

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 34 OF 2010

[An appeal against the Judgment Decree passed by Hon. Justice Rugadya- Atwoki on 27.07.2009 in High Court at Fort-Portal (Judgment delivered in Kampala) Civil Suit No. HCT-OI-CV-CS-0049-2007']

- 1.** Kithende Appolonaris Kalibogha
- 2.** Peter Kalibogha
3. Kithende Hostels Project (KITHOP) Ltd

Appellants

VERSUS

Mrs. Eleonora Wismer
suing through her lawful
Attorneys: Mr. Aaron Muhindo and
Fr. Laurent Bwambale

Respondent

Coram: Hon. Mr. Justice SBK Kavuma, DCJ Hon. Mr. Justice A.S. Nshimye, JA Hon. Mr.
Justice Remmy Kasule, JA

JUDGMENT OF THE COURT

In the courts below the respondent through her two attorneys, sued the appellants claiming recovery of various pieces of land, building ,and property as well as both special and general damages, she also claimed cancellation of the certificate of incorporation of the third appellant.

The hearing of the case was in Fort Portal but judgment was delivered in Kampala on 27.07.09 in favour of the respondent.

Court awarded to the respondent the land property comprised in Plot 3 Rubaga Road, Kampala, as well as 200 acres of land at Rwentuntu, Kasese. The respondent was further awarded special damages totaling shs. 157,000,000= and general damages of shs. 150,000,000= with interest at the Court rate on the damages.

Dissatisfied with the High Court decision, the appellants appealed to this Court. The grounds of appeal are:

- 1. The learned trial Judge erred both in law and fact in finding that the transfer of Plot 3, Rubaga road, Kampala into the names of the third appellant was fraudulent.**
- 2. The learned trial Judge erred both in law and fact by finding that the donation of Plot 3, Rubaga Road, was incomplete.**
- 3. The learned trial Judge erred both in law and fact by finding that the respondent had locus to institute the claim.**
- 4. The learned trial Judge erred both in law and fact in finding that the 200 acres of land at Rwentutu was bought by the respondent and was therefore her property.**
- 5. The learned trial Judge erred both in law and fact in awarding special damages when there was no evidence in support of the same.**
- 6. The learned trial Judge erred in law by shifting the burden of proof of special damages on the appellants.**
- 7. The learned trial Judge erred in awarding substantial general damages without evidence to support the same.**
- 8. The learned trial Judge erred both in law and fact by declaring that the third appellant be struck off the Register of Companies.**
- 9. The learned trial Judge erred both in law and fact by finding that the respondent was a member**

of the NGO.

- 10.** *The learned trial Judge did not properly analyze the documents relating to Plot 3, Rubaga Road, and thereby arrived at a wrong conclusion.*
- 11.** *The learned trial Judge erred both in law and fact by not properly evaluating the evidence on record and thereby came to a wrong conclusion occasioning a miscarriage of Justice. (SIC)*

The appellants prayed that the appeal be allowed, the Judgment of the High Court set aside and the suit lands revert to the 3rd appellant after the said 3rd appellant had been reinstated on the register of companies as a properly registered company limited by guarantee.

At the hearing, learned Counsel Brian Othieno represented the appellants while Mr. Muhumuza Kaahwa appeared for the respondent.

By way of background, the respondent, a Swiss female national, aged 67 at the hearing of the case (27.08.2007) met the first appellant at the time the said first appellant was a university student at Fribourg, Switzerland. As a result of that meeting, the respondent offered to mobilize funds for the purpose of helping deserving destitute and orphaned Ugandan children, particularly those from Kasese, to attain education and better life. It was later agreed between the respondent and the first appellant that the charitable work for which the respondent was to mobilize funding was to be carried out through a charitable Non-Governmental Organization (NGO).

Apparently the first appellant, who later became a member of Parliament of Uganda (2006-2011), together with the second appellant, a young brother to the first appellant, had already in place an organization, not yet formally registered as an NGO, by the names of KITHENDE HOSTELS PROJECT. Later on 03.11.1995 this organisation was formally registered as an NGO and it became the medium through which the respondent channeled her money and other resources she managed to earn and get through her own efforts, for purposes of carrying out the charitable work already stated above.

The evidence adduced at trial was to the effect that the respondent was a member of the executive committee, as co-ordinator and advisor of the said NGO, as from 02.01.1994. Both the 1st and the 2nd appellants testified to that fact.

The other members of the executive committee of the said NGO were the 1st appellant as Chairman and the 2nd appellant as General Secretary. Both the 1st and the 2nd appellants, as founding members of the NGO, also became its trustees for life.

At trial, two copies of the NGO constitution dated 02.05.94 were produced and admitted as exhibits PE 16 tendered in by the respondent (Pw 1) and PE (1) (b) tendered in by the 2nd appellant (Dwl). In exhibit PE 16 the respondent is stated, under Article 7(c)(vi) thereof, to be the first co-ordinator of the NGO. However in exhibit PE (1)(b) under the same article, one, Ms Mantilda Kanyere Mutokambali, is stated to be the first co-ordinator of the NGO. We shall revert to this variance as

to who was the first co-ordinator of this NGO later on in this Judgment.

