

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 187 OF 2012**

- 1. DAVID KIZITO KANONYA
  - 10 2. DICKSON NSUBUGA
  - 3. DIANA SEMAKULA
  - 4. DENIS KAVULU
  - 5. JOYCE NANSUBUGA
  - 6. IVAN ZIMBE
  - 15 7. DANIEL KIZITO
  - 8. MARTHA NANKYA.....APPELLANTS
- VERSUS**
- BETTY KIZITO.....RESPONDENT

20 *[Appeal from the Judgment of the High Court of Uganda at Kampala delivered by the Hon. Mr. Justice Rubby Aweri Opio on the 25<sup>th</sup> May, 2012 in High Court Civil Suit No. 543 of 2003]*

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA  
25 HON. MR. JUSTICE KENNETH KAKURU, JA  
HON. MR. JUSTICE BARISHAKI CHEBORION, JA

**JUDGMENT OF THE COURT**

30 This appeal arises from the Judgment of Hon. Mr. Justice Rubby Aweri Opio (as he then was) in *High Court Civil Suit No. 543 of 2003*, delivered on 25<sup>th</sup> May, 2012 in favor of the plaintiff now respondent. The appellants, being dissatisfied with the Judgment filed an appeal in this Court with the following grounds;-

- 35 1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence of the 1<sup>st</sup> Appellant as a whole thereby arriving at a wrong decision.*
- 40 2. *The learned trial Judge erred in law and fact when he ruled that the 1st appellant fraudulently transferred the proprietorship of Block 244 plot 5091 land at Muyenga.*

- 5           3. *The learned trial Judge occasioned a miscarriage of justice to the appellant when he did not properly record the evidence presented.*

**Background to the appeal**

10           The suit at the High Court was concerned with land comprised in Kyadondo Block 244 Plot 5091, land at Muyenga. That land was at one time registered in the joint names of the 1<sup>st</sup> appellant and the respondent until the 22<sup>nd</sup> of January, 2002 when the 2<sup>nd</sup> to the 8<sup>th</sup> appellants were added as tenants in common and the 1<sup>st</sup> appellant's name was removed leaving as proprietors the seven appellants.

15           The first appellant and the respondent are siblings being children of the late Semei Kizito. The other appellants are children of the first appellant and his wife Joyce Nansubuga.

20           The respondent was aggrieved by the transfer and subsequent registration of the 2<sup>nd</sup> to 8<sup>th</sup> appellants on the title to the suit property and her removal there from. She contended that the 1<sup>st</sup> appellant had acted fraudulently then filed a suit at the High Court seeking to have the 2<sup>nd</sup> to 8<sup>th</sup> appellants' registration cancelled and an order reinstating her name on to the suit title as a joint proprietor. She also sought an order directing that the said property be divided into pieces of land one for herself and the other for the 1<sup>st</sup> appellant. The High Court found for the respondent and granted her the orders sought.

25           Being aggrieved, by the Judgment of the High Court the appellants filed this appeal on grounds set out above;

- 30
1. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence of the 1<sup>st</sup> Appellant as a whole thereby arriving at a wrong decision.*
  - 35           2. *The learned trial Judge erred in law and fact when he ruled that the 1st appellant fraudulently transferred the proprietorship of Block 244 plot 5091 land at Muyenga.*
  - 40           3. *The learned trial Judge occasioned a miscarriage of justice to the appellant when he did not properly record the evidence presented.*

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5 **Representation**

At the hearing of this appeal learned Counsel *Mr. Edward Kangaho* appeared for the appellants, while *Mr. James Nangwala* and *Ms. Lillian Kutesa* appeared for the respondent.

10 **The appellant's case**

Learned counsel submitted on the first ground of appeal, that, as a first appellate Court, this Court, has a duty to reevaluate all the evidence which was adduced at the trial and to arrive at its own conclusion as to whether the finding of the trial Court can be supported. He relied on *Fredrick Zaabwe vs Orient Bank and 5 Others; Supreme Court Civil Appeal No. 4 of 2008.*

20 Counsel faulted the trial Judge for failing to find that the respondent was not certain of her claim against the appellant, when she filed the suit at the High Court. Her intention according to counsel, was to unjustly enrich herself, by making fictitious claims against the appellant.

