IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0039 of 2019

In the matter between

OLANGO JOSEPH **APPELLANT**

And

TOO-ROM RICHARD **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Civil Procedure *— section 70 of The Civil Procedure Act — No decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. — A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error.*

Land Law *— Locus in quo — The practice of visiting the locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case. —Fraud — Section 59 of The Registration of Titles Act guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of The Registration of Titles Act which essentially relate to fraud or illegality committed in procuring the registration.— In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents — The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary*

civil cases though not beyond reasonable doubt as in criminal cases — Leases— Once the lease expires, the relation of landlord and tenant ceases and in that case the lease cannot be extended but can only be renewed — Due to this brief cessation of a leasing relationship between the parties, a lease renewal legally creates a new lease agreement between the parties — It is generally against public policy for a public agency to extend an expired contract.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the appellant for recovery of land comprised in Plot 23 Perry Okech Road, Pece Lukung, Laroo Division in Gulu Municipality, a declaration that the property belongs to the respondent, general damages for trespass to land, *mesne* profits, an order of eviction, permanent injunction, interest and costs. His claim was that on or about 15th May, 1995 he applied to Gulu Municipal Council for allocation of the land in dispute, which at the time was un-surveyed, unoccupied land. The General Purpose Committee at its meeting of 3rd August, 1995 under minute Min. 20/1995 (117) allocated the land to him upon a lease for an initial period of five years. During the same year, he caused survey of the land under interaction to survey 1/S No. A6503 undertaken on sheet No. 22/2/22/NW/3 and survey mark stones were duly installed. By reason of insurgency that engulfed the region, the respondent was unable to put up any structures on the land during the five year period of the initial term. The initial term leas accordingly expired in the year 2000. On 2nd March, 2004 he applied for its renewal. By its minute GDLB No. (7) / 2006 (14) of 2nd and 3rd November, 2006 Gulu District Land Board was offered the respondent another lease over the same plot. When the respondent attempted to begin construction of a building on the plot, he was surprised to find that it was occupied by the appellant who had already constructed a temporary building thereon. The appellant refused to vacate the land, hence the suit.

[2] In his written statement of defence, the appellant averred that the land in dispute was occupied by customary tenants, both at the time of application for a lease and at the time of survey that the respondent never compensated. It is the appellant who from 1999 to the year 2001 compensated the four occupants for their developments on the land. It is thereafter that the appellant constructed three grass-thatched houses and a one three bedroomed semi-permanent house on the land. The dispute over this land was the subject of litigation previously before the L.C.II Court of the area which decided in the appellant's favour against the respondent. The appellant therefore counterclaimed for a cancellation of the respondent's leas title on account of fraud, general damages for inconvenience, a permanent injunction, interest and costs.

The respondent's evidence in the court below:

[3] P.W.1 Too-Rom Richard testified that he applied for the plot in dispute (exhibit P. Ex.1) and was granted a five-year lease by the Municipal Council (document P. ID.4). At the time there was only one occupant, a one Ojera, who was willing to receive compensation of shs. 2,000,000/= and vacate the land but he was unable to pay the money since due to insurgency the occupant would not have been able to move to any other place. On 5th May he paid the survey fees (exhibit P. Ex.1). After the survey he paid the premium. In the year 20003 he found the appellant in occupation and his lawyer wrote him a notice to vacate. On 2nd March, 2004 he applied for extension of the lease. On 17th November, 2006 he received a lease offer (document P. ID.6). He was subsequently issued with a lease title for the land (exhibit P. Ex.2). The appellant has turned the land into his homestead against the respondent's will. He proposed to compensate or share the land with the respondent but he rejected both proposals.

[4] P.W.2 Ojera Alex testified that the respondent on 15th May, 2015 applied for a residential plot. The General Purpose Committee of the Municipal Council considered the application and on 25th August, 1995 allocated the plot in dispute

to the respondent (exhibit P. Ex.3). He accepted the offer on 25th August, 1995 (exhibit P. Ex.4). He received an offer for a five year initial term lease (exhibit P. Ex.5). The land was subsequently surveyed and 17th November, 2006 a title deed for a ten year lease with effect from 1st November, 2006 was issued (exhibit P. Ex.2). The initial lease offer had expired during the year 2000. The respondent applied for extension of the lease during the year 2005.