The evidence at trial established that the respondent both personally and/or through an organization known as “STIFTUNG HOPE” mobilized and availed funds to the said KITHOP NGO which was under the control in Uganda of both the 1st and the 2nd appellants. Those funds were supposed to be utilized partly to develop the NGO project at Plot 3, Rubaga Road, Kampala. This project comprised of land and a residential house that the respondent had acquired through purchase.

she had donated the same to the kithende hostels project NGO to use the same for charitable purpose, on condition that, she and her family, would use a portion of the residential house of the property for staying in while in Uganda.

The other projects for which the money raised by the respondent was utilised were:-

- i) Land at Kasese upon which there was constructed a boys hostel.
- ii) Another piece of land at Kasese upon which there was constructed a girls hostel
- iii) Construction of Kyarumba Hostel on land of Kyarumba Catholic Church.
- iv) Rwentutu land of 200 acres.
- v) The EL-Go Round scheme project
- vi) The project of land mine victims.

At trial, the case of the respondent against the appellants was that for purposes of defrauding her, the 1st and the 2nd appellants, without any notification to her and without her consent and approval, incorporated the 3rd appellant as a company limited by guarantee and controlled by both the 1st and the 2nd appellants and registered ownership of plot 3 Rubaga Road into the names of the said company, thus depriving the respondent of any interests in that property and the charitable projects thereon.

Further, in respect of all the other projects in Uganda that the respondent mobilized resources for funding and/or facilitation in some other ways, the respondent contended that the 1st and the 2nd appellants acted fraudulently and/or in breach of their fiduciary duties to her by using the money and/or projects for their personal ends and as such both appellants ought to refund to her the said money and properties for allocation to other charitable organizations of her choice. The respondent also claimed both special and general damages from the appellant jointly and/or severally.

The appellants did not admit the respondent's claims in the court below. They contended that the respondent had no cause of action against them as she was not the only donor who donated funds for setting up the projects in issue. The same had been set up by use of funds and materials from both the 1st and the 2nd appellants and other donors and not only by the respondent. They also contended that the consent and approval of the respondent was not necessary to incorporate the 3rd appellant as a company limited by guarantee. The respondent had no locus in the management and running of the NGO that was turned into a company limited by guarantee. Further, the respondent having donated the property comprised in Plot 3, Rubaga Road to the said NGO, it became necessary to incorporate and register the 3rd appellant as a company limited by guarantee for the purposes of owning the said property, as the NGO could not own it under the law.

The appellants denied being liable in any way to the respondent, whether in damages or otherwise. At the conclusion of the trial, the learned trial Judge, Rugadya Atwoki, J. held in favour of the respondent and awarded her a number of reliefs she had prayed for. Hence this appeal.

At the hearing of the appeal, six issues were framed as arising out of the grounds of appeal. These are:

- 1. Whether the registration of Plot 3, Rubaga Road, into the names of the 3rd appellant was done fraudulently (Grounds 1, 10, and 11).**
- 2. Whether the donation by the respondent to the 1st and 2nd appellants of Plot 3, Rubaga Road, was incomplete (Grounds 2 and 11)**
- 3. Whether the respondent had the locus standi to institute the claim in the High Court (Grounds 3,9 and 11)**
- 4. Whether the respondent bought the 200 acres of land at Rwentutu (Grounds 4 and 11)**
- 5. Whether the respondent was entitled to both special and general damages (Grounds 5, 6, 7 and 11)**
- 6. Whether the Trial Judge's findings that the 3rd appellant was fraudulently incorporated and his orders to deregister the 3rd appellant were correct (Ground 8)**

As a first appellate Court, we are entitled, as one of our duties, to re-appraise the evidence that was adduced in the Court below and to draw inferences of fact therefrom: See Rule 30 (1) (a) of **The Judicature (Court of Appeal) Rules SI: 13-10: See also Coghlan Vs Cumberland (1898) 1 Ch:704:**

Pandya vs R:[1957] EA 570 and Rev. Father Nasensio Begumisa and three others vs Eric Tibebaga: (Criminal Appeal No 17 of 2002: [2004] KALR 236.

Pursuant to the above duty imposed upon this Court, we proceed to resolve the issues in the order they were submitted upon before us.

Issues 1 and 2: These were submitted upon together. The essence of these two issues is whether there was fraud on the part of the 1st and 2nd appellants when they registered the ownership of Plot 3 Rubaga Road, into the names of the 3rd appellant and also whether the donation of Plot 3, Rubaga Road, to the NGO was subject to any conditions that made the said donation to be incomplete.

For the appellants, it was submitted that the trial Judge erred in finding that it was fraudulent of the 1st appellant not to disclose to the respondent that a registration certificate for the NGO had already been issued on 03.11.1995 when the said 1st appellant signed the agreement with the respondent on 15.11.1995. It was a term in that agreement that Plot 3, Rubaga Road, would be given as a donation to the NGO as soon as the number of the registration certificate would be known. There was no evidence that as of 15.11.1995 the 1st appellant had been notified by the NGO Board that registration of the NGO had been completed and a certificate issued.