Counsel submitted that, had the learned trial Judge properly evaluated the evidence on record, he would have found that, the respondent had freely signed the transfer of the title to the land in issue to the appellant.

25 Counsel further submitted that, the respondent had at the trial failed to adduce sufficient evidence to sustain her claim against the appellant. In this regard counsel contended that, no documentary evidence was adduced by the respondent to support her claim that, indeed she owned the property in issue jointly with the respondent, or that, she had contributed in any material way to the acquisition and development of that property. Counsel submitted further that, the trial Judge based his findings on only three facts. Firstly, that, both parties operated a joint Bank account at Barclays bank. Secondly, the suit property had been prior to 2002 been registered in the names of the respondent and the 1<sup>st</sup> appellant and thirdly that the Judge also considered the fact that the 1<sup>st</sup> appellant had introduced the respondent to Pw3 a tenant in the property at Kisugu as the owner of that property.

40 Counsel submitted that, the above facts were insufficient to sustain the respondent's claim and the trial Judge should have found so. He contended further that, the respondent's evidence was very weak when weighed against the overwhelming evidence adduced by the appellant in his defence to the suit.

5 He asked Court to allow the appeal on this ground alone.

In respect of the second ground of appeal, learned counsel submitted that, the trial Judge erred when he found that, the appellant had fraudulently transferred the proprietorship of the suit property into his name and the names of his children.  
10 Before arriving at the conclusion that he did, counsel submitted that, the trial Judge considered the fact that the transfer forms used, in the transfer of proprietorship of that property indicated that, the same had been given as a 'gift' to the 1<sup>st</sup> appellant and his children the 2<sup>nd</sup> to 8<sup>th</sup> appellants by the respondent.

15 Further, that the trial Judge had also considered the fact that, the land in question had been stated in the consent form to have been undeveloped yet at the time, thereon were two buildings.

20 He argued that, the above evidence was insufficient to sustain the respondent's claim.

Counsel argued that, the respondent had signed a blank transfer form freely and had not been under any duress or undue influence and as such what was written on that form in order to complete the registration process could neither vitiate it,  
25 nor amount to fraud.

Counsel contended further that, the land transfer form correctly indicated the consideration to have been a gift, as no money had changed hands between the parties to the transaction.  
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He asked this Court to allow this ground.

In the 3<sup>rd</sup> issue learned counsel submitted that the learned trial Judge erred when he ordered the cancellation of the names of the 2<sup>nd</sup> to the 8<sup>th</sup> appellants from the certificate of title when there was no fraud attributed to them.  
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He submitted that, the respondent had not pleaded that, the 2<sup>nd</sup> to 8<sup>th</sup> appellants had committed any fraud or fraud had been attributed to them. Further that, no evidence had been adduced to prove fraud or to attribute fraud to any of them.  
40

Counsel submitted that the 2<sup>nd</sup> to 8<sup>th</sup> appellants were protected by the provisions of Section 176 of Registration Titles Act. He relied on *Kampala Bottles Ltd vs Damanico (U) Ltd; Supreme Court Civil Appeal No. 22 of 1992*, for the proposition that fraud

5 must be attributed to the transferee either directly or by necessary implication. He asked Court to uphold this ground.

10 In respect of ground 4, learned counsel submitted that, the trial Judge erred when he prematurely closed the appellants' case thereby denying them of a right to a fair hearing. He submitted that on 14<sup>th</sup> September 2011 when the matter came up for further hearing of the defence case, the appellants' lawyer Mr. Mpanga was away on paternity leave and Ms. Cynthia Musoke was holding his brief. He went on to submit that, when the matter was called for hearing Ms. Musoke applied for adjournment which was opposed by counsel for the respondent whereupon, she closed the  
15 defence case. From the foregoing counsel submitted Ms. Musoke had been briefed to apply for adjournment only and as such she had no brief to close the case.

20 Counsel submitted that a mistake of advocate ought not to be visited on his client. By allowing counsel to close the defence without inquiring why the other witnesses had not testified, the Court violated the appellants' right to a fair hearing and as such condemned the appellants unheard, in contravention of the rules of natural justice.

He asked Court to uphold this ground.

25 **The respondent's case**

Mr. Nangwala for the respondent opposed the appeal and supported the judgment of the High Court except for the issues raised in the cross appeal.