The appellant's evidence in the court below:

[5] D.W.1 Olango Joseph Odongpiny testified that the land in dispute measures approximately 30 x 40 metres. He acquired it by way of purchase from four different occupants, starting 18th December, 1999 and the last one was on 25th March, 2001 (exhibits D. Ex.1 - D. Ex.4). It is during the year 2004 that the respondent first laid claim to the land. During the year 2011 the respondent sued him before the L.C.1 and L.C.II Courts but at both levels the decisions were in favour of the appellant. The appellant holds an occupation permit in respect of that land (exhibit D. Ex.5) and has been paying ground rent for it (exhibit D. Ex.6). The respondent has no building on the land. By the time the respondent obtained a lease offer in respect of that land on 2nd March, 2004 the appellant had already taken possession and compensated all of the former occupants.

[6] D.W.2 Odongo Justine testified that he is a neighbour to the appellant. The appellant settled on the land in dispute in 1999 after he had compensated the then occupant, a one Ojera Wilfred. During a survey conducted by the appellant it was found that a part of land belonging to the witness was enclosed in that of the appellant. The appellant compensated him for that part in two instalments paid on 25th November, 2000 and on 25th March, 2001 respectively. It is during the year 2008 that the respondent first claimed ownership of the same land. He sued before the L.C.II but lost the case. The appellant has a semi-permanent house on the land constituting his home. He uses part of the land for subsistence farming.

Proceedings at the *locus in quo*:

[7] The court then visited the *locus in quo* on 5th December, 2018 from where it recorded additional evidence from a one Ociti Jimmy. The court observed that a three bedroomed semi-permanent house is located on the land. There were five grass-thatched house thereon, two makeshift kitchens and a VIP latrine. There were two orange trees, one banana sucker, one *mvule* tree and five mango trees all planted by the appellant. The court prepared a sketch map illustrating the features seen during the visit.

Judgment of the court below:

[8] In his judgment delivered on 12th April, 2019 the trial Magistrate found that the appellant did not adduce evidence proving that the respondent acquired title to the land fraudulently. During the visit to the *locus in quo*, the appellant admitted that he wouldn't mind if the respondent were to compensate him for the land. This implied that the appellant acknowledges the validity of the respondent's title. Under the law, a certificate of title is conclusive evidence of ownerships of land. The respondent therefore is the legal owner of the land in dispute. During the visit to the *locus in quo*, it was established that the appellant is in possession of the land in dispute. He had constructed thereon a semi-permanent house and several grass-thatched houses. It was the respondent's case that the appellant took advantage of the insurgency to grab the land. Although the respondent presented six documents indicating that he compensated the occupants he found in possession of the land, which did not prove that he acquired valid title to the land.

[9] The court found further that by the year 2007 the appellant had notice of the respondent's title to the land yet he never sought to challenge its validity. He instead refused to vacate the land thereby constituting an act of trespass to the land. In acquiring title to the land, the respondent followed the established

procedure without any challenge from the appellant. The appellant did not prove any fraud on the part of the respondent committed in the process of acquisition of that title. Consequently, judgment was entered in favour of the respondent whereby he was declared the rightful owner of the land. He was granted an order of vacant possession or in the alternative the appellant compensates the respondents for the value of the land and retain it. The respondent was awarded general damages of shs. 3,000,000/= *mesne* profits of shs. 2,000,000/= with interest thereon at court rate, and the costs of the suit.

The grounds of appeal:

[10] The appellant was dissatisfied with the decision and appealed to this court on the following grounds namely;

1. The learned trial Magistrate erred in law and in fact when he relied on extraneous material during the visit to the *locus in quo* thereby occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and in fact when after finding that the appellant was in effective control of the land, he ruled that the appellant was a trespasser.
3. Had the trial Magistrate properly evaluated the evidence on record, he would have found the appellant a purchaser in good faith of the suit land.
4. Had the trial Magistrate properly addressed his mind to the law on acquisition of public land, he would have found that by the respondent not conducting an open, transparent inspection of the suit land, he had committed acts of fraud vitiating his certificate of title.
5. The learned trial Magistrate erred in law and in fact when he warded general damages and *mesne* profits that were not proved by the respondent.

