THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0018 OF 2017

1. BIYINZIKA ENTERPRISES LTD
2. SAMUEL MUKASA
3. MILLY MUKASA::APPELLANTS

VERSUS

1. BIYINZIKA FARMERS LIMITED
2. AGRO BUSINESS DEVELOPMENT A/S::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Wangutusi, J. dated the 13th day of April, 2015 in Civil Suit No. 0276 of 2007.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA
HON. MR. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my learned brother Kasule Ag. JA in this matter. Therein, his Lordship sets out at length, the facts, the grounds of appeal, and the parties' submissions. I will therefore not repeat the same in this judgment, except where it is necessary for my assessment of the appeal. However, because of the intricate nature of the facts with which this appeal is concerned, I have deemed it necessary to consider them at some length.

The respondents, Biyinzika Farmers Ltd (BFL) and Agro Business Development A/S (ABD) filed Civil Suit No. 276 of 2007 in the trial Court against the appellants, Biyinzika Enterprises Ltd (BEL), Samuel Mukasa and Milly Mukasa.

As the plaintiffs, BFL and ABD stated in their plaint that in 2004, BFL was incorporated, with BEL (incorporated under the laws of Uganda) and Agro Business Development (ABD) (incorporated under the laws of Denmark) as the shareholders in the proportion of 88 and 12 shares respectively. BFL's main object was to be engaged in the business of commercial farming. BFL

could also **"acquire and hold for the benefit of the company land under any form of tenure as stipulated under the laws governing land relations in Uganda."**

It was an agreed fact that the management of BFL was initially overseen by 3 directors, Mr. Samuel Mukasa, Mrs. Milly Mukasa and Mr. Hendrick Hanker. BFL and AGD, as plaintiffs stated in their pleadings that at the beginning of their relationship, AGD provided money to the tune of Ug. Shs. 63,000,000/= which Mr. Mukasa was to use for purchasing land for BFL. This was done. After purchasing land for BFL, on 11th July, 2005, it was registered as the proprietor of land described as Kyaggwe Block 118 Plot 7 situated at Budo, Mukono District (the suit land).

It was the respondents' case that, after BFL's incorporation, its shareholders BEL and AGD executed agreements which changed the shareholding of BFL. First in about August, 2005, the shareholding was changed and BEL and AGD each began to hold 50 shares.

Further that earlier by a debenture dated 24th May, 2005, AGD advanced a loan of US Dollars 529,377 to BEL, on the terms stated therein. The respondents stated in their plaint that part of the security for that loan presented by BEL was the shares it held in BFL. The respondent AGD further stated that BEL defaulted on its obligations under the debenture. As a result, it moved to realize the securities in the debenture. By memorandum dated 1st July, 2006, it was agreed that BEL transfers its shares in BFL to AGD. This was done.

This meant that, from that time, AGD owned all the shares in BFL and by that time BFL had effectively become a single member company. By a resolution dated 28th July, 2006, the management of BFL was changed and Mr. and Mrs. Mukasa were removed as directors. From that point, BFL began to conduct commercial farming business on the suit land.

The respondents furthser pleaded that in September, 2006, BFL's business operations were interrupted by agents of one Mr. Emmanuel Bwanika, a defendant at the trial, but not a party to this appeal. Mr. Bwanika stated in his pleadings that he was entitled to occupy the suit land. He stated that he

had bought the suit land from BFL and presented a resolution dated 23rd June, 2006 where the company agreed to sell him the suit land. Mr. Bwanika therefore claimed to be a bonafide purchaser of the suit land.

BFL and AGD claimed that at the time Mr. Bwanika evicted them from the suit land, they had commenced a business thereon from which they expected to make income. Their eviction had led to a loss of expected income amounting to Ug. Shs. 470,468,892/=. They also claimed for value of the suit land and a refund of monies worth Ug. Shs. 33,000,000/= unjustly given to the respondents for purchase of the suit land.

