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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NUMBER 0186 OF 2012**

- 1. IMELDA GERTURIDE BASUDDE MATOVU
- 10 2. DR. JOSEPH WASSAWA MATOVU
- 3. JOSEPHINE NAKATO MATOVU
- 4. BEATRICE BABIRYE MATOVU
- 5. JOHN KIZZA MATOVU
- 6. HENRY TIBYASA MATOVU..... APPELLANTS

15

VERSUS

- 1. JOHN TIBYASA MATOVU
- 2. ADRON NYINDOMBI
- 3. DOROTHY MATOVU
- 20 4. SARAH MATOVU
- 5. GEORGE MATOVU
- 6. DENNIS MATOVU
- 7. THEREZA MATOVU.....RESPONDENTS

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[An appeal against the ruling and orders of the High Court of Uganda at Kampala, Land Division, (Hon. Mr. Justice Joseph Murangira) made on the 28th day of April, 2010 in Civil Suit No. 250 of 2009]

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA ←**

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JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA

This appeal arises from the ruling and orders of Land Division of the High Court Civil
35 Suit No. 025 of 2009 at Kampala delivered by Hon. Murangira, J on 28th April 2010.

The brief background to this appeal as far as I could ascertain from the record is as follows:-

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Sometime in 2003 the 1st appellant filed a suit at the High Court *vide* High Court Civil Suit No. 410 of 2003 against one Tereza Mwewulize and John Tibyasa Matovu the 1st respondent herein. The said Tereza Mwewulize is a sister to the 1st respondent.

10 The amended plaint dated 20th August 2003 sets out the cause of action in paragraph 4 as follows:-

The plaintiff's claim against the defendants jointly and severally is for:-

- (i) *A declaration that property comprised in Kibuga Block 1 Plot 558 situate at Lunguja together with its residential house thereon is a matrimonial home.*
- 15 (ii) *An injunction restraining the defendants and/or their agents/employees/servants and/or those claiming title under their names from evicting the plaintiff.*
- (iii) *A declaration that the plaintiff is entitled to staying in the said premises.*
- 20 (iv) *In the alternative but without prejudice to the foregoing, an Order of Court directing the 2nd defendant to construct alternative shelter/accommodation for the plaintiff.*
- (v) *An order directing the Registrar of Titles to cancel the 1st defendant's title and substitute thereof the 2nd defendant as registered proprietor.*
- 25 (vi) *Costs of the suit.*

In paragraph 5 she sets out the facts giving raise to the cause of action as follows:-

- (a) *Sometimes on 30th November 1963, the plaintiff got married to the 2nd defendant and upon solemnization thereof, the couple lived and*

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- 5 (i) *A declaration that property comprised in Kibuga Block 1 Plot 558 situate at Lunguja together with its residential house thereon is a matrimonial home.*
- (ii) *An injunction, restraining the defendants and/or agents/employees/servants and/or those claiming title under their names from evicting the*
10 *plaintiff.*
- (iii) *A declaration that the plaintiff is entitled to stay in the suit premises.*
- (iv) *An order directing the Registrar or Titles to cancel the 1st defendant's title and an order substituting the 2nd defendant thereof.*
- (v) *In the alternative but without prejudice to the foregoing, an Order*
15 *directing the 2nd defendant to construct alternative shelter/accommodation for the plaintiff.*
- (vi) *In further alternative but without prejudice to the foregoing an order for refund of shs. 150,000,000/= being added value to the suit premises.*
- (vii) *Costs.*
- 20 (viii) *Any other further and better relief this Honourable Court may deem fit.*

The defendants denied the allegations in the written statement of defence and counter claim against the plaintiff now 1st appellant as follows:-

- 25 a) *As the registered proprietor of the suit land, the first defendant has been denied the use and enjoyment of her property by the unlawful occupation of the plaintiff since 2001, when she was registered as proprietor of it. Since 2001, the first defendant has been asking the plaintiff to vacate the suit property but the plaintiff has refused to do so.*
- b) *The first defendant claims the sum of Ug. Shs. 24,000,000/= being the amount*
30 *of mesne profits (rental income) lost since 2001 i.e.*

5 *Rent realizable from the property per month = Ug. Shs. 1,000,000/=*
Ug. Shs. 1,000,000/= x 12 months x 2 years
Total amount claimed = Ug. Shs. 24,000,000/=.

c) *General damages for loss and inconvenience.*

d) *All order for vacant possession against the plaintiff.*

10 *WHEREFORE it is prayed that judgment be entered against the plaintiff for:-*

a. *Uganda shillings Twenty four million only (Ug. Shs. 24,000,000/=) as mesne profits.*

b. *General damages for loss and inconvenience.*

15 c. *Interest thereon at the rate or 20% from the date of judgment until payment in full.*

d. *An order of eviction against the plaintiff.*

e. *Costs.*

When the suit came up for hearing before Hon. Justice Musoke-Kibuuka J on 25th February 2005 at the High Court Kampala neither the plaintiff nor her advocates
20 were present. Having been satisfied that they had been duly served with Court process the learned Judge dismissed the suit under Order 9 Rule 19 of Civil Procedure Rules with costs. The Court then proceeded to hear and determine the counterclaim on the basis of evidence of witnesses and documents before it. I am
25 constrained to reproduce the learned trial Judge's finding in *extenso*. He states at pages 7-9 of his Judgment as follows:-

The evidence, therefore, shows that the suit property belongs to the first defendant. The history of registration as shown in exhibit D1, also shows that the suit property has never been registered in the names of second defendant.