30 He submitted that:- the respondent's case at the High Court was set out in accordance with the law as it sought specifically for a declaration that, the appellants were fraudulently registered on the title to the land comprised in Kyadondo Block 244 Plot No. 5091 at Muyenga.

35 The respondent was well within her right when she sought an order cancelling the names of the appellants from the said title and reinstating her name and that of the 1<sup>st</sup> appellant as tenants in common with equal shares.

There was no objection raised at the trial for want of action or rejection of the plaint and as such none could be raised at this stage.

40 The learned trial Judge had properly evaluated the evidence on record and had come to the correct conclusion.



He asked court to dismiss this ground.

In reply to ground 2 , Mr. Nangwala, submitted that:-

10 The respondent proved at the trial that she had been induced to sign blank land transfer forms by the 1<sup>st</sup> appellant after a false representation that she would take part of the land at Kisugu and part of the land at Katwe.

15 The above fact was backed up by the evidence of PW3 Gabindadde Musoke who was introduced to the respondent by the first appellant as the new owner of the property at Kisugu. A tenancy agreement in respect of that house was later extended between Pw3 and the respondent.

20 It was further submitted for the respondent that, she did not intend to sign the transfer of the suit land to the 2<sup>nd</sup> -8<sup>th</sup> appellants and did not give them land as a gift, as was indicated on the land transfer form. The fact that, the 1<sup>st</sup> respondent misrepresented the consideration for that land and dishonesty stated that the same was undeveloped whereas there were buildings on that land amounted to dishonest dealing in the said land was proof of fraud. The misrepresentation was admitted by  
25 the 1<sup>st</sup> respondent, who stated that he was trying to avoid paying stamp duty on the transfer.

30 Counsel concluded that, the learned trial Judge was justified when he held that the 1<sup>st</sup> appellant had transferred the land from the names of both himself and the respondent to those of himself and 2<sup>nd</sup> to 8<sup>th</sup> appellants by fraud. He asked this Court to dismiss this ground.

35 Mr. Nangwala, opposed the 3<sup>rd</sup> ground of appeal and supported the decision of the learned trial Judge, when he cancelled the registration of the 2<sup>nd</sup> to 8<sup>th</sup> appellants.

40 He submitted that, the 2 to 8<sup>th</sup> appellants did not furnish any consideration for the acquisition of the suit land, and therefore they would lose nothing. Further that, a transfer as a donation is not protected under Section 176 of the Registration of Titles Act when the title is impeached for fraud. Counsel argued that the 2<sup>nd</sup> to 8<sup>th</sup> appellants were not *bonafide* purchasers for value and as such their registration having been obtained through fraud was rightly cancelled by the Court.

5 In respect of the 4<sup>th</sup> ground of appeal, counsel submitted that, trial Judge was justified when he closed the defence case and it was just to do so under Section 17(2) of the Judicature Act (Cap 13) which gives Court power to prevent abuse of Court process by curtailing delays in trial. Further that the appellants' counsel at the trial, Ms. Cynthia Musoke was not coerced by Court to close the defendant's case, 10 but rather she closed it willingly. Lastly that, the Court was under no obligation to inquire as to why the appellants, who were at the time defendants were not calling other witness since they were represented by counsel.

Counsel asked the Court to dismiss the appeal.

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### Cross appeal

The respondent filed a cross appeal. It is set out as follows:-

- 20 1. *THAT the decision of the lower Court be reversed and an order be made declaring that the Respondent is entitled to mesne profits from the decreed portion of the suit premises from the time of registration of the Appellants on the title to the time the Respondent took vacant possession thereof.*
- 25 2. *THAT the Court assesses the quantum of the mesne profits to the Respondent on the basis of the evidence on record.*
- 30 3. *THAT the Court orders an award of general damages in favour of the Respondent and assesses the quantum thereof on the evidence on record.*
4. *THAT the Court awards the Respondent Costs of the Appeal and of the Cross Appeal.*

Mr. Nangwala first set out the law relating to the award of *mesne* profits and general damages. He then submitted that, the respondent was entitled to *mesne* profits, the 35 trial Judge having found that, she had been fraudulently deprived of her share of the suit land, the respondent was entitled to the rent that was accruing from that property from the time the respondent was deprived of it to the time she regained possession.