Further, the transfer had been effected by the lawyers of those who sold Plot 3, Rubaga Road, to the respondent and so any fraud should be attributed to them and not to the appellants.

It had not been pleaded specifically by the respondent that the date of registration for the 3rd appellant vis-a-vis the date of transfer was to be the basis of imputing fraud on the part of the appellants and yet the particulars of fraud had to be specifically pleaded. This prejudiced the appellants and the respondent must not profit from that prejudice.

As to the incompleteness of the donation, the respondent had divested all her interests in the property and the conditions to the donation did not amount to proprietary interests.

Counsel for the respondent in reply submitted that fraud was specifically pleaded and proved. The 1st appellant was also aware of the registration status of the NGO at the time of the execution of the donation. The conditions pertaining to the donation comprised proprietary interests of the respondent in the property.

We have carefully re-appraised the evidence that was adduced as regards issues 1 and 2. It is clear from this evidence that the relationship between the respondent and the 1st and the 2nd appellants was, from the very beginning such that the

respondent offered to mobilize, acquire and donate money and other resources to a body that was a charitable organization in Uganda and in which the 1st and the 2nd appellants were members. The charitable work of the said organization was mainly to provide free or inexpensive accommodation to Ugandan youth pursuing education by establishing hostels and orphanages. This was to enable these youths to pursue education, have proper health care, run income self-generating schemes and generally to uplift their development. These objectives were elaborately set out in the constitution of Kithende Hostels Project (KITHOP) admitted in evidence as Exhibit PE 1(b) and also as Exhibit PE 16. The evidence of the 1st and the 2nd appellants and that of the respondent was to the same effect.

Kithende Hostels Project (KITHOP) was an organization that the 1st and the 2nd appellants had created within their family, but the same had not yet been registered as a charitable organisation before both the 1st and the 2nd appellants established a relationship with the respondent. After the relationship had been established with the respondent, from about 31.08.1992, through some form of Memorandum of Understanding (Exhibit PE 17), steps started to be taken to formally register KITHOP as a Non Governmental Organisation doing charitable work. The registration was completed on 03.11.1995 when a Certificate of Registration was issued for twelve months after which the registration was to be reviewed.

It is a fact therefore that by the 15.11. 1995 when the respondent executed the donation of Plot 3, Rubaga Road, to “Kithop” (Kithende Hostels Project) NGO ***“as soon as the NGO certificate number will be known***” the said NGO had already been

registered as an NGO and its number had already been issued. In our considered view, the reference in the donation document, Exhibit PE 5, to ***“as soon as the NGO certificate number will be known”*** provides proof that the respondent and her family were donating Plot 3, Rubaga Road to “KITHOP” (Kithende Hostels Project) as a registered NGO doing charitable work and to no other entity or individuals. The said donation was therefore not to the 1st or the 2nd appellants or both of them in their individual or collective capacities.

We also note from the evidence that was adduced that Exhibit PE 17 was executed on 13.08.1992 by, the 1st and the 2nd appellants respectively as President/Owner, Managing Director on the one hand and with the respondent as Co-ordinator/Advisor on the other. This document sets out the aims, management set-up, obligations, capital and profits and resources of Kithende Hostel Project. We note further that exhibits PE 1(b) and PE 16, both being more detailed constitutions of Kithende Hostel Project, also constituted evidence before the trial Court. Exhibits PE 17 dated 13.08.1992 and PE 16 dated 02.01.1994 respectively had the names of the respondent as “Co-coordinator and Advisor” and “first Co-coordinator” respectively. However, Exhibit PE 1 (b) also bearing the same date of 02.01.1994 has the same contents as

Exhibit PE 16, except that in exhibit PE (b), it is not the respondent who is stated as the first co-coordinator. In this document, the first co-coordinator is stated to be Ms. MANTILDA KANYERE MUTOKAMBALI who, according to PW2, (Aron Muhindo), was the biological mother of both the 1st and the 2nd appellants. Both appellants never denied this assertion in their evidence to the trial Court.

The trial Judge evaluated in detail the evidence of Pw 1, Pw2, Dw 1 and Dw2 as well as the documentary evidence that was before him and he came to the conclusion that Plot 3, Rubaga Road, was fraudulently transferred into the names of the third defendant.

We too, having subjected the said evidence to a fresh re-appraisal and scrutiny, find that the trial Judge was right in so holding. We are further fortified in this finding by the fact that the 1st and the 2nd appellants, who were signatories to exhibits PE 1 (b), PE

15 and PE 17, offered no explanation as to why, when it came to registering the constitution of Kithende Hostels Project (Kithop), the respondent, as first Co-coordinator with the NGO, was substituted with the biological mother of the 1st and the 2nd appellants MANTILDA KANYERE MUTOKAMBALI. This was done by the 1st and the 2nd appellants without, in any way, notifying and/or giving an explanation to the respondent. We infer from this conduct of the 1st and the 2nd appellants, an overt act on their part to exclude the respondent from playing any role in the

NGO, even though she was the donor of Plot 3, Rubaga Road, to the said NGO and, at all material time, both appellants continued to make it appear to her that she was co-coordinator and advisor in the NGO, whereas not. A fraudulent act is one that involves bad faith, dishonesty, lack of integrity or moral turpitude: See: *Black's Law Dictionary: 8th Edition pp 685, 687*. See also *Frederick J.K. Zaabwe V Orient Bank Ltd & Others SCCA No. 04 of 2006*. We accordingly find, and accept what the trial Judge also found, that this conduct of the 1st and the 2nd appellants amounted to fraud on their part to the prejudice of the respondent.