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The plaintiff's claim, which is the basis of her occupation of the suit property without the consent of its registered proprietor the first defendant, is that it constitutes her matrimonial home with the second defendant. It is a right recognized in the Constitution of Uganda, Article 31, that parties to a marriage are entitled to equal rights in marriage, during marriage and at its dissolution. It is also clear that a matrimonial home is the place where parties to a marriage live together as husband and wife either actually or constructively". That place must, however be either owned by them jointly or at least by one of them, in order for the rights to be enjoyed by the parties under Article 31 of the Constitution to give rise to a claim , in respect to it by any of the parties to the marriage. In the instant case the essential element of ownership is missing. The fact that for a few years after their marriage, the plaintiff and the second defendant, intermittently resided in the suit property, which was clearly owned by the second defendant, cannot, rightly give rise to a good claim by the plaintiff, of a matrimonial home especially so many years after the couple's resided in it and when it is registered in the names of a third party.

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The plaintiff forceful entry into to the suit property without the consent of its registered proprietor and remaining in it against the registered proprietor's will and without any clear basis for her claim of right, clearly amounts to trespass. See Sheik Mohamed Lubowa vs. Kitara Enterprises Ltd. HCCS No. 4 of 1987, where Court defined trespass to land as constituted by entry to land by a person without the consent of the owner.

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5 Court recognises the fact that where a marriage is subsisting any of the parties is entitled to the matrimonial home if there is one. But that right notwithstanding, even where of the matrimonial home exited but has subsequently registered in the names of a third party, during the estrangement of one of the parties to the marriage, such party would not
10 even upon his or her return to the marriage successfully reclaim the property from the third party the reason being that the right to a matrimonial home is merely in personam and not in rem. That right is contractual in the sense that it emanates from the contract of marriage. It is therefore, not enforceable against third parties.

15 Upon the basis of the evidence and circumstances of this case, it appears that even if the suit property had been the matrimonial home for the plaintiff and the second defendant, it does not appear that she would successfully claim back the suit property upon the basis of its once having been her matrimonial home since it is now registered in the names of the
20 third party. The position appears to differ significantly from that covered by the Land Act, Cap 227 under Section 39.

In the circumstances of this instant Case, court duly agrees with learned Counsel, Mr. Ssendege, that the counter claim by the first defendant must succeed. It so succeed and clearly, the first
25 defendant merits the relief she seeks in her counter claim.

In consequence, an eviction order issued against the plaintiff to hand over vacant possession of the property comprising Kibuga Block 1, plot 558 at Lunguja to the first defendant not later than
30 14 days from the date of delivery of the Judgment.

5 There is no evidence that the 1st appellant the plaintiff appealed this decision.

On 20th July 2009, she together with her children she produced with the 1st respondent herein filed High Court Civil Suit No. 250 of 2009 against the respondents herein. The 2nd respondent is the 1st respondent's wife of the second marriage and the other respondents are their children. The 3-7
10 respondents are the children of the 1st respondent in his first marriage with the 1st appellant.

The plaint was later amended on 17th November 2009. It is on the basis of the amended plaint that suit from which this appeal arises was determined.

When the suit came up for hearing before Hon. Murangira J on 21st January
15 2010, Counsel for both parties sought and where allowed to proceed by way of written submissions, in respect of preliminary objection raised by the plaintiff's Counsel Mr. Solomon Webale Araali and Mr. Joash Ssendege. The Ruling on preliminary objectives was delivered on 28th April 2010.

The preliminary objections were upheld by the learned trial Judge. He held
20 that the suit was frivolous and vexatious. Further that the plaint did not disclose any cause of action against the defendants. He struck out the plaint under Order 7 Rule 11 of the Civil Procedure Rules and went on to dismiss the suit under Order 6 Rule 30 of the Civil Procedure Rules with costs to the respondent.

25 Judgment was entered in the counter claim and issued the following orders:-

(a) That the caveat lodged by the plaintiffs on the suit land be removed from the certificate of title of the said land by the Commissioner Land Registration within thirty (30) days from the date of this Ruling.

5 *(b) A permanent injunction restraining the plaintiffs or persons deriving interest from them from ever interfering with the suit land in whatever manner or disturbing the quiet possession of the suit land by the defendants or counterclaimants is granted.*

(c) Costs are awarded to defendant.

10 Being dissatisfied with the ruling the appellants filed this appeal on the following grounds:-

- 15 1. *When he found that it was a fact admitted by the plaintiffs/appellants that the 1st and 2nd respondents were "permanent friends and had been living together as a couple (man and wife)", whereas no such admission was ever made.*
2. *When he found that it was a fact admitted by the plaintiffs/appellants that 1st plaintiff in 1968 left her marriage and constructively separated from the 1st defendant up to date", and that "the 2nd to 6th plaintiffs have never stayed with the 1st defendant when no such admission was made.*
- 20 3. *When he found that there was no "existing family" between the 1st appellant and the 1st respondent.*
4. *When he found that the appellants were not entitled to contest the purported gift of the suit land and transfer of same by the 1st Respondent to the to the 2nd to 7th Respondents.*
- 25 5. *When he disregarded the appellants' pleading, information furnished to court and submissions to the effect that when the 1st respondent purportedly gifted and transferred the suit land to the 2nd to 1st*

- 5 *respondents, he was a person of unsound mind or so mentally impaired that the purported gift and transfer were void.*
6. *When he struck out the plaint and dismissed the suit at the preliminary stage, without giving the appellants opportunity to be heard on the merits.*
- 10 7. *When he made no ruling on the 1st respondent's state of mind and implications thereof on the suit.*
8. *When he found that the appellants' suit disclosed no cause of action and was frivolous and vexatious.*
- 15 9. *When he struck out the appellants' counterclaim whereas the same was not a subject of the respondents' preliminary objection.*

Representation

At the hearing of this appeal *Mr. Benson Tusasirwe* learned Counsel appeared for the appellants while *Mr. Martin Kakuru* learned Counsel appeared for the respondents.