The appellants, BEL and Mr. and Mrs. Mukasa stated in defence to the plaint that AGD never advanced any money to BEL or to its directors Mr and Mrs. Mukasa for purchasing property for BFL. The appellants claimed that the Ug. Shs. 63,000,000/= in issue was advanced to BEL in connection to separate "business dealings" concerning supply of Unimix agricultural produce. The appellants further accused AGD of failing to pay up for its shares in BFL. They also accused AGD of acting with bad faith and making various misrepresentations in their relationship with BEL. With respect to the transfer of shares which eventually made AGD the sole shareholder in BFL, the appellants pleaded that BEL had agreed to transfer its shareholding to AGD out of duress.

BEL, Mr. and Mrs. Mukasa also lodged a counterclaim. They claimed that in about 2004, they engaged in a separate business in conjunction with AGD, by which AGD would provide financing for BEL to supply agricultural produce, referred to as unimix crop to the World Food Programme. They pleaded that due to fraudulent manipulations by AGD, they overpaid on the contractual price by US Dollars 86,000. BEL and the Mukasas claimed for refund of that over payment from AGD.

Hearing of the relevant suit commenced before Arach-Amoko, J. (as she then was). PW3 Mr. Larsen testified that he was conversant with the facts of the case as he had acted as a consultant for BFL and AGD. He testified that AGD gave Mr. Mukasa Ug. Shs. 62,000,000/= to be used for purchasing the suit land.

With regards to the unimix business dealing, he testified at page 66 of the record that AGD advanced a loan to Mr. Mukasa (probably on behalf of BEL) as financing to enable BEL to supply agricultural produce to the World Food Programme. The transaction was complex, but it can be deduced from the evidence that a loan facility of US Dollars 600,000 was advanced with respect to the unimix transaction. Mr. Larsen testified that BEL agreed to pay a share of the profit it would receive from WFP to AGD. Factoring in the share of profit, the total amount of monies BEL came to owe to AGD under the relevant contract was agreed to be US Dollars 711,000.

As at 14th March, 2005, BEL owed AGD US Dollars 529,377, and a debenture was prepared to cater for the repayment of that loan. The parties thereafter agreed as seen from a memorandum of 1st July, 2006, that AGD would take over BEL's shares in BFL as satisfaction of the outstanding indebtedness.

The main evidence for the appellants was that of Mr. Mukasa, DW1. He said that he was BEL' managing director. BEL was engaged in commercial farming. BEL had business dealings with ABD, and the two had partnered for purposes of obtaining financial and technical support from DANIDA. The grant and the technical support which involved hiring experts to boost its capacity was extended to BEL.

DW1 testified that the relationship between BEL and ABD was one of partners in a technical support partnership. DW1's evidence set out to show that the manner of arrangement of the alleged support received from DANIDA was such that ABD obtained the majority of the financial support. Further, the technical support offered to BEL was also equally unproductive.

With respect, to the suit land, DW1 stated at page 161 that it was sold to Mr. Bwanika by BEL and cash was received as consideration.

It must be noted, however, that on reading the record, one immediately discovers that the learned trial Judge found DW1's evidence very unsatisfactory. She found the evidence confusing, and muddied. She viewed it with skepticism.

It will be observed that the evidence of DW1 in effect attempted to destroy that given for the respondents. He denied that BEL had formed a company with ABD to undertake a joint business venture, and that ABD was only a conduit to help BEL gate financial and technical assistance from DANIDA. Two points may be made. First, the evidence of DW1 was a departure from their own pleadings which acknowledged that ABD and BEL were shareholders in BFL. At Para 6 of the appellants' pleadings at page 364 of the record, it was stated:

> **"It will be averred that on incorporation of Biyinzika Farmers Ltd, the 1st defendant (BEL) and the 2nd plaintiff (ABD) agreed to take on 88 and 12 shares respectively and subsequently pursuant to a misrepresentation by the 2nd plaintiff a shareholders' agreement was executed in which it was agreed that the parties would each hold 50 shares in the said Biyinzika Farmers Ltd."**

The second point to be made, is that DW1's evidence went against the seemingly credible documentary evidence retrieved from the Companies Registrar, which tended to support the respondents' case about the state of affairs with respect to BFL. Those documents showed that BFL was incorporated with ABD and BEL as shareholders. The documents also record a change in the shareholding in BFL, up until just before the suit was filed when ABD owned 100% of the shared in BFL. In my view, therefore, the evidence and case for the respondents was satisfactorily proved.