Exhibit PE 6, the sale agreement, executed between the respondent, as purchaser, and a one, Sherali Bandali Jaffer, as seller, clearly shows that the respondent was the owner by purchase of Plot 3, Rubaga Road. She therefore had all the powers, as such owner, to donate the same to whomever she chose and also to set the conditions relating to that donation.

Exhibit PE5, the donation agreement dated 15.11.1995, signed by the respondent as donor and the 1st appellant for and on behalf of the donee, clearly sets out the terms upon which the donation was made and accepted. First, the donation was made to Kithende Hostels Project NGO only upon the said NGO being formally registered and the NGO certificate number given and made known. Second, the room, the shower to it and all the furniture in it, beside the office with a separate entrance, being

part of the premises on Plot 3, Rubaga Road, were to remain owned, occupied and used by the respondent and her family members, to the exclusion of any other person (except Margaret Kithende and the 1st appellant), unless the respondent's family instructed otherwise. Lastly, any future management, of Plot 3, Rubaga Road had to take up the said management subject to observing the stated above conditions.

We thus come to the conclusion, as the learned trial Judge also found that the third appellant, a company registered by guarantee, was never given by the donor Plot 3, Rubaga Road. The donee of that property was the NGO, Kithende Hostels Project, registered as such NGO for carrying out charitable purposes.

certain conditions. The respondent and her family retained certain proprietary rights in the property as to ownership, occupation and use of part of the said property. Any registered owner of the said property had to do so subject to complying with those conditions.

It follows, therefore, that the donation of Plot 3, Rubaga Road, was made to KITHOP NGO for charitable work for which it was registered at the material time of the donation (15.11.95). Since the respondent and her family retained proprietary interests in the said property, any decision, as in whom the ownership of the same was to be registered, had to be with the knowledge prior

approval and consent of the respondent. Otherwise her donation would not materialize. Neither of these was sought from the respondent, and when she came to know that the conditions pertaining to her donation were not being observed, she revoked the donation on 19.04.2007 as per Exhibit PE9.

We find the appellants' contention that it was necessary to create the 3rd appellant, a company limited by guarantee, so as to have ownership of the donated property, Plot 3 Rubaga Road, registered in its names un acceptable. It is not an explanation by the 1st and the 2nd appellants as to why they did not notify and seek the consent of the respondent before registering the ownership of the said property into the names of the third appellant.

We further note that there were alternative ways under the law of registering ownership of Plot 3, Rubaga Road, into a corporate body while at the same time observing and fulfilling the conditions set up by the respondent as the donor. One of these, for example, would be the incorporation of a trust for charitable purposes to own Plot 3 Rubaga Road, on the conditions set by the respondent and having the same incorporated and managed under the Trustees Incorporation Act, Cap. 165, Laws of Uganda.

We, therefore, safely conclude the conduct of the 1st and the 2nd appellants elaborated herein above was a carefully calculated scheme intended to deprive the respondent of any interests, proprietary or otherwise, in the said property.

We accordingly conclude, as the trial Judge found, that the respondent was entitled to and acted rightly, in revoking the donation as the 1st and the 2nd appellants acted fraudulently in the way they handled the said donation.

We, therefore, answer issues 1 and 2 in the affirmative and, allow grounds 1, 2, 10 and 11 of the appeal in as much as they relate to the stated two issues.

Issue 3

This issue involved determining whether the trial Judge was right to hold that the respondent had locus standi to bring the suit (*HCCS NO. 49/2007, at Fort Portal*), against the appellants.

We have carefully considered the submissions of both Counsel for the parties to this appeal on the issue of locus standi.

Locus standi is the right that one has to be heard in a Court of law or other appropriate proceeding. Once one has a direct interest in a matter, then one is eligible to claim relief respecting that matter if that one's interest is being adversely affected. Such a one is said to have locus standi and his/her cause of action is said to be disclosed. A cause of action is created in a person once that person has a right, the said right is being violated and the alleged violator is liable: *See Auto Garage & Others vs Motokov (No 3) 1971 EA 5 14 at p. 519*: See also: the persuasive South African case of the *Cabinet of The Transitional Government Swa V Eins [1988] 2 Sa 379*.

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At trial the evidence adduced was to the effect that the respondent as an individual acquired by purchase the property comprised in Plot 3, Rubaga Road, and donated the same, on specific conditions, to a named charitable organization. The 1st and the 2nd appellants, contrary to the conditions of the donation set by the respondent, instead created the 3rd appellant and vested ownership of the stated property into that 3rd appellant. Those circumstances clearly, in our considered view, gave a locus standi to the respondent to sue the appellants as she did in High Court *Civil Suit No. 49 of 2007* as regards the property comprised in Plot 3, Rubaga Road.