20 **Appellants' case**

The appellant's case was that the learned trial Judge erred when he dismissed the suit for non disclosure of a cause of action, against the respondents

Counsel for the appellant contended that, the learned trial Judge ought to have allowed the appellants to adduce evidence to prove the facts pleaded and his
25 decision to dismiss the suit amounted to prejudging the issues without a hearing.

Further that he ought to have at least determined the question relating to the capacity of the 1st respondent whose mental state was in question. Counsel went on to urge that, the facts set out in the plaint sufficiently disclosed a cause of action

5 against the respondents. He asked the Court to allow the appeal and to set aside the orders of the trial Judge striking out the plaint and dismissing the suit and substitute them with an order dismissing the preliminary objection and ordering that the hearing of the suit proceeds at the High Court and the same be determined on merit.

Respondents' reply

10 The respondent opposed the appeal and supported the ruling and orders of the trial Judge. He contended that, the facts set out in the plaint did not disclose any cause of action. The land the appellants sought to recover described in the plaint as family, could never at law have been such. This was determined by the Court upon looking at the plaint. The appellants sought order of cancellation of title without pleading
15 fraud. Such an action is not sustainable and was rightly rejected by the trial Judge.

He asked Court to dismiss the appeal with costs.

Resolution by the Court

This being a first appeal this Court is required to re evaluate the evidence and make its own inferences on all issues of the law and fact.

20 This is a long standing requirement of law that I am obliged to apply. See: *Rule 30 (1) of the Rules of this Court, Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002 Kifamunte Henry vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses vs Uganda Supreme Court Criminal Appeal No. 1 of 1997* among other authorities of this Curt and the Supreme Court.

25 I will proceed to apply this principle.

The issue before the High Court raised by way of a preliminary objection was whether the plaint disclosed a cause of action against the defendant jointly and

5 severally. The learned trial Judge answered it in the negative. I am now required to re-evaluate evidence before the learned trial Judge and make my own inferences, on the question of law.

I have carefully studied the Court record and I have also listened to both Counsel, I have read the authorities cited and others which have not. I must state from the
10 onset that, the question of whether the suit was *res judicata* or not ought to have been sought for its rejection on account of none disclosure of a cause of action, persuades me to conclude that the preliminary objection was brought under order 7 Rule 11 and not under Order 6 Rule 30 of the Civil Procedure Rule.

Order 7 Rule 11 of the Civil Procedure Rules provides as follows:-

15 *Rejection of plaint*

*The plaint shall be rejected in the following cases:
(a) Where it does not disclose a cause of action;"*

While considering the input of the above Rule the Supreme Court, in *Uganda Telecom Ltd vs ZTE Corporation, Supreme Court Civil Appeal No. 3 of 2017*, Arach
20 Amoko JSC observed at pages 10-11 of her lead Judgment as follows:-

*"I agree with the finding of the learned Justices of the Court of Appeal that the trial judge had the discretion to dispose of the preliminary point raised by the appellant either at or after the hearing. He chose the latter and gave his reasons. From the submissions by
25 learned counsel for the appellant, he also agrees with this position of the law. His complaint is, however, that the reasons given by the learned trial judge for staying his ruling on the preliminary objection offended Order 7 rule 11 of the Civil Procedure Rules. The judge stated in his ruling that he wanted to hear more evidence. Here, I agree with counsel for the*

5 *appellants that the learned judge did not have the power to look for
evidence other than the plaint and its annexures. This is because, as
stated earlier that, in order to determine whether or not a plaint
discloses a cause of action, the court must look only at the plaint and its
annexures if any, and nowhere else. Where the court considers irrelevant
10 matters in determining a cause of action, it shall be set aside. (See:
**Mulindwa Birimumaso vs. Government Central Purchasing
Corporation, CA Civil Appeal No.2 of 2002).***

It was the respondent's case at the trial, that the suit against them was frivolous and
vexatious. In paragraphs 4 and 5 the written statement of defence, the respondent
15 sated as follows:-

5. *The plaint does not disclose a cause of action. Therefore before or at the
time of hearing, the 1st defendant shall move court to reject and strike out
the plaint with costs. In view of the absurdity and vexatious nature of the
claim, that Court will be invited to direct that costs be paid personally by
20 Counsel for the plaintiffs.*

The objection appears to have been made pursuant to Order 6 Rule 30 of the Civil
Procedure Rules and Order 7 Rule 11 of the Civil Procedure Rules.

My own understanding of the Rules procedure is that the objection ought to have
been premised one of the above and not both. Be that as it may, in paragraph 4 and
25 5 of the written statement of defence the respondents state that the suit is frivolous
and vexatious.

In order to determine whether or not the plaint disclosed any cause of action against
the respondents or whether indeed it was frivolous and vexatious, I am required
only to look at the plaint and its annexures.

The facts constituting the cause of action are set out under paragraph 5 of the amended plaint ad follows:-

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"5(a) Sometimes on 30th November 1963, the plaintiff got married to the 2nd defendant and upon solemnization thereof, the couple lived and stayed in premises situate at Lungujja described as Kibuga Block 1 Plot 558. (See Annexure "A").

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(b) At all material times the 2nd defendant represented to the plaintiff, which the plaintiff honestly believed, this was their matrimonial home especially in 1967 when the plaintiff and the 2nd defendant left Masaka in now what is known as Agripa house back to the suit premises the plaintiff was re-assured the suit property was the matrimonial home.

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(c) Later, the plaintiff learnt that the premises referred to, belonged to the 2nd defendant's mother, one Sarah Ndagire, who died in 1984.

(d) Upon Sarah Ndagire's decease, by Will, Ndagire bequeathed the said property to the 2nd defendant personally. (See Annexure "B").

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(e) The couple continued to live and stay thereat until they got some intermittent misunderstandings; albeit the plaintiff effected structural developments to the suit premises including but not limited to re-roofing , putting terrazzo on the verandahs and shed, putting slates repairing and resealing floors, repainting the house (several times) totaling approximately Ug. Shs. 150,000,000/=(one hundred fifty million shillings).