40 Counsel also contended that the Court ought to have awarded the respondent general damages, for the loss and injury caused to her by the 1<sup>st</sup> appellants' unlawful actions. The award counsel submitted should be guided by the value of the subject matter and the extent of the breach.

5 **Reply to cross appeal**

Counsel submitted that the respondent is not entitled to *mesne* profits and or general damages having freely relinquished her interest in that property.

**Resolution of the grounds of appeal**

10 We are required as a first appellant Court, to re-evaluate all the evidence on record and to make our own inferences on all issues of the law and fact. *See: Rule 30(1)* of the Rules of this Court and ***Supreme Court Civil Appeal No. 17 of 2002: Fr. Narcensio Begumisa & 3 Others -vs- Eric Tibebaga.***

We shall proceed to do so.

15 The background to this appeal has already been set out earlier in this Judgment and we shall not repeat it.

Suffice it to state that, the 1<sup>st</sup> appellant and the respondent are siblings who were on 6<sup>th</sup> February 1995 registered as tenants in common on land comprised in Kyadondo Block 244 Plot No 5091. From the evidence on record, exhibit P8 the 'land transfer  
20 form' indicates that the said property first belonged to one Irene Nanziri of P.O Box 16568 Kampala and was transferred to David Kanonya Kizito and Betty Kizito Nalongo both of P. O. Box 2135 Kampala for a consideration of shs. 8,000,000/= on 25<sup>th</sup> January 1995 as tenants in common.

The property remained in the names of both the 1st appellant and the respondent. It  
25 is not in dispute that subsequent to the purchase a double storeyed house was built on the land, it is largely immaterial as who built the house on the land, as it had no consequence on proprietorship.

The evidence adduced at the trial also shows that on 22<sup>nd</sup> January 2002 the proprietorship of that land was changed from the names of the 1<sup>st</sup> appellant and  
30 that of the respondent to the 2<sup>nd</sup> to 8<sup>th</sup> appellants who were at the time minor children of the 1<sup>st</sup> appellant.

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5 The transfer form which was presented at the Land Registry and was used to effect the said transfer is critical in the determination of this matter.

The respondent's case at the trial was that she and the 1<sup>st</sup> appellant had overtime acquired three properties and developed them together. Evidence was adduced to show that both the respondent and the 1<sup>st</sup> appellant operated a joint Bank account,  
10 from which the respondent claimed, money was drawn to develop the properties.

However, out of the three properties only one, the suit property, was registered in the names of both the 1<sup>st</sup> appellant and the respondent. The other two properties appear to have been registered in the name of the 1<sup>st</sup> appellant alone.

It was the respondent's case that the two had agreed that, the 1<sup>st</sup> appellant would  
15 take the suit property alone. In order to effect this she would surrender her share of that property to him. In return the respondent would take part of the land comprised in Block 244 plot 1768 at Kisugu on which one of the double storeyed houses is built leaving the other part for the 1<sup>st</sup> appellant and one part of the property at Katwe with some buildings.

20 The respondent further contended in the plaint that, she had signed a blank land transfer form and handed it over to the 1<sup>st</sup> appellant on the understanding that the he would use it to have the whole of the suit land registered in his name and in return she would have one house at Kisugu and one house/shops at Katwe. The 1<sup>st</sup> appellant had undertaken to subdivide the titles for the land at Kisugu and that at  
25 Katwe and to transfer at his expense part of those titles into the names of the respondent. She contended that, this did not happen as the 1<sup>st</sup> respondent transferred the whole of the suit property into him name and those of his children and still refused to surrender to her part of Block 244 Plot No. 1766 at Kisugu and one storeyed house at the land at Katwe as had been agreed.

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5 She contended at the trial that she had been deprived of her interest in the suit property by the 1<sup>st</sup> respondent fraudulently. She set out the particulars of fraud in her amended plaint as follows:-

PARTICULARS OF FRAUD IN RESPECT OF BLOCK 244 PLOT NO. 5091 – MUYENGA

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(i) *the 2<sup>nd</sup> and to 8<sup>th</sup> Defendants being included in the conveyance when they did not furnish any consideration to the Plaintiff A nextures "B" and "C" refer.*

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(ii) *Making a false entry in the transfer that consideration was a gift whereas not.*

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(iii) *failing to disclose in the transfer that the consideration was a transfer of other real property to the Plaintiff.*

(iv) *making a false declaration that the land was undeveloped whereas it was developed with 2 double stoyered houses fully completed.*

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(v) *making such false declaration for purposes of evading payment of proper stamp duty.*

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(vi) *obtaining the Plaintiff's signature on the transfer form by false and fraudulent misrepresentation.*

(vii) *forging the signature of the plaintiff on the Land Consent Form on which alleged value of land was assessed.*

35 We have perused the pleadings of both parties, at the High Court. We have also carefully perused the proceedings and in particular the evidence on Court record.