Arguments of counsel for the appellant.

[11] Counsel for the appellant, submitted that while under cross-examination, the respondent admitted that he never physically saw or inspected the land before and after he applied for a lese in 1995. He also admitted that he neither met nor compensated the then occupants of the land at the time. In his application to the District Land Board he falsely claimed to have constructed a building on the land up to ring-beam level, whereas he had not. At the time he applied for extension, the lease had expired and that required him to apply for renewal. All this proved that the respondent's acquisition of title was fraudulent. The appellant presented purchase agreements between him and the then occupants of the land indicating that he was a bona fide purchaser of their interest before he took possession of the land. The respondent had never been in actual nor constructive possession of the land and therefore the appellant who at all material time had been in effective possession should not have been found to be a trespasser on the land. The responder acquired title six years after the appellant had purchased and taken actual possession of the land. They prayed that the appeal be allowed. The respondent never filed submissions in reply.

Duties of a first appellate court:

[12] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). 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 (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[13] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the

evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Ground one; Errors in conducting proceedings at the *locus in quo.*

[14] In the first ground of appeal, it is contended that the trial court while at the *locus in quo*, consideration of extraneous matters resulting in a miscarriage of justice. The law permits the trial court to carry out an inspection of the *locus in quo*. According to Order 18 rule 14 of *The Civil Procedure Rules*, the court may at any stage of a suit inspect any property or thing concerning which any question may arise. Therefore, where it appears to the court that in the interest of justice, the court should have a view of any place, person or thing connected with the case the court may, where the view relates to a place, either adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place, person, or thing concerned. The purpose of visiting the *locus in quo* is for the court to view the place where issues that led to the case before the court arose in order to enable it understand the evidence better. It is intended to harness the physical aspects of the evidence in conveying and enhancing the meaning of the oral testimony. It is also for the proper determination of the case before the court in the interest of justice.

[15] Therefore at the *locus in quo*, the court must limit its inspection to the specific aspects of the case as canvassed during the oral testimony in court and to testing the evidence on those points only. The practice of visiting the locus in quo is to check on the evidence by the witnesses, and not to fill gaps in their evidence for them or lest Court may run the risk of turning itself a witness in the case (see

Fernandes v. Noroniha [1969] EA 506, De Souza v. Uganda [1967] EA 784, Yeseri Waibi v. Edisa Byandala [1982] HCB 28 and *Nsibambi v. Nankya [1980] HCB 81*). It was an error for the court to have recorded evidence from Ociti Jimmy, who had not testified in court.

[16] That notwithstanding, according to section 166 of *The Evidence Act*, the improper admission or rejection of evidence is not to be ground of itself for a new trial, or reversal of any decision in any case, if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision. Furthermore, according to section 70 of *The Civil Procedure Act*, no decree may be reversed or modified for error, defect or irregularity in the proceedings, not affecting of the case or the jurisdiction of the court. Before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice.

[17] A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial. Having done so, I have decided to disregard the evidence of the one additional witness, since I am of the opinion that there was sufficient evidence to guide the proper decision of this case, independently of the evidence of those three witnesses. I have not found any other extraneous matter that was considered by the court. The first ground of appeal therefore fails.

Grounds two, three and four; Findings as to occupancy and acquisition of title deed.

[18] In the second, third and fourth grounds of appeal the trial court is faulted in the manner it went about its evaluation of evidence related to occupancy and acquisition of title deed over former public land. Section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The Registration of Titles Act*, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker [1967] AC 569*).

[19] Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disenabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited, S.C. Civil Appeal No. 22 of 1992; Sejjaaka Nalima v. Rebecca Musoke, S. C. Civil Appeal No. 2 of 1985;* and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya S.C. Civil Appeal No. 36 of 1995*).