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(f) The plaintiff has continued to live and stay thereat together with her family of five (5) children they gotten with the 2nd defendant

The complaints raised in paragraph 5 (a-f) above were subject of civil suit No. 410 of 2003 referred to earlier in this Judgment. It was held that the house at Lungujja referred to was not a matrimonial home as claimed but belonged to someone else.

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The suit was between the 1st appellant and the 2nd appellant. No. Appeal was preferred against the decision. That matter is *res judicata* under the provision of Section 7 of the Civil Procedure Rules. See: *Manshukul Ramji Karia and Anor vs Attorney General and Another, Supreme Court Civil Appeal No. 2002*, and *National Council for Higher Education vs Anifa Kawooya Bangirana Supreme Court Constitutional Appeal No. 4 of 2011*.

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For a matter to be *res judicata* the following broad minimum conditions have to be satisfied: -

1) *There have to be a former suit or issue decided by a competent court.*

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2) *The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.*

3) *The parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.*

In *Ismail Karshe ss Uganda Transport Ltd* [1967] EA, Sir Udo Udoma, put it this way:

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“Once a decision has been given by a Court of competent jurisdiction between two person over the same subject matter, neither of the parties would be allowed to relitigate the issue again or to deny that a decision had in fact been given, subject to certain conditions”.

In my opinion this is a correct summary of S.7 (Supra).

5 The Judgment in respect of High Court Civil Suit No. 410 of 2003 is on Court record and was referred to by the respondent was in paragraph 12 of the written statement of defence as follows:-

10 *“(12) The 1st defendant adds that when the 1st plaintiff deserted the 1st defendant, the 1st defendant left the house and started living elsewhere up to date. After the death of the 1st defendant's mother, the executors of her will transferred the house and the land to Ms. Tereza Mwewulize, a daughter of the deceased. In the H.C.C.S No.410 of 2003 the 1st plaintiff claimed the house as her property but the court dismissed the case and ordered her to vacate it. The 1st plaintiff has to-date defied the eviction order. Copies of the plaint and the eviction order are attached hereto*
15 *marked jointly as Annexure 'A'.*

This would render paragraphs 5 (a-g) frivolous. The statements are clearly false. They are also vexatious and are insufficient to sustain any claim against the respondents.

20 Paragraph 5 (h) does not disclose the interest of the 1st defendant in the suit land. She is not stated to have been a registered proprietor or to have been any registered interest thereon.

25 The Mityana land she claims to have been family land is stated to have been sold in 1977. At that time the concept of “family land” was not part of the land law. Land transactions were governed by Registration of Titles Act this being Land registered there under. The concept of “family interest” in land had not become a law at the time. It was only introduced by the Land Act of 1998.

30 The appellants could not have acquired any interest in respect of Busiro Block 367 plot 143 at Mpogo, which was acquired in 1977 and registered in the name of the 1st appellant.

5 The 1st appellant has never lived there as she states in paragraph 5 (d) of the plaint. In view of the above paragraph 5 (ii) of the plaint cannot be a true statement of law or fact.

In paragraph 5 (J) of the plaint it is stated that the 1st respondent was of unsound mind at the time the suit was filed.

10 If this is indeed true then it would render the proceedings against him a nullity. In paragraph 3 of the plaint, the 1st defendant is not described as a person of unsound mind. The plaint ought to have been rejected on that account that the action brought against a person of unsound mind.

The appellants concede that, they do not know as a fact whether the 1st respondent is of unsound mind. Having stated so, they proceed to seek in paragraph 9 of the plaint an order of the Court to adjudge him a such and to appoint a guardian *ad litem*.

The above admission would render the whole claim *frivolous* as the suit is based on the unproven state of mind of the 1st defendant.

20 On the authority of *Mortkov vs Auto Grarage 1970 EA* I find that the plaint does not establish any right upon which the plaintiffs now appellants could sustain an action to recover land in question from the respondents. There is no right violated by the defendants against the plaintiffs described in the plaint.

I agree with the learned trial Judge that the suit is frivolous and vexatious. I would uphold the order of the learned trial Judge striking out the plaint under Order 7 Rule 11 of the Civil Procedure Rule with costs.

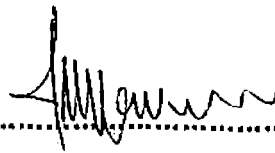
I would uphold the order vacating the caveat lodged by the appellants that survived. I would also uphold the order of a permanent injunction restraining the appellants

5 or other persons claiming any interest from them in respect of the suit land in the terms set out in the Judgment of the High Court. The award of costs to the respondents is upheld.

I would also award costs at this Court to the respondents.

I would so order.

10 **Dated at Kampala** this^{11th}.....day of^{Feb}..... 2021.



.....
Kenneth Kakuru

JUSTICE OF APPEAL

15

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 186 OF 2012

(An Appeal from the Ruling and orders of the High Court of Uganda at Kampala
(Land Division) before Hon. Mr. Justice Joseph Murangira dated 28th April 2010)

1. IMELDA GERTRUDE BASUDDE MATOVU
2. DR.JOSEPH WASSWA MATOVU
3. JOSEPHINE NAKATO MATOVU
4. BEATRICE BABIRYE MATOVU
5. JOHN KIZZA MATOVU
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VERSUS

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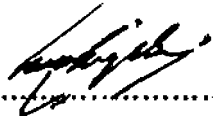
(CORAM: KAKURU, KIRYABWIRE, MADRAMA)

JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the Judgment of my Brother Hon. Mr. Justice Kenneth Kakuru, JA in draft and I agree with the findings and final decisions and orders and have nothing more useful to add.

Dated at Kampala this.....11th..... day ofFeb.....2021.