It appears to us from the record that, the respondent's claim against the 1<sup>st</sup> appellant was breach in contract and not for recovery of land. In this regard paragraph 10,11,12,13 and 14 of the plaint state as follows:-

40 " 10. Sometime in 1995 the Plaintiff and the 1<sup>st</sup> Defendant purchased land comprised in Kyadondo Block 244 Plot No. 5091 measuring 0.20 hectares out of funds from the joint account and from the personal savings of the Plaintiff. The said land was registered in the joint names of the plaintiff and 1<sup>st</sup> Defendant on the insistence of the

- 5 *Plaintiff having notice of previous dealings when the 1<sup>st</sup> Defendant fraudulently excluded her from the conveyances. Copy of the certificate of title reflecting the registration pursuant to Instrument No. KLA 1228 is attached hereto and marked Annexure "A".*
- 10 11. *The said land was developed with 2 double storeyed houses one being for the Plaintiff and the other for the 1<sup>st</sup> Defendant. The said houses were duly connected to main electricity and telephone. The Plaintiff shall adduce \ evidence to that effect.*
- 15 12. *In January, 2002, the Plaintiff and the 1<sup>st</sup> Defendant, who hitherto had been doing business jointly in Kikuubo, broke up owing to the 1<sup>st</sup> Defendant's slyness and opted to share the estate which they had set up together.*
- 20 13. *The 1<sup>st</sup> Defendant using male chauvinism and exploiting the Plaintiff's humble temperament forced her to take part of the developed land which included a house in Block 244 Plot No. 1766 at Kisugu and one double storeyed house at Katwe on land which had been given to the two by their grandmother but which the 1<sup>st</sup> Defendant had*  
25 *dishonestly registered in his name. The 1<sup>st</sup> Defendant was to effect this change at his cost.*
- 30 14. *The above share was in consideration of the 1<sup>st</sup> Defendant taking all the land comprised in Kyadondo Block 244 Plot No. 5091 at Muyenga with all developments thereon and the remaining part of the land comprised in Block 244 Plot No. 1766 at Kisugu which was also developed with a house."*

From the above paragraphs of the amended plaint, it appears that, the respondents and the first appellant had agreed to share properties they had acquired together overtime. The agreement according to the plaint was that the 1<sup>st</sup> appellant would  
35 take all the property comprised in Kyadondo Block 244 Plot No. 5091 at Muyenga which was at the time registered in the names of both the 1<sup>st</sup> appellant and the respondent as tenants in common with equal share and developed with two houses.

In return the respondent would take part of the land which part included a house at Kisugu Comprised in Kyadondo Block 244 Plot 1766. That house at Kisugu was at  
40 the time occupied by a paying tenant Pw3 and was registered in the names of the 1<sup>st</sup>

5 appellant lone. The respondent was in addition to take one double storeyed house at Katwe.

The 1<sup>st</sup> appellant who was the registered proprietor of both the property at Kisugu and Katwe was to effect the subdivision and the transfers into the name of the respondent at his expense. He was also to physically hand over the possession of the  
10 said properties to the respondent. Indeed, the 1<sup>st</sup> appellant handed over the possession of the house at Kisugu which was occupied by Pw3 to the respondent.

In consideration of 1<sup>st</sup> appellant the handing over of the physical possession of one house at Kisugu and one house at Katwe, causing each of the said properties to be subdivided and ownership of part of the land transferred into the name of the  
15 respondent, the 1<sup>st</sup> appellant would retain the whole of the land at Muyenga. The respondent was to divest herself of all the interest in the land at Muyenga, referred to herein as the suit land. This was the nature of the contract between the two siblings as we understood it.