[20] In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others, S.C. Civil Appeal*

No. 4 of 2006 and *Kampala Bottlers Ltd v. Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992*). The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*).

[21] In the instant case, the respondent was given an initial offer of a lease that elapsed after five years. It is trite that when a lease expires, the land automatically reverts to the lessor (see *Dr. Adeodanta Kekitiinwa and three others v. Edward Maudo Wakida, C.A. Civil Appeal No 3 of 2007; [1999] KALR 632*). According to section 59 (8) of *The Land Act,* a District Land Board is authorised to exercise as holder of the reversion, in relation to subsisting leases over former public land, the powers of a controlling authority under *The Public Lands Act, 1969*, as if that Act has not been repealed. The procedures of allocation, renewal and extension of leases though are not stated in either Act. Nevertheless, under *The Public Lands Rules S.I 201-1* (later revoked in March, 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001* which in turn were subsequently on 16th December, 2004 revoked by rule 96 of *The Land Regulations, S.1. 100 of 2004*), there were prescribed forms and procedures out of which were developed standard terms and conditions of every grant of public land. These were well thought out and covered the whole country. They made land administration easier and did not leave too much procedural discretion to public officials.

[22] In the absence of a specific time designation in the lease, an option to extend remains effective only during the term of the lease. When a lease stipulates that an option to extend must be exercised “at the end of” or “at the termination of” the lease, the lessee must exercise the option on or before the day the original lease expires (see *Max Norton and Long Outdoor Advertising v. John McCaskill, dba City Sign Co., 12 S.W.3d 789, 793-94 (Tenn.2000*). Once the lease expires,

the relation of landlord and tenant ceases and in that case the lease can only be renewed. The characteristics of a lease extension are; (i) the application may only be made before expiry of the lease; (ii) once approved, such extension takes effect on the last day of the unexpired term and does not extinguish the unexpired term.

[23] Although there is no published set of guiding criteria, by operation of the Constitutional doctrine of "Public Trust" embedded in article 241 (1) (a) of *The Constitution of the Republic of Uganda, 1995* and section 59 (8) of *The Land Act,* before granting extension of a lease, the Board should at a minimum;- (i) confirm that all outstanding land rates and rents have been settled; (ii) determine whether or not there are existing encumbrances on the leasehold title deed for which an extension of lease is being sought. Having encumbrances should not adversely affect the application for extension of the term of a lease, but rather, it is meant to ensure that where there is a valid encumbrance, then that encumbrance is reflected in the event that extension of the lease is approved; (iii) evidence that the landowner has complied with the terms and conditions of the existing lease. This could involve submission of building approvals and plans where the existing lease has a condition requiring the landowner to develop the property in accordance with approved plans; (iv) whether the extension is beneficial to the economy and the country; (v) whether the proposed user is in accordance with national / local policies; (vi) and whether the extension is in the public interest, public safety, public order, public morality, public health and land use planning. The land's use has to continue to serve the grant's original public purpose because the land remains subject to the public trust after the grant. Where a private person was granted the use of certain previously public land for a purpose in the public interest, there is an implied condition in the grant that the private person cannot retain the land granted without using it for the purpose for which it was granted.

[24] Renewal denotes the re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract (see *Black's Law Dictionary* 1410, 9th ed. 2009). Renewal of a lease creates a new lease agreement. With renewal of a lease, there is a legal instant in time between the expiry of the original term and the commencement of the renewal term. Due to this brief cessation of a leasing relationship between the parties, a lease renewal legally creates a new lease agreement between the parties.

[25] The practical implications of renewal of a lease are; (i) the application may be made either before or after expiry of the lease; (ii) once approved, renewal of a lease takes effect immediately; (iii) it results in the issuance of a new lease offer (letter of allotment); (iv) the land will then be re-valued to determine the payable land rent and other requisite fees, re-surveyed and geo-referenced and the lessee surrenders the existing title or lease certificate in consideration for a new lease; and (v) it results in the preparation and registration of a new lease; thereafter, a new certificate of title is issued for the renewed term.