With respect to other property and enterprises, the subject of the suit from which this appeal arises, though the 1st and the 2nd appellants contended that there were other donors, none of them contested the assertion of the respondent that in one way or another, she donated towards each of those projects/enterprises. This was the case in respect of land at Kasese where a boys hostel and also a girls hostel were constructed, then also the Kyarumba hostel put up on the land of the Kyarumba Catholic Church. The Rwentutu land was also purchased with monies provided by the respondent. Further, the respondent's evidence that she provided money for micro-finance activities under the EL-GO-Round Scheme was never controverted by the appellants.

We have found no credible evidence on record that any other donors contributed to the projects in issue. The respondent on

the other hand, adduced such evidence in respect of each particular project. But even if it were to be proved that another donor, in addition to the respondent, donated towards any of the said projects, which is not the case here, this, *per se*, would not deprive the respondent of locus standi to question the appellants, through a law suit, as to whether or not the donations she made to the projects complied with the conditions that were attached to those donations and, if not, then to seek appropriate reliefs through court action.

In conclusion, in respect of issue 3, we uphold the holding of the learned trial Judge that the respondent had locus standi to institute **Civil Suit No. 49/2007** in the High Court at Fort Portal against the appellants. Grounds 3,9 and 11 of the appeal therefore fail.

Issue No. 4:

This issue requires us to determine whether the learned trial Judge was right, on the basis of the evidence that was before him, to hold that it is the respondent who provided money and thus actually purchased the 200 acres of land at Rwentutu.

It was contended for the appellants that the trial Judge ought to have found that the respondent could not have bought the said 200 acres of land at Rwentutu because in law, being a non-Ugandan she could not own such land. Further, that the trial

Judge did not consider the effect of exhibit D3 which clearly stated the true owner of the said land.

For the respondent, it was maintained that the said land was acquired by purchase with money provided by the respondent and it was supposed to be owned by the NGO, KITHENDE HOSTELS Project (Kithop) and be utilized for the charitable purposes of that NGO.

We have carefully reviewed the evidence that was adduced before the trial Judge as regards the Rwentutu land. We reject the appellants contention that because, in law, the respondent, being a non-Ugandan, she could not own land, therefore she could not buy such a land. No provision of any law was cited to Court to support this preposition.

Exhibit DE 2 clearly shows that, through a foreign organization known as “HOPE”, the respondent raised the money that was the purchase price for the Rwentutu land and bought the same in 1994 and after the purchase the said land was donated to “Kithende Hostels Project (KITHOP), an NGO registered in Uganda. The purpose of the donation according to Exhibit DE 2 was:

“This land is not owned by an individual. It is owned by ”KITHOP” as a self-help project to support hundreds of children in the “KITHOP” Hostels in Kyarumba, Kasese, Kampala and others are planned. Also many orphans

will benefit from the proceeds of the products growing on that land.

“KITHOP” needs that big land to survive for the betterment and development of the youth as the “KITHOP” Constitution states”.

The learned trial Judge dealt in detail with the evidence as regards the land at Rwentutu. He found that the respondent had bought the said land with the aim that the same be utilized by the Kithende Hostels Project NGO which was supposed to be managed by the 1st and the 2nd appellants. The said NGO was so mismanaged that it no longer operated as an NGO and the Board refused to re-new its registration as it was being managed like a business instead of as a charitable organisation. Instead of using the land for charitable purposes, the 1st appellant had used it for business purposes by letting it to other people at a yearly fee of shs. 40,000= per acre. No accountability had been given to the respondent by the 1st appellant as to how the money so charged was being used.

We note with approval the learned trial Judge’s evaluation of the evidence as regards the land at Rwentutu and the finding he reached that the said land was bought with money provided by the respondent to be used for charitable objectives. Accordingly issue No. 4 is answered in the affirmative.

Therefore, grounds 4 and 11 of the appeal that constitute this issue are disallowed.

Issue No. 5

The essence of this issue is whether or not the trial Judge acted rightly to award both special and general damages to the respondent jointly and/or generally against the appellants.

As to special damages these were specifically pleaded in paragraph 6 of the plaint as being moneys advanced by the respondent to the 1st appellant for the 1st and the 2nd appellants to carry out the charitable work of KITHENDE HOSTELS Project (KITHOP). That money was: shs 60 million for the EL-GO- Round Scheme of Microfinance activities, shs. 20 million for the development of Rwentuntu land and shs. 65 million for land mines victims. The respondent contended that the 1st appellant converted to personal use and/or embezzled the said money.

Further, in paragraph 11 of the plaint, the respondent pleaded that the 2nd appellant embezzled shs. 12 million meant for purchase of the Rwentutu land.

The first appellant admitted in paragraphs 6 and 8 of the written statement of defence receipt of the moneys pleaded in paragraph 6 of the plaint. The 2nd appellant denied receipt and/or embezzlement of the respondent's shs. 12 million

meant for construction of a business school. Both appellants denied embezzling any moneys of the respondent.