Having said that, the respondents' suit in the trial Court was mainly founded on BFL's dispossession from the suit land. The respondents pleaded that this dispossession, in which the appellants participated, was unlawful as BFL was the lawful owner of the suit land. As a result, BFL had suffered loss of income, and other losses for which the appellants were liable to pay general damages. Unfortunately, the success of the appellant's claim hits one major stumbling block presented in ground 3 of the appellant's memorandum, which alleges that BFL could not legally own the suit land. For the reasons set out by Kasule, Ag. JA in his judgment in this matter, with which I entirely agree, I would also find that BFL could not legally own the suit land. The suit land was of the mailo tenure, and it is established under the Land Act, Cap.

227, that foreign persons, such as BFL a foreign legal person, cannot legally own land under mailo tenure.

It is an established legal principle that "No court will lend its aid to a person who founds his cause of action upon an immoral or an illegal act." See: **Holman v Johnson (1775) 1 Cowp 341, 343 (per Lord Mansfield).** However, where it is proven that a person has done an illegal act, but he/she, can base his claim independently of the said illegal act, that Court may come to his/her aid. In the case of **Mistry Amar Singh v Serwano Wofunira Kulubya [1963] 1 EA 408 (PC),** it was held to the effect that even where illegality exists, a claim will not fail if the claimant does not rely on the illegality to found it, and/or if the claim can be presented without the necessity of referring to the illegality in the claimant's pleadings.

In the present case, I hold the view that the majority of the respondents' claims were founded on their alleged ownership of the suit land, and thus are founded on illegality, having earlier found that BFL could not lawfully own the suit land, and that purporting to do so was an illegality. This includes the respective claims for loss of income, for special damages, for general damages and for recovery of the value of the suit land, all said to have occurred following BFL's dispossession from the suit land. It cannot be stated that any of those claims can succeed without BFL and AGD asserting BFL's illegal ownership of the suit land. Accordingly, I would find that the learned trial Judge erred in awarding, and would set aside, the awards to the respondents against the appellants: 1) Requiring the appellants to pay to the respondents, monies equivalent to the value of the suit land; 2) of general damages of Ug. Shs. 100,000,000/=; 3) of special damages of Ug. Shs. 70,895,000/=; the interest on each respective damages award.

However, I observe that the respondents also claimed for and were awarded Ug. Shs. 30,000,000/= as a refund of monies they had advanced to the appellants. The respondents had pleaded that after incorporation of BFL in 2004, ABD had advanced to Mr. Mukasa, as director in BFL, monies to the tune of Ug. Shs. to purchase land for BFL. At paragraph 13 of the plaint, the respondents pleaded:

> **"The plaintiffs (BFL and ABD) will further aver that they have since discovered that the 1st, 2nd and 3rd defendants defrauded them in**

purchase of the land in issue (the suit land). Of the Ug. Shs. 63,000,000/= that was forwarded to the defendants (appellants) to purchase the said land, only Ug. Shs. 30,000,000/= was the actual price. The plaintiffs demand the balance of Ug. Shs. 33,000,000/="

The evidence on record, which Kasule, Ag. JA has considered at length, indicates that AGD advanced Ug. Shs. 60,000,000/= to the 2nd and 3rd appellants, who purchased the suit land. The purchase price for the suit land was Ug. Shs. 30,000,000/= and not Ug. Shs. 60,000,000/= which was advanced. The learned trial Judge, after considering the evidence concluded as follows at page 16 of the record:

"Since it has been found that only Ugx. 30,000,000/= was spent on the purchase of the land, it is my finding that the 1st, 2nd and 3rd defendants should refund to the 2nd plaintiff Ugx. 30,000,000/= as the money that was not spent on the purchase of the land."

In my view, the learned trial Judge's findings are correct. The applicable legal principles, as derived from the common law were those related to the unjust enrichment principle. In the **UK House of Lords decision in Fibrosa Societe Anonyme v Fairbairn Lawson Combe Barbour Ltd [1942] UKHL 4 (per Lord Wright)** it was stated:

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

Lord wright further stated that:

"In one word, the gist of this " kind of action is that the Defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money."