There is credible evidence on record that both parties attempted to actualize the  
20 contract. The 1<sup>st</sup> appellant handed over the house at Kisugu to the respondent and introduced her to the tenant, Pw3 who had previously been paying rent to the 1<sup>st</sup> appellant. Pw3 started paying rent to the respondent who had now become his new *land lord*. A tenancy agreement between the respondent and Pw3 was executed. The respondent is described in that tenancy agreement (exhibit P.6) as "the landlord"  
25 and "the beneficial proprietor of plot 1766 Kisugu."

On her part the respondent signed a blank land transfer form and handed it over to the 1<sup>st</sup> appellant on the understanding that, she had divested herself from any interest in that property.

It appears that, subsequent to that, the 1<sup>st</sup> appellant was overtaken by greed. He re-  
30 negated on all his earlier promises and commitments. He refused to sub-divide the

5 land a Kisugu and that at Katwe. He also refused to transfer portions of these lands and developments thereon into the name of the respondent.

He attempted to retake possession of the house at Kisugu from the respondent, by instructing the tenant Pw3 not to deal with her any longer notwithstanding his earlier handover and the fact that the respondent had a tenancy agreement with the  
10 tenant in that house Pw3.

The respondent then, realized she had been duped. Upon checking at the land registry she ascertained that the 1<sup>st</sup> appellant had transferred the property at Muyenga into the names of his children and himself. This was not all. She was also confronted by Pw3 about the status of the ownership of the property at Kisugu. Pw3  
15 had been instructed by the 1<sup>st</sup> appellant to stop paying rent to the respondent, and he was seeking clarification in view of the tenancy agreement that was still in force at the time between the two.

The respondent then realized that, the 1<sup>st</sup> appellant intended to dispossess her all of the properties she thought she owned with him, hence the suit from which this  
20 appeal arises.

We have carefully studied the High Court record and especially the evidence adduced by both parties at the trial. We have also carefully studied the Judgment of the Court.

We are alive to the position of the law as set out in *Lazanus Estates vs Beasley* [1956]  
25 1 QB 702 at page 712 and followed by this Court in *Cresensio Mukasa vs Yokobo M.N. Senkungu & Others*, Civil Appeal NO. 35 of 2006 that,

*"No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No Judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.  
30 The Court is careful not to find fraud unless it is distinctly pleaded*



5            *and proved, but once it is proved, it vitiates Judgment, contracts and all transactions what so ever."*

Black Law Dictionary 4<sup>th</sup> Edition at page 788 defines fraud as perversion of the truth for purposes of inducing another relying upon it to part with some valuable thing belonging to him or making a false representation of a matter of fact or misleading  
10    allegations.

Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings proportionate to gravity of the offence concerned. *See:*  
15    Odunga's Digest on Civil Case Law and Procedure page 3633.

We have found no evidence to prove that the property in issue comprised in Kyadondo Block 244 Plot No. 5091 had been transferred from name of the respondent to the names of the 1<sup>st</sup> appellant and the 2<sup>nd</sup> to 8<sup>th</sup> appellants by fraud. The pleadings and the evidence of the respondent point to the fact that the  
20    respondent did voluntary sign the transfer form and handed it over to the 1<sup>st</sup> appellant clearly authorising him to remove her name from that title as she had agreed to transfer her interest to him. In return she was to get one house at Kisugu and one house at Katwe, and the 1<sup>st</sup> appellant had agreed to process the title deeds in respect of these properties by subdivision and transfer at his expense into the  
25    name of the respondent. This he did not do.

In respect the suit property therefore, the 1<sup>st</sup> appellant did what had been agreed to, by removing the respondent's name from the title and divesting her of her interest in that property. We find nothing fraudulent about this. The respondent having transferred her interest to the 1<sup>st</sup> appellant, he was free to transfer that interest to  
30    his children or to any other person.

With all due respect, the learned trial Judge erred when he founded his decision on the contents of the transfer and consent forms alone as proof of fraud.

We have carefully looked at the transfer form in issue. It is exhibit P.1. In her testimony in chief the respondent states;

35            ***"I signed the blank transfer form with Kanonya after agreeing that he Kanonya would take Muyenga house while I take one of the houses in***



5 ***Kisugu plot 1766 and Block B Katwe are not reflected in the transfer forms.***

Clearly the respondent's signature on the transfer form in respect of the suit land was not forged neither was it obtained by fraud. The transfer form did indicate that the consideration was a gift, which strictly was not true. It also indicates that the respondent had transferred her interest in the property to the 1<sup>st</sup> appellant and the 2<sup>nd</sup> to the 8<sup>th</sup> appellants. This is also not correct.