.....
HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL

**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 186 OF 201**

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

- 1. IMELDA GERTRUDE BASUDDE MATOVU}**
- 2. DR. JOSEPH WASSWA MATOVU}**
- 3. JOSEPHINE NAKATO MATOVU}**
- 4. BEATRICE BABIRYE MATOVU}**
- 5. JOHN KIZZA MATOVU}**
- 6. HENRY TIBYASA MATOVU}APPELLANTS**

VERSUS

- 1. JOHN TIBYASA MATOVU}**
- 2. ADRON NYINDOMBI}**
- 3. DOROTHY MATOVU}**
- 4. SARAH MATOVU}**
- 5. GEORGE MATOVU}**
- 6. DENNIS MATOVU}**
- 7. THEREZA MATOVU}RESPONDENTS**

(Appeal from the judgment of the High Court of Uganda at Kampala, Land Division, Hon. Mr. Justice Joseph Murangira) made on 28th day of April, 2010, Civil Suit No. 250 of 2009)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA and I agree with the facts, analysis and decision therein.

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5 I would however add a few words of my own on the cause of action pleaded in the plaint. The learned trial Judge issued a ruling on the preliminary objection that:

the Plaintiffs have no cause of action against the Defendants

10 At the same time and in the same judgment the learned trial Judge dismissed the suit for being frivolous and vexatious.

The question that I want to consider is whether the learned trial Judge relied on the plaint alone to reach his conclusion and whether the conclusion, in any event, can be supported upon a perusal of the plaint alone.

15 The learned trail Judge noted in his ruling that the claim of the Plaintiffs against the Defendants jointly and severally is for a declaration that the land comprised in Busiro Block 367, plot 143 situated at Mpogo, Wakiso district is family land of the Matovu family in which the Plaintiffs have an interest. Secondly, for a declaration that the transfer of the land by the first Defendant to the second - seventh Defendants was wrongful and void. For an order
20 cancelling the transfer and an order vesting the land into the joint names of the Plaintiffs and the first Defendant and for a permanent injunction to restrain further dealings in the suit property, general damages, interests and costs.

25 The learned trial Judge found that the facts in support of the suit are that the first Plaintiff is the lawfully wedded wife of the first Defendant by virtue of a marriage solemnised in 1963. Following the marriage, the first Plaintiff and the first Defendant lived together and were blessed with 5 children who are the 2nd, 3rd, 4th and 5th Plaintiffs. It is averred that the first Plaintiff and the first Defendant have been living apart since 1968 pursuant to constructive
30 desertion. Thereafter the first Defendant had other children namely the 3rd, 4th, 5th and 7th Defendants with the second Defendant he was cohabiting with. It is asserted that the first Plaintiff raised her children single-handedly after



5 the desertion. However, in the course of the time they lived together, they had developed some family property which they lived on and subsequently the first Defendant sold the family interest in the land and bought the suit property namely Busiro Block 367, Plot 143 measuring about 49 acres which was registered in his own names.

10 This property was developed into a farm and continued to be held by the first Defendant in trust for the entire family. Subsequently, the Plaintiffs found out that by instrument number KLA 402691 dated 20th January 2009, the first Defendant had transferred the suit property into the names of the second up to the seventh Defendants and the transfer was effected without the
15 knowledge or consent of the Plaintiffs. Upon learning of the transfer, the Plaintiffs lodged a caveat on the title.

In reply, the Defendants assert that the action is frivolous and vexatious and stated that they would raise a preliminary objection to the effect that the
20 complaint discloses no cause of action against them and have it struck out for being frivolous and vexatious. It is asserted that the second up to the 7th Defendants never infringed any right of the Plaintiffs or anybody by receiving a gift from the first Defendant who is a friend of the second Defendant and the father of the 3rd to the 7th Defendants. It was argued for the Defendants that the transfer of the suit land to the Defendants by the first Defendant was
25 not unlawful and does not found a cause of action for the Plaintiffs. On the other hand, the Plaintiffs asserted that the suit property is family land and ought not to have been transferred to the 2nd – 7th Defendants by the first Defendant without their consent.

The learned trial Judge found that the 3rd to 7th Defendants are children of
30 the first Defendant. Secondly, the 3rd to 7th Defendants are the offspring of the first and second Defendants. Further, that by 1967 to date, the first and second Defendants lived together as a couple. The first Plaintiff in 1968 (constructively separated from the first Defendant up to date). The second to



5 the 6th Plaintiffs have never stayed with the first Defendant. That it was further
admitted that after 9 years of the first Plaintiff and the first Defendant's
separation in 1977, the first Defendant had bought the suit property and
registered it in his own names and later in 2009 transferred it to the second
– seventh Defendants. The learned the trial Judge found that by the time the
10 suit property was bought and registered in the names of the first Defendant,
there was no existing family between the first Plaintiff and the first Defendant.

The learned trial Judge also relied on the submissions of the parties and the
pleadings on record and found that the suit property was not family land. He
relied on section 39 of the Land Act, Cap 227 for the definition of "family
15 land" to mean land on which the family ordinarily resides and from where
the family derives sustenance or which the family freely and voluntarily
agrees to treat as a family land which is according to norms, customs or
cultures. He found that in all fairness the land belonged to the registered
proprietor who was the first Defendant and was protected by Registration of
20 Titles Act cap 230 which allows a registered proprietor under section 92
thereof to transfer the property to another transferee whereupon the
transferee becomes the proprietor thereof. The first Defendant transferred
the property as a gift to his own children and their mother and this was not
an unlawful act. He further found that the transfer could only be challenged
25 on the basis of fraud but the Plaintiffs had neither pleaded fraud nor
particularised any fraud, as required by the rules. He found that it was
unconstitutional for the court to order the first Defendant to surrender his
land to people he does not wish to give it to or to make an order of
cancellation of title in the names of the second – seventh Defendants who
30 are his children. He relied on article 26 (2) the Constitution of Uganda for the
proposition that no person shall be compulsorily deprived of property or any
interest in property of any description without compensation. He found that
no right of the Plaintiffs had been violated and this is an essential ingredient
of a cause of action. Secondly, the second – seventh Defendants committed



5 no illegality by accepting the gift of land from the registered proprietor who
happened to be their father. He found that the suit is frivolous and vexatious
and at the same time that each of the Plaintiffs had no cause of action against
the Defendants jointly or severally and struck out the plaint under order 7
rule 11 of the Civil Procedure Rules. He also dismissed the suit pursuant to
10 Order 6 rule 30 of the Civil Procedure Rules with costs to the Respondents.