[26] When considering renewal of public leases, various factors will be taken into account, including;- giving the first-option-of-renewal to the outgoing lessee; whether the land is required for a public purpose upon expiry of the lease; or whether serious breaches of conditions and covenants exist under the expired lease; if the lease was granted on policy considerations for promoting certain objectives; whether the policy consideration is still valid; whether the conditions will be different from those in the expired lease, such as the need to impose periodic reviews to enforce compliance with use and development conditions in leasehold covenants upon renewal, and so on. Where the use of public or publicly-granted land changes over time, the District Land Board must approve the changed use. Just as it is with extensions, when these considerations are subjected to public participation, although the concerned citizens may not have been permitted to participate in the debate on a particular issue, and may in fact

not agree with the Board's decision, they will nonetheless have had the opportunity to participate in and witness the decision-making process, and, possibly to hear the true rationale behind the decision.

[27] When a contract expires, then it no longer legally exists and therefore it follows that, if it doesn't exist, it cannot be extended. The respondent's five year initial term lease terminated on 1st September, 2000, the option was no longer in force and the fourth defendant's attempt to extend it six years later on 17th November, 2006 (exhibit P.ID.6) was ineffective. An expired contract means that there is no document to amend or extend. Once an agreement has expired, the parties cannot revive it. In legal terms, it no longer exists. What the parties can do, however, is create a new contract with a new term.

[28] Secondly, according to Regulation 10 of *The Public Lands Rules S.I 201-1* (revoked in March 2001 by rule 98 of *The Land Regulations, S.1. 16 of 2001*), being the law in force at the time, an offeree of a lease on public land was a mere tenant at sufferance and he or she could only acquire interest at registration. A lease offer does not create an interest in land. Similarly under section 54 of *The Registration of Titles Act*, no instrument until registered in the manner provided for by the Act, is effectual to pass any estate or interest in any registered land. Therefore, an offer of a lease on former public does not create an interest in the land so offered until actual registration of that lease. The respondent had no interest in the land until his registration.

[29] It is generally against public policy for a public agency to extend an expired contract. If an agency were to assume that an expired contract could lead to amendments or extensions, then the agency would never be required to conduct competitive solicitation or invite public participation. Rather, they could just amend contracts that have previously expired. In case there are exceptional reasons, then the agency needs to put in writing the reasons why this was necessary in the specific case. Whatever the case may be, the longer it has been

since a contract expired, the more difficult it would be for a public agency to justify its resurrection by way of extension after its expiry. As a general rule, it may be said that any type of contract is treated as opposed to public policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest" (see *Fender v. St John-Mildmay [1938] AC 1, at 13–14, 18*).

[30] Equitable interests are created according to justice and fairness, and may be expressly created, implied by the circumstances, or imposed by a court. Their existence does not conflict with legal ownership because they are recognised and enforceable in a separate jurisdiction. It is on that basis that in cases such as *Kampala Distributors Land Board and Chemical Distributors v. National Housing and Construction Corporation S.C. Civil Appeal No. 2 of 2004*, the Supreme Court held that the sitting tenants should be given the first priority to lease land if it is being leased. In that case, the respondent had occupied the suit land since 1970 and had used the land as a playground for children residing in its adjoining estate, among other uses. It had fenced the land and constructed a toilet on it. The 1st appellant granted a lease over the suit land to the 2nd appellant ignoring the objections of the respondent and local council officials of the area. The respondent sued the appellants claiming that the grant of the lease to the 2nd appellant was unlawful and fraudulent. The respondents' claim was upheld.

[31] The court further held that since the respondent in that appeal was in possession of the suit land when it was offered by Kampala District Land Board to the second appellant, the respondent was a bona fide occupant and was entitled to the first option to be leased the land. In that case, equity was invoked to protect its rights of occupancy against persons who acquired title for the dominant or sole purpose of evicting it. This was an equitable interest imposed by court on the basis of fairness. Whether described as squatters, tenants of a tentative nature, licensees with possessory interest, or bona fide occupiers, persons with possessory interests of this nature are protected from administrative injustice

(see *Kampala District Land Board and Another v. Venansio Babweyaka and others, S.C. Civil Appeal No.2 of 2007*).