The respondent had simply divested her interest in the suit property in favour of the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was already jointly registered with the respondent on the title as tenants in common. In which case, the transfer form ought to have properly indicated that, the respondent was transferring her interest to the 1<sup>st</sup> appellant for the consideration already stated above, that is in exchange of the other properties. This was not done.

We have also noted that, the consent and form, (exhibit P2) which is normally filed together with the transfer form (exhibit P1), the signature of the respondent was found to have been forged, and it was indicated thereon that, the land in issue was underdeveloped whereas it is common ground that, the suit land was fully developed.

The question is whether the irregularities, omissions, falsehoods and forgery on the two forms set out above were prove that the 1<sup>st</sup> appellant had deprived the respondent of the suit property by fraud, and had procured the registration of the said land into his name and those of the 2<sup>nd</sup> to 8<sup>th</sup> respondents by fraud.

In this regard one has to examine law and apply it to the facts already set out above.

**Section 76 of the RTA provides as follows;-**

30 ***"176. Registered proprietor protected against ejectment except in certain cases.***

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

1. *the case of a mortgagee as against a mortgagor in default;*
- 35 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 vb against a person*

5 *deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.”*

We are required to determine whether or not the respondent was deprived of the suit property at Muyenga by fraud committed against her by the 1<sup>st</sup> appellants.

10 We have found no evidence to suggest that the appellants or the 1<sup>st</sup> appellant in particular had an intention to defraud the respondent of her legal right to the suit property in terms of the definition of fraud as set in ***Frederic Zaabwe Vs Orient Bank & others (Supreme Court Civil Appeal No. 4 of 2016)***.

15 We find so, because the respondent had willingly accepted to transfer all her interest to the 1<sup>st</sup> appellant when she voluntarily signed the transfer forms and handed it to him with clear instructions, take over her interest in respect of that property. The appellant did not use the transfer forms to transfer any other property except the suit property in respect of which the respondent had issued the transfer forms.

20 We therefore find that the 1<sup>st</sup> appellant did not commit any fraud against the respondent and did not procure his registration and that of the 2<sup>nd</sup> to the 8<sup>th</sup> appellants as proprietors of the suit land by fraud.

Having found so, we have to look at the consequences of the errors, irregularities, and forgeries on the forms that were used to effect the transfer.

25 Firstly, that there is the issue of misrepresentation of the consideration of the property. The 1<sup>st</sup> appellant did not state the true consideration of the property when he stated in form exhibit P1 that it was a gift. We know it was not. The purpose of stating the consideration, among others is to help determine the value of the property. This is superfluous to say the least as the government valuer is required to  
30 physically inspect the property in issue in every application for transfer and ascertain its value, which value is endorsed on the transfer form under his or her signature.

The second issue raised was that the respondent had not intended to have her share of that property transferred to the 1<sup>st</sup> appellant's children but only to the appellant.  
35 We think that, once she had divested herself of all her interest in the property, in favor of the 1<sup>st</sup> appellant, her interest in this property ceased. Thereafter the power to deal with that property lay with the 1<sup>st</sup> appellant.

In respect of the exhibit P2 the consent form. We find that, there is sufficient  
40 evidence to prove that the signature on that form purporting to be that of the respondent was forged.



5 We also find that, there was a misrepresentation that, the land was undeveloped whereas, it was fully developed with two houses.

As already noted above the value of the land or whether or not it is developed, is ascertained by the government valuer's physical inspection, irrespective of what is written on the consented or transfer form.

10 Therefore the misrepresentation as to the development on the land had no legal consequence on the transaction.

In respect of the forged signatures, we observe that, transfer form could be signed by either the applicant or his or her advocate. In his opinion on the signatures exhibit P. 10 the Pw2 states;-

15 *"I am therefore of the opinion the person whose sample signatures are the caveat (24/6/2002 the affidavit (24/6/204) and Exhibit 'A-C' one Betty Kizito did not write the question signature"*

This only confirms that the respondent did not write the signatures. However, that form could have been signed by someone else not the applicant and would still have  
20 been valid.