Order 7 rule 11 of the Civil Procedure Rules, provides that where a plaint
discloses no cause of action, it shall be rejected. Once the plaint is rejected,
it cannot at the same time be dismissed. A suit may be dismissed under Order
6 rule 30 of the Civil Procedure Rules on the ground that it is frivolous or
15 vexatious. The question of whether the plaint discloses a cause of action can
only be considered upon perusal of the plaint alone and anything attached
to it forming part of the plaint and on the basis of an assumption that the
facts averred therein and the attachments thereto disclose true facts. On the
other hand, a suit is dismissed under Order 6 rule 30 of the Civil Procedure
20 Rules on the basis that the suit by the pleadings is shown to be frivolous or
vexatious.

Order 7 rule 11 (a) of the Civil Procedure Rules provides that the plaint shall
be rejected where it discloses no cause of action. The plaint shall also be
rejected where it appears from the statement in the plaint to be barred by
any law under order 7 rule 11 (d). A plaint must allege all facts necessary to
25 disclose a cause of action (See **Sullivan v Ali Mohamed Osman (1959) EA
239**). To establish whether a plaint discloses a cause of action, the court
peruses the plaint and any document/s attached to it and assumes that all
facts alleged in it are true. In **Attorney General v Oluoch (1972) EA.392**
30 **Spry VP** held at page 394 thereof that:

In deciding whether or not a suit discloses a cause of action, one looks,
ordinarily, only at the plaint (*Jeroj Shariff & Co v Chotai Family Stores (1960 EA
374)*) and assumes that the facts alleged in it are true.



5 The provision that a plaint be rejected for disclosing no cause of action under Order 7 rule 11 of the Civil Procedure Rules is mandatory (See **Auto Garage v Motokov (1971) EA 514**). Order 6 rule 30 of the Civil Procedure Rules provides that:

30. Striking out pleadings

10 (1) The Court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or the defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be just.

15 (2) All orders made in pursuance of this rule shall be appealable as of right.

It is clear from Order 6 rule 30 of the Civil Procedure Rules, that a pleading, and as in this case, a plaint, can be struck out where it discloses no reasonable cause of action or alternatively the suit may be stayed or dismissed where it is shown by the pleadings to be frivolous or vexatious. Where it is a defence, the written statement of defence can be struck out on the ground that it discloses no reasonable answer or judgment may be entered on the ground that the written statement of defence is frivolous or vexatious.

In **Ismail Serugo v Kampala City Council and the Attorney General; Constitutional Appeal No. 2 of 1998**, Wambuzi CJ at page 3 held that to determine whether a plaint discloses a cause of action or a reasonable cause of action (Order 7 rule 11 and Order 6 rule 30 respectively of the revised Civil Procedure Rules), only the plaint shall be perused.

30 "In my view, it is important to note that both Respondents asked the Constitutional Court to strike out the petition and that was the remedy granted. The relevant provisions in this regard would appear to be Order 7 Rule 11 or Order 6 Rule 29.

Order 7 Rule 11 provides as follows in so far as is relevant:

'The plaint shall be rejected in the following cases-



5 where it does not disclose a cause of action...

(d) where the suit appears from the statement in the plaint to be barred by any law...

and in so far as is relevant Order 6 Rule 29 (Now rule 30 of the revised rules) provides as follows;

10 The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action and, in such case, may order the suit to be stayed or dismissed or judgment to be entered accordingly...

I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the
15 plaint can be looked at.."

I have carefully considered the Plaintiffs amended plaint in the lower court which shows that the claim of the Plaintiffs against the Defendants jointly or severally is for declarations that the suit property comprising over 49 acres is family land of the family of the first Defendant in which the Plaintiffs have an
20 interest and for a declaration that the transfer of land by the first Defendant to the second – seventh Defendants was wrongful and void among other things. The basis of the suit *inter alia* is that the transfer was wrongful and void. As for the declaration that the suit property is family property, what remained to be established from the plaint is averred in paragraph 6 which
25 gives the facts giving rise to the cause of action.

I have carefully considered the facts and the plaint discloses that the first Plaintiff was the lawfully wedded wife of the first Defendant according to a marriage solemnised on 30th November, 1963. The first Plaintiff and the first Defendant lived together at Masaka and later at Lungujja. They had 5
30 children but have been living apart since 1968. The first Defendant thereafter had the 6th Defendant out of wedlock. Further, the first Defendant begat the 3rd – 7th Defendants with the second Defendant with whom he was cohabiting over the years. Specifically, the basis of the Plaintiff's claim is that while she was living together with the first Defendant, they acquired and developed a



5 family land along Mityana road with one Ssengoba. In 1977, the first
Defendant sold the family interest in the land and with the proceeds, bought
the suit property comprising Busiro block 367 Plot 143 at Mpogo measuring
49 acres which was registered in the names of the first Defendant. The land
was developed into a farm and continued to be held by the first Defendant
10 in trust for the entire family. They further allege that the first Defendant got
under the negative influence of the second Defendant who took advantage
of his unsoundness of mind or mental infirmity and persuaded him to
disinherit and dispossess the Plaintiffs. Following that, the Plaintiffs
discovered that by instrument number KLA 402691 dated 20th January 2009,
15 the first Defendant transferred the suit property from his names into the
names of the second – seventh Defendants. The transfer was effected without
the knowledge or consent of the Plaintiffs. Upon learning of the wrongful
transfer, the Plaintiffs lodged a caveat on the title which is reflected in a
search report attached.