The learned trial Judge evaluated in detail the evidence relating to the claim for special damages. He ⁵⁴ found that none of the 1st and the 2nd appellants gave any accountability as to how the respective amounts of money received from the respondent by each one of them for the various projects was expended. The respondents' efforts to cause the appellants to account for the money was to no avail.

We are persuaded, as the trial Judge was, that the fact as to how the money donated by the respondent was utilized was within the special knowledge of the 1st and the 2nd appellants in terms of to Section 106 of the Evidence Act. Therefore the evidential burden shifted to the 1st and the 2nd appellants for each one of them to provide accountability as to the use of the sums of money provided to them by the respondent. Each of the 1st and the 2nd appellants had the burden to show that the money received was expended for the purposes for which it was intended and that the same was not converted by them to their personal use. The 1st and the 2nd appellants, like the trial Judge found, and as we also conclude, failed to discharge this burden.

Accordingly, the 1st appellant must refund to the respondent the monies pleaded in paragraph 6 of the plaint. The 2nd appellant too has to refund to the respondent shs. 12 million

being the balance of the sum of money the respondent sent to him to pay for the purchase of the Rwentutu land, but which balance he retained for his own use.

As regards the shs. 12 million for the construction of a business studies school allegedly embezzled by the 2nd defendant, there was no admission by any of the 1st and the 2nd appellants that it was received by them or any of them. The respondent on her part adduced no evidence to Court relating to this sum. We thus uphold the finding of the trial Judge, in respect of which there was no counter-appeal by the respondent, that this item of special damages was not proved by the respondent.

As regards the award of general damages, in our Judgment we conclude that the 1st and the 2nd appellants acted willingly, intentionally and fraudulently to turn the charitable intentions of the respondent to help the needy, to their personal aggrandizement, enjoyment and profit. They did so through creating the 3rd appellant. None of them informed or sought the prior consent of the respondent. This was a gross breach by the 1st and the 2nd appellants of the trust that the respondent had put in them.

We too, like the learned trial Judge found, come to the conclusion that the respondent, provided substantial sums of money to develop and put up structures of boys and girls hostels in Kasese District and other projects from which the appellants benefited and continue to benefit by being the controllers of the 3rd appellant. Therefore, it is only fair that the respondent be awarded substantial general damages to enable her pursue her charitable goals. The learned trial Judge assessed this sum at shs. 150,000,000= . We have not been persuaded by the appellants that this sum ought to be set aside or reduced. We find the same appropriate and adequate as general damages, given the circumstances of this case.

Issue No. 5 is thus answered in the affirmative. Grounds 5, 6, 7 and 11 of the appeal also fail.

Issue: 6:

This ground faults the learned trial Judge for striking off the 3rd appellant from the Register of Companies.

The reasons why the learned trial Judge ordered the deregistration are that, on the basis of the evidence that was before him, the 3rd appellant was registered as a company without the 1st appellant as a subscriber which was contrary to Section 3(1) of the then Companies Act. Further, the Memorandum and Articles of Association of the said company were never properly executed. The Memorandum was not dated and there was no witness to the signatures of the subscribers. The Articles of Association were not dated either.

At trial, none of the appellants denied the assertion that the Memorandum and Articles of Association had not been properly executed. Before us, counsel for the appellants submitted that the certificate of registration was conclusive evidence that all the necessary steps had been complied with in registering the 3rd appellant. That the power of attorney by virtue of which the respondent had instituted the suit, did not empower him to seek de-registration of the 3rd appellant.

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We reject the submissions of counsel for the appellants on this point. The Memorandum and Articles of Association provide for the Internal Rules of the company. Persons transacting business with a company are bound to make themselves acquainted with such company's statutes, that is the Memorandum and Articles of Association, so as to inform themselves generally about the operations of the company before dealing with it. Such persons fail to do so at their own peril: See: ***Royal British Bank VS Turquand [1843-1860] ALL ER 435.***

Accordingly the subscribers/shareholders to a company that is being registered have a duty to ensure that the Memorandum and Articles of Association that they submit for registration are properly executed. Sections 5 and 11 of the then Companies Act, Cap. 110, required this, among other things, in mandatory terms. Section 11 provided substantially in similar terms in respect of the Articles of Association.

Under the new Companies Act, Act 1 of 2012, the relevant Sections are 8(1) and 15(d).

The appellants did not contest the assertion that the Memorandum of Association of Kithende Hostels Project (Kithop) Limited was not dated and that the signatures of the subscribers were not witnessed as the law required.

There is, however, no Statutory requirement that the Articles of Association be dated, though in the normal course of things, they are usually also dated.

At the trial, evidence was adduced, and the learned trial Judge accepted it as truthful, to the effect that the signature of the second appellant (Peter Kalibogha) that appeared on the Company's Memorandum and Articles of Association was a forgery. This meant in effect that the third appellant became registered as a Company Limited by Guarantee with only one genuine subscriber, the first appellant.

The evidence of the forgery of the 2nd appellant's signature in the Memorandum and Articles of Association of the third appellant is contained in exhibit PE 12, a document that the second appellant admitted as having been its author. In that document, the second appellant accused the first appellant thus:-

“(b) This trend of income expectation do also put a lot of questions to Appolinaris illegal transformation of Kithop NGO to Co. Ltd without resolution of Kithop Board”. (SIC)

The Appolinaris referred to in the quotation is one of the names of the first appellant.

