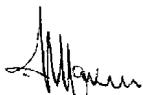
1. Every instrument, excepting a transfer, presented for registration may be in duplicate and shall be registered in the order of and as from the time at which the instrument is produced for that purpose, and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.

2. Upon the registration of any instrument not in duplicate, the registrar shall file and retain it in the office of titles, and upon the registration of any instrument in duplicate, the registrar shall file one original and shall deliver the other, hereafter called the duplicate, to the person entitled to it.'

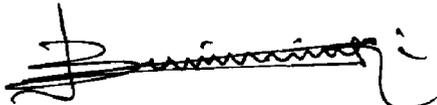
35. Notwithstanding this error by the learned trial judge there was ample justification in law for the orders made by the learned trial judge.

36. In light of the foregoing we do not find any merit in grounds 2, 3, 4 & 5. This appeal is dismissed with costs here and below.

Dated, signed and delivered this 28th day of April 2017


Kenneth Kakuru
Justice of Appeal


Fredrick Egonda-Ntende
Justice of Appeal


Barishaki Cheborion
Justice of Appeal

28/4/2017

- Enoch Emmanuel for Appellants
- Oluwase Kassim holding brief
for Isaac Walukaga for Respondent

- Amia c/c

- P.D for Appellant present.

CV: Judgment read in court.


SR.