20 In the alternative, the Plaintiffs aver that they found that the first Defendant
had been receiving psychiatric treatment and suffers from mental infirmity
and is of unsound mind. It is on the basis of the unsoundness of mind that
he conveyed and transferred the property and the conveyance was void. The
Plaintiffs averred that they would ask the court to cause to be made an
25 inquiry into the first Plaintiff state of mind to determine whether guardian ad
litem be appointed for him for purposes of conducting the suit and also to
determine the validity of the conveyance of the suit property made by him.

The essence of the Plaintiffs cause of action is that Busiro Block 367 Plot 143
was held in trust for the Plaintiffs by the first Defendant who breached the
30 trust by transferring it to his children by another woman. The basis of the
claim is an alleged sale of property that was "family" property by the first
Defendant in 1977. It is clearly averred that the first Defendant bought the
suit property from the proceeds of the sale of land. The sold land is stated to



5 be situated along Mityana Road and developed jointly with one Ssengoba. From the pleadings the first Plaintiff does not object to the sale of land or the fact that the first Defendant bought another piece of land and registered it in his names. The Plaintiffs seek an order to cancel the registration in the names of the Defendants and to transfer the property into the names of the
10 first Plaintiff and the first Defendant. It is a fact disclosed in the plaint that the first Plaintiff and the first Defendant had separated by 1968 and lived apart since then. The plaint does not disclose that the Plaintiffs lived in Canada though it discloses that they were living apart from the first Defendant. It is implied that the first Defendant held the land he bought in
15 1977 in trust for the first Plaintiff and her children with the first Defendant as family property. They attached a search report which discloses that the transfer was made into the names of the 2nd – 7th Defendants on 20th January 2009. In the alternative it is alleged that the transfer was made while the first Defendant was of unsound mind.

20 The decision of the lower court rests on the proposition that the Plaintiffs have no proprietary or beneficial interest in the suit property. This is further based on the proposition that they could not have acquired any interest in a property purchased in 1977 about nine years after the first Defendant had separated with the first Plaintiff who was his wife and they two were living
25 apart. The proposition that the property was family property needs to be examined critically. The first Plaintiff never brought any action to claim the family property for a period of over 40 years after being separated with the first Defendant. Secondly, the claim is not based on occupation or use of family property. Such a claim would have been caught by the law of
30 limitation. Thirdly, if there was any breach of trust, the averment together with particulars of the breach of trust shall be given. Order 6 rule 3 of the Civil Procedure Rules provides that:

3. Particulars to be given where necessary.

A handwritten signature in black ink, appearing to be 'A. S. N. Z.', written in a cursive style.

5 In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.

10 This rule was interpreted in **Kampala Bottlers Ltd v Damanico (U) Ltd Civil Appeal No. 22 of 1992 [1993] UGSC 1 11th January 1993** where the Supreme Court held that fraud shall not only be pleaded but also proved. The court further held that unless fraud is strictly proved, the title of a registered proprietor cannot be impeached and a suit for impeachment of title is barred under section 176 of the Registration of Titles Act and the fraud
15 must be attributable to the transferee in title.

Platt JSC stated that:

20 Fraud is very serious allegation to make; and it is; as always, wise to abide by the Civil Procedure Rules Order VI Rule 2 and plead fraud properly giving particulars of the fraud alleged. Had that been done, and the Appellant had been implicated, then on the Judge's findings that would have been the end of the defence.

In the same category as fraud, breach of trust shall be averred and particulars of the breach stated.

25 The Plaintiffs are alleging breach of trust in that the property which was stated to be family property along Mityana Road was sold by the first Defendant in 1977 and thereafter using the proceeds of the sale, the first Defendant bought property in his own names which he subsequently transferred to the second up to the seventh Defendants. No particulars of the family property are given, as to whether it is registered land and in whose names, yet this is the foundation of the claim that the first Defendant owed
30 money which he held in trust for the beneficiaries who are the Plaintiffs after selling the land and it is from this money that he bought the suit property. The Plaintiffs are trying to trace the property.



5 The right of the Plaintiffs as beneficiaries to the alleged family property is not supported by law in terms of the exclusive right to property protected by Article 26 of the Constitution nor is a right disclosed in the plaint. In the absence of averments tracing the beneficial interest in particular property, the plaint discloses no reasonable cause of action. For the Plaintiffs to have
10 an existing interest, it should be shown that the first Defendant was a trustee and not owner with the right of a legal proprietor. Generally, an action to recover the land is barred by sections 5 and 6 of the Limitation Act. I further find that the second – sixth Plaintiffs did not inherit the property since the first Defendant was alive and transferred his interest to the other Defendants.
15 In those circumstances the 2nd – 6th Plaintiffs could not claim future interest by transfer or usufruct and their only claim was through their parents which right they had not disclosed in the plaint. They were never in occupation, possession or use of their father's land.

The first Plaintiff was not in possession as a married woman since 1968. She
20 was separated by 1968 and the first Defendant bought the property in 1977. The Plaintiffs could have claimed a future interest under a will or the law of intestacy but the first Defendant was alive and transferred his interests to the other Defendants by gift. I will further consider whether there was any express, implied or constructive or resulting trust averred. Under section 8 of
25 the Limitation Act, it is provided that:

8. Provisions in case of settled land and land held on trust.

(1) Subject to section 19(1), this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as it applies to legal estates, and accordingly, a right of action to
30 recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his or her interest were a legal estate in the land.



5 (2) Where any land is held upon trust, including a trust for sale, and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not
10 been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustees shall be extinguished.

(3) Where any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right
15 of action has not been barred by this Act, notwithstanding that the right of action of the trustees would, apart from this provision, have been barred by this Act.