[32] The power by a land management agency such as a District Land Board to grant titles to land is restricted where a person with a valid possessory interest in the land also applies for title to the same land. In such a case the agency is required to observe and be guided by rules of natural justice. The occupant has the right to be heard if the land is to be alienated to another person or for public use (see *Matovu M., Mulindwa J. and Munyanga J. v. Sseviiri and Uganda Land Commission [1979] HCB 174*). In the instant case, there is no evidence to show that the appellant was heard before a lease was granted to the respondent in respect of land under her possession at the material time. She on that account argues that the respondent fraudulently acquired title to that same land.

[33] At the time Gulu District Land Board granted the respondent a ten year extension with effect from 1st November, 2016 of his expired lease on 17th November, 2016, the appellant was in physical possession of the land. The Board did not follow the process outlined by *The Land Regulations, 2004* in extending, what should have been a renewal of the lease. The process required the District Land Board to, *inter alia*; advertise the application by giving notice of at least twenty one days in a newspaper with wide circulation in the district and by such other means as are likely to draw the matter to the attention of persons likely to be affected by the application within the district (Regulation 23 (2) (a); issue notices of not less than two weeks to the applicant, owners of the adjacent land and other interested parties, fixing the date and time of inspection of the land (Regulation 26 (1); and the committee to walk round the land, tracing, ascertaining, verifying, determining and marking the boundary of the land in the presence of the applicant, neighbours, owners of adjacent land and other interested parties (Regulation 27 (1). Had they done so, they would have discovered that the land is not in possession of the respondent, but rather the appellant. Their failure to do so denied the appellant the opportunity to have his interest in the land taken care of

and the opportunity to be accorded the first option to obtain a lease of the land. The subsequent title for the 0.197 hectares of land comprised in LRV 3703 Folio 13 Plot 23 Perry Okech Road, was therefore issued in violation of the law.

[34] A title deed that is procured illegally may be cancelled. I am persuaded by decisions by the High Court of Kenya such as that in *James Joram Nyaga and another v. The Hon. Attorney General and Another, H.C. Misc Civil Application No. 1732 of 2004(K)*, to the effect that any alienation of land that is in contravention of provisions of *The Constitution*, though the title is registered under *The Registration of Titles Act*, since the Act is subordinate to The Constitution, such registration would not grant indefeasibility of unconstitutional land allocations. The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility (see *Chemei Investments Limited v. Attorney General and Others, H. C. Civil Petition No. 94 of 2005(K*).

[35] Registration of a title to land is not absolute and is defeasible where the creation of such title was not in accordance with the applicable law. A title deed issued in disregard of the applicable law and the public interest will be cancelled (see *Milan Kumar Shah and two others v. City Council of Nairobi and another, H.C. Misc Civil Application No. 1024 of 2005(K*). The purported title will be declared null and void, irrespective of the fact that there is no proof that the title holders were party to any fraud or misrepresentation (see section 91 (2) (e) and (f) of *The Land Act and C.R. Patel v. The Commissioner Land Registration and two others, H.C. Civil Suit No. 87 of 2009 (U*). Having decided before that the 4th defendant's extension of LRV 1077 Folio 22 was null and void, the plaintiffs are entitled to the relief of cancellation of that title and an order to that effect is hereby accordingly issued.

Order:

[37] In the final result, the appeal is allowed. The judgment of the court below is set aside and it its place the suit is dismissed and judgment is entered in favour of the appellant against the respondent on the counterclaim, with orders that;

a) A declaration is hereby made that the land in dispute belongs to the appellant.

b) A permanent injunction issues against the respondent, restraining him his agents, employees or persons claiming under him, from interference with the appellant's quiet possession and enjoyment of the land.

c) An order is hereby made directing the Commissioner land Registration to cancel the defendant's title to the 0.197 hectares of land comprised in LRV 3703 Folio 13 Plot 23 Perry Okech Road, and instead register the appellant as owner thereof.

d) The costs of the suit, the counterclaim and the appeal.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ocorobiya Lloyd

For the respondent :