Be that as it may, Exhibit P2 Application for consent to transfer or sublease public land was a requirement under Section 22(5) (e) (i) of the Public Lands Act (Act 13 of 1969) and Section 10 of Decree 3 of 1995 (The Land Reform Decree)

25 Both the Public Lands Act and the Land Reform Decree were repealed by Section 99 of Land Act (ACT of 1998). We find that, there exists on legal basis for the use of the consent form exhibit P2 after the coming into force of the land Act of 1998 although it continues to be used. We find therefore that, the contents of exhibit P2 were irrelevant to the determination of the issues at the trial.

30 Having found as we have, on all the grounds of appeal, this appeal substantially succeeds, except for ground 4.

In respect of ground 4 our finding is that, the appellant was duly represented by counsel at all material time. It was Ms Cynthia Musoke who applied to close the defence case. She was not forced to do so by Court. There is no evidence that the Court denied the appellants to call witnesses. This ground has no merit and it is  
35 hereby dismissed.

### **CROSS APPEAL**

We find no merit in the cross appeal, having found that the respondent had already divested herself of all interest in the suit property upon the signing of the transfer

5 form. We find that she is not entitled to mesne profits as she was already receiving rent from another property which she had exchanged for the suit property.

### CONCLUSION

10 We have found that, exhibit P1 the transfer form was contained errors and misrepresentation however, they did not amount to forgery or fraud. The respondent having found out the anomalies on that form should have been brought them to the attention of the Commissioner for Land Registration before the institution of the suit requesting him /her to invoke his/her powers under Section 91 of the Land Act, to rectify them.

That section provides as follows;-

15 ***"91. Special powers of registrar.***

20 *Subject to the Registration of Titles Act, the registrar shall, without referring a matter to a court or a district land tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise."*

It is now not necessary for this Court to order the respondent to sign fresh transfer forms the matter having been adjudicated upon inter parties at this Court and the High Court and having found that the errors and misrepresentation pointed out did not vitiate the transfer.

25 This appeal therefore succeeds in part.

However, we find that the transfer of the suit land to the names of the 1<sup>st</sup> appellant by the respondent was conditional upon him sub-dividing and transferring part of the land at Kisugu and part of the land at Katwe referred to above into the names of the respondent. This condition has not yet been fulfilled.

30 Applying the principles of equity in this case, we hold that, the appellant cannot benefit from the said transfer and at the same time deprive this respondent of her share in the properties at both Kisugu and Katwe.

The respondent having carried out her part of the bargain the 1<sup>st</sup> appellant must be compelled to do his own part.



5 **COSTS**

All the parties to this Court are siblings. The 1<sup>st</sup> appellant and the respondent were very close to each other over a long period of time. There is need for Court to foster re-conciliation and harmony. We shall therefore not award costs in this matter but rather encourage parties to reconcile.


10 We now make the following declarations and orders;-

- 1) *Grounds 1, 2 and 3 of appeal are upheld.*
- 2) *Ground 4 of appeal is dismissed.*
- 3) *The cross appeal is dismissed.*
- 15 4) *The registration of the appellants as proprietors of the land comprised in Kyadondo Block 244 Plot 5091 into the names of the appellants was not procured by fraud, but was conditional upon the appellant subdividing the property comprised in Block 244 Plot 1768 at Kisugu and that at Katwe and providing a title for part of each one of them to the respondent.*
- 20 5) *The 1<sup>st</sup> appellant is hereby ordered to proceed to sub-divide the property at Kisugu and that at Katwe and to provide a title for one part of each plot to the respondent.*
- 6) *For the reasons given in this Judgment each party shall bear their own costs both at this Court and the Court below.*
- 25 7) *The Judgment the High Court is hereby set aside and substituted with this Judgment.*

Dated at Kampala this 16<sup>th</sup> day of October 2017.

  
.....  
HON. JUSTICE RICHARD BUTEERA  
JUSTICE OF APPEAL

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.....  
HON. JUSTICE KENNETH KAKURU  
JUSTICE OF APPEAL

35   
.....  
HON. JUSTICE BARISHAKI CHEBORION  
JUSTICE OF APPEAL

16/10/2017  
1<sup>st</sup>, 7<sup>th</sup> Appellants present  
Respondent present  
Both Counsel absent

CV Judgment read in Court

  
D/R

Lare  
Kanfako Edward for Appellants  
Lihani Kutee for Respondents

appeared

  
D/R