(4) Where any settled land or land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled to the land, no right of action to
20 recover the land shall be deemed for the purposes of this Act to accrue during such possession to any person in whom the land is vested as trustee or to any other person entitled to a beneficial interest in the land or the proceeds of sale.

There is no averment that the land was held in trust for sale or under any other form of trust arrangement under deed, implied or constructive. Section
25 1 (r) of the **Trustees Act Cap 164** defines the word trust as;

(r) "trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception, "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative,
30 and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee;

An express trust must be in writing with the settlor having put his intention to create a trust in writing. Implied and constructive trusts are established by considering the facts and circumstances of the case.



5 In a trust arrangement, property is owned and managed by a person, or
persons, known as a trustee or trustees for the benefit of another person
known as *cestui que trust* or beneficiary. A trust can be created when a settlor
settles his or her property to persons called trustees for the benefit of the
beneficiaries. The trustee becomes the legal owners of property with capacity
10 to deal with it subject to the terms of the trust of which the primary object is
the interest of the beneficiary. A beneficiary may be entitled to finally acquire
the property upon attaining the legal age of majority or fulfilling the criteria
set out in the express trust. There are exceptions to limitations for actions by
a beneficiary tracing his or her beneficial interest in the hands of third parties.

15 19. Limitation of actions in respect of trust property.

(1) No period of limitation prescribed by this Act shall apply to an action by a
beneficiary under a trust, being an action—

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a
party or privy; or

20 (b) to recover from the trustee trust property or the proceeds of the trust property
in the possession of the trustee, or previously received by the trustee and
converted to his or her use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or
in respect of any breach of trust, not being an action for which a period of limitation
25 is prescribed by any other provision of this Act, shall not be brought after the
expiration of six years from the date on which the right of action accrued; but the
right of action shall not be deemed to have accrued to any beneficiary entitled to
a future interest in the trust property until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act
30 shall derive any greater or other benefit from the judgment or order obtained by
any other beneficiary than he or she could have obtained if he or she had brought
the action and this Act had been pleaded in defence.



5 Section 19 (1) (a) and (b) may apply where it is proved that there is a trust. A trust has three elements namely, the settler of the property, the beneficiary and the trustee.

The section deals with exceptions to the operation of the law of limitation to actions by a beneficiary under a trust under two circumstances in subsections
10 (a) and (b). Under section 19 (1) (a) (supra), the limitation period does not apply to an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy. The Plaintiffs suit is not for any fraud or fraudulent breach of trust and no particulars therefore are averred in any case.

15 Secondly the Plaintiffs case is not to recover from the trustee property or the proceeds of the trust property in the possession of the trustee, or previously received by the trustee and converted to his own use. The necessary facts in support of such an assertion are not disclosed in the plaint and there is no such cause of action in terms of section 19 (1) (b) (supra).

20 In the absence of the exceptions in section 19 (1) (a) and (b) of the Limitation Act, an action by a beneficiary shall be commenced within a period of 6 years from the date the cause of action accrued to the beneficiary. The cause of action is stated to have commenced in 2009 when the first Defendant transferred the property to other Defendants. That implies that the first
25 Defendant acted in breach of trust.

The first Defendant is said to have sold the trust property in 1977 and using the proceeds thereof bought the suit property. In whose names was the trust property? Was it registered land? It was not stated to be matrimonial property and there is no averment that it was trust property where the
30 particulars of the trust arrangement can be discerned. It was simply stated to be family land.



5 In **G.L. Baker Ltd v Medway Building and Supplies, Ltd [1958] 2 All E.R. 532** it was held that a suit can be filed against a third party and the period of limitation does not run in terms of section 19 (1) of the Limitation Act if certain conditions are fulfilled. The court considered section 19 (1) of the Limitation Act, 1939 of the UK which is in *pari materia* with the section 19 (1)
10 (a) and (b) of the Ugandan Limitation Act, Cap. 80. As far as paragraph (a) of section 19 (1) is concerned, Danckwerts J held at pages 535 - 536:

Paragraph (a) does not in terms refer to an action against a trustee, and the first question to consider is: is it a provision which only deals with proceedings against a trustee who has been guilty of fraud, or does it also apply to a person who was
15 not the original trustee, but a person who acquired the trust property or payment which was fraudulently made out of the trust property? It does not in terms refer to actions against trustees, but the words used are "in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy". It seems to me that the words "in respect of any fraud or fraudulent breach of trust" may be
20 capable of referring to a case where the action of the Plaintiff is based on the fact that their moneys were fraudulently paid away and have reached the hands of an innocent party.

However, Phillip H Pettit in **Equity and the Law of Trusts Fourth Edition Butterworth's** at page 388 - 389 states that to take a cause of action out of
25 the law of Limitation, it should be shown that the fraud is imputable to the transferee in title.

As regards fraud, Lord Davey said, (in *Thorne v Heard* [1895] A.C. 495 at p 506 H.L) on similar words in the 1888 Act, that "if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of
30 or in some way imputable to the person who invokes the aid of the Statute of Limitations.

It is therefore material in this case that the fraud alleged must be the fraud of the transferees namely the Defendants and this shall be averred and particulars pleaded.




5 In the circumstances, I would find that the suit was not maintainable as there
was no reasonable cause of action of the first Plaintiff who separated from
the first Defendant in 1968 to date or her children who were never in
possession of the suit property and did not prove beneficial interest in it.
There was no reasonable cause of action disclosed and if any it would be
10 time barred under section 19 (2) of the Limitation Act.

I concur with the judgment of my learned brother Hon. Mr. Justice Kenneth
Kakuru, JA that the appeal be dismissed with the order he has proposed and
for the reasons he has set out in his judgment.

Dated at Kampala the 11th day of Feb 2021

15



Christopher Madrama

Justice of Appeal