In Exhibit PE 13, being the minutes of a meeting held in Kasese on 16.04.07, which both appellants as well as the respondent agreed to have attended and signed the said minutes, the second appellant explained in clear terms in Min. 03/04/07 that:

“Kithop Co. Ltd was registered as a Company limited by Guarantee and my signature was forged so I am not a member of Kithop Co. Ltd and I had complained about this forgery on 1st November 2003 in a Board meeting held at Rubaga Hostel Kampala. I made a complaint through my lawyers Mwesigye, Mugisha and Co, Advocates about the forgery in a letter dated 23rd June, 2005”.

The 2nd appellant did not deny making the above statement at the meeting. Indeed he signed the minutes of that meeting. He later, however, claimed that he signed the said minutes involuntarily after counsel for the respondent had forced him to do so. Yet the very second appellant communicated to his lawyers, Messrs Mwesigye, Mugisha and Co, Advocates, on

18.07.05 in his letter to them, Exhibit PE 18, and stated, as regards the allegation of forgery of his signature that:

“I request to withdraw the allegations put against my brother after receiving your findings about it. He has come to me and explained to me and I have understood and consented to what he did. He had sought advice that N.G.O. couldn’t own property and we ought to streamline the N.G.O. to Company Ltd by Guarantee to own property with the guarantees of we both as guarantee by way of resolution of the N.G.O. Directors dated 26th January,1996.

In this resolution we had agreed that we apply for ownership of Rubaga P.t. 3 LRV 152, Folio 12 which became legal. Hence the allegations of forgery in that matter become meaningless because the reason for which it was done was for the good, safety and development of the Organization. Noted here too was Kithop Co. Ltd stands in for Kithop N.G.O. without any intention to change or tamper with its original objectives under its constitution”. (SIC)

The second appellant confirmed that he was the author of this letter, Exhibit PE 18. His reasoning in this letter is that, according to him, the fact that his name had been forged by his brother, the first appellant, in the Memorandum and Articles of Association, Exhibit PE3, had become of no

meaning because the said forgery had been done for the good, safety and development of the organization.

But forgery is a crime created by Sections 342, 343 and 345 (a) (d) (i) and (iv) of the Penal Code Act with a sentence of imprisonment for three (3) years in case of a conviction.

In effect, the second appellant's reasoning expressed in Exhibit PE 18, was that the crime of forgery committed by the first appellant of forging the second appellant's signature on the Memorandum and Articles of Association of the third appellant was no longer a crime because the same had been done for the good, safety and development of the organization.

This evidence amounted to compounding the crime of forgery committed by the first appellant by his brother the 2nd appellant. A Court of Law cannot be a party to such. The 2nd appellant had a duty to inform the relevant authorities, such as the Registrar of Companies as well as the respondent, if not the Police, of the felony of forgery of his (2nd appellant) signature on the Memorandum and Articles of Association committed by the 1st appellant, as soon as, he, the 2nd appellant, became aware of the commission of that felony.

The conduct of the 2nd appellant whereby he allowed the forgery of his signature by the 1st appellant to remain on the Memorandum and Articles of Association of the 3rd appellant ***“because the reasons for which it was done was for the***

good, safety and development of the organization”

amounted to debasing justice. It is proof, in our considered view, of how far both the 1st and the 2nd appellants went with their schemes, in total disrespect of the law, to defraud the respondent.

We accordingly uphold the finding of the learned trial judge, who, in our view, dealt in great detail, by way of evaluating the evidence that was before him, relating to the issue of the forgery of the 2nd appellant's signature on the Memorandum and Articles of Association of the 3rd appellant before finding that the incorporation of the 3rd appellant was done fraudulently, and therefore, the 3rd appellant was, and is, an illegal company.

The then Section 16(1) of the Companies Act, Cap. 110, (now Section 22(1) of the new Companies Act 1 of 2012) provides that a certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Companies Act in respect of registration and matters precedent and incidental to registration have been complied with and that the association is a company authorized to be and is duly registered under the Act.

However, the issuance of a Certificate of Incorporation does not make lawful any activity of the company that is unlawful under the general law and does not validate any provision of

the company's Memorandum or Articles of Association which conflict with the general law; such as, for example, the mandatory provisions of the Companies Act: See: ***Pennington's Company Law Butterworths, UK, 7th Edition, P. 34***

At the material time i.e. January, 1998 Section 3(1) of the then Companies Act required in mandatory terms that a private company, which the third appellant purports to be, had to be formed by any two or more persons, associated for any lawful purpose. Under the new Companies Act 1 of 2012, the law seems to have been changed because Section 4(1) of the new Act now provides that any one or more persons may for a lawful purpose, form a company, by subscribing their names to a Memorandum of Association and otherwise complying with the requirements of the Act in respect of registration. However, by January, 1996, the law in mandatory terms required the 3rd appellant to be incorporated with at least two subscribers having signed the Memorandum of Association. The 1st appellant did so with one, himself, and then included the 2nd appellant through the forgery of the signature of the 2nd appellant on the Memorandum and Articles of Association.

Further, the Memorandum of Association of the 3rd appellant submitted to the Registrar of Companies on 25th January, 1996, was not dated and there was no attestation to the subscribers signatures, contrary to the mandatory

requirement of Section 5(1) of the then Companies Act (now Section 8(1) of Act 1/2012.

It follows, therefore, that the issuance of the Certificate of Incorporation of the 3rd appellant by the Registrar of Companies did not validate what the Companies Act, Cap. 110 mandatorily required to be complied with as a condition precedent before the third appellant was incorporated as a Private Company Limited by Guarantee.

We accordingly, answer issue number 6 (ground 8 of the appeal) in the affirmative.

We appreciate that the respondent, Mrs. Eleonora Wismer, being a Swiss national, thus a non citizen of Uganda, cannot as an individual, have land in Uganda vested in her and can only acquire lease interests in such land: See **Article 237** of the Constitution and Section 2 of The Land Act, Cap. 227.

However, the same Section 2 of the Land Act allows a Non Governmental Organisation (NGO), duly registered to carry out charitable work, under the Non Governmental Organisations Registration Act, Cap. 113 to own land since the same is a body corporate. Thus the respondent together with other Ugandans is free to be a member of such an NGO which can be vested with ownership of the said land.

The land comprised in Plot 3 Rubaga Road, is of a Leasehold tenure and as such the respondent, though a foreigner, can

individually have the same registered into her names, if she so wishes. She, may then transfer the same to an NGO that may be subsequently created. There is thus no need to interfere with the trial Judge's Order No. 1 of his Judgment as regards Plot 3 Rubaga Road.

However, with regard to the land of 200 acres and the developments thereon at Rwentutu, the tenure of this land was not ascertained by the trial judge. There was no evidence to show that a registered title to the same had ever been issued whether as leasehold or freehold or mailo. The respondent cannot thus, in our view, own and hold it as an individual so as to be able to assign or donate the same to the Kasese Catholic Diocese or any other charitable organization of her choice as the trial Judge ordered.

In the circumstances, we consider it appropriate for Court to appoint the two attorneys of the respondent, who are Ugandan citizens, namely Mr. Aaron Muhindo and Rev. Fr. Laurent Bwambale, to be trustees for and on behalf of the respondent, to, in the interim, take over the said land from the appellants and to own and manage the same for charitable purposes in accordance with the directions of the respondent.

It will be up to the respondent to cause an appropriate entity by way of an NGO, or otherwise, catering for her charitable interests to be created or appointed to own and manage the said Rwentutu land. This appointment is made by this Court

pursuant to Sections 40 and 51 of the Trustees Act, Cap 154. The appointment is to last for 3 years, within which period steps will have been taken to create an appropriate entity to own and manage the said land. In the event that this will not have been done, then the parties concerned, that is the respondent and the two trustees shall apply to the High Court for directions. At all the time of the appointment of the trustees, they shall act jointly and not singly.

As all the issues and consequently the grounds of appeal having been resolved in favour of the respondent, this appeal fails and stands dismissed. The Judgment of the High Court is hereby upheld subject to the following modifications and additions thereto:

The shs. 60 Million which was meant for the EL-Go Round Scheme,

The shs. 20 Million which was meant for the development of Rwentutu land, and

The shs. 65 Million which was meant for land mine victims, i.e. the sums in (i), (ii) and (iii) above are to be paid back to the respondent (Plaintiff) by the 1st appellant (1st Defendant: Kithende Appollonaris Kalibogha).

- (iv) The shs. 12 million, the balance of the money meant for the purchase of Rwentutu land is to be paid back to the respondent (plaintiff) by the 2nd appellant (2nd defendant Peter Kalibogha).
- (v) The general damages of shs. 150,000,000= is hereby awarded to the respondent (plaintiff) jointly and /or severally against the 1st and 2nd appellants.
- (vi) The lawful respondent's Attorneys in the suit and in this appeal, that is, Mr. Aaron Muhindo and Fr. Laurent Bwambale are hereby appointed trustees to jointly take over from the appellants, own and manage for and on behalf of the respondent, the land of 200 acres at Rwentutu for a period of 3 years as from the date of this Judgment, subject to orders set out in this Judgment.
- (vii) The two trustees appointed in (vi) above shall furnish the respondents with annual management reports over the property herein put under their trusteeship including, *inter alia*, the progress in the steps taken to comply with the Courts directions herein. A copy of the said reports shall be filed with the Registrar of this Court and another with the Registrar of the High Court at every end of year of their trusteeship and in any case not before 14 days after the end of the previous year of such trusteeship.

The respondent is awarded the costs of this appeal and those in the Court below as against the 1st and the 2nd appellants (defendants in the Court below) jointly and/or severally.

Dated at kampala this 23rd day of October 2015

Hon. Mr Justice S.B.K Kavuma
Deputy Chief Justice

Hon. Mr. Justice ATS Nshimye
Justice of Appeal

Hon. Mr. Justice Remmy Kasule
Justice Of Appeal