In the present case, the 2nd and 3rd appellants who received monies from AGD for purchase of the suit land, and who expended less money towards the purchase of the land, than was advanced to them ought to refund the excess money. For that reason, there was no error in the learned trial Judge's decision on that point.

I note that Kasule, Ag. JA takes the view that the appellants must repay the entirety of the monies advanced to them by AGD for purchase of the suit land. He reasons that the agreement to purchase land for BFL was rendered void ab initio as BFL could not hold mailo land. His Lordship states at page 27 of his judgment that:

> **"The transaction of the acquisition of the suit land having been null and void ab initio, the respondents are entitled to recover the whole purchase price amount of UGX 60,000,000/= jointly and/or severally from the appellants. Each one of the appellants ought to have been aware of the illegality of the whole land transaction. They are presumed to have known the law. They received the said sum of UGX 60,000,000/= from the 2nd respondent to carry out a transaction prohibited by law. It was money received for no valid consideration under the law. It must be refunded. Accordingly, I hold that the appellants have jointly and/or severally to repay UGX 60,000,000/= land purchase price to the respondents."**

While Kasule, Ag. JA may have reached the legally sound conclusions; it must be kept in mind that there was no cross appeal by the respondents about the quantum of refund money in connection to purchase of the suit land. Accordingly, it is my humble opinion that this Court cannot on appeal enhance an award made by the trial Judge in the absence of a cross appeal. Moreover, the respondents did not plead for refund of the entirety of the monies advanced for purchase of the suit land. I would maintain the refund award made by the learned trial Judge for the appellants to pay to the respondents Ug. Shs. 30,000,000/= as monies advanced for purchase of the suit land.

With regards to the appellant's counterclaim for US Dollars 86,000, I agree with the conclusion reached by Kasule, Ag. JA in upholding the learned trial Judge's decision to dismiss it. In my view, the evidence of the appellants in support of the counterclaim and their case in general, was unsatisfactory and evasive. I would not believe it.

I would, therefore, summarise my decision in this matter as follows: The learned trial Judge erred in failing to consider the legal issues surrounding the 1st respondent's ownership of the suit land. The suit land was of the mailo land tenure, and the 1st respondent, a non-citizen company could not

in law own such land. Consequently, the 1st respondent's ownership of the suit land being illegal, no claim could succeed based on that illegal ownership unless the claim could be asserted without reference to the illegality. The claims which could only be asserted after reference to the illegality in issue but which the learned trial Judge ought not to have allowed, included: 1) the claim for the appellants to pay to the respondents, monies equivalent to the value of the suit land; 2) the claim for general damages of Ug. Shs. 100,000,000/=; 3) the claim for special damages of Ug. Shs. 70,895,000/=; and the interest awarded on each respective damages award. I would set aside all those claims.

I would uphold the learned trial Judge's decision to order the appellants to pay Ug. Shs. 30,000,000/= as a refund of monies by the 2nd respondent to the former for purchase of the suit land.

I would also uphold the learned trial Judge's decision to dismiss the appellant's counterclaim. I would award the costs of the appeal to the respondents, although the appeal succeeds in some respects. I reach this decision because I consider that in their business dealings with the respondents, the appellants could have acted with more honesty and good faith. I would also uphold the learned trial Judge's order on costs.

I will conclude by setting out the decision of the Court in this matter as reflected in the judgments of Musoke and Musota, JJA and Kasule, Ag. JA, which is as follows:

a) The appeal is allowed in part.

b) By unanimous decision (Musoke and Musota, JJA and Kasule, Ag. JA), the order of the learned trial Judge based on the 1st respondent's illegal ownership of the suit land, requiring the appellants to pay to the respondents a sum equivalent to the current value of the suit land, and the accompanying order for the appellants to pay interest on the said sum at 22% per annum from 27th March, 2004 till payment in full are set aside.

c) By majority decision (Musoke and Musota, JJA with Kasule, Ag. JA dissenting) the orders of the learned trial Judge based on the 1st respondent's illegal ownership of the suit land, for the appellants to pay

to the respondents, general damages of Ug. Shs. 100,000,000/= and special damages of Ug. Shs. 70,895,000/=, as damages occasioned following the eviction of the 1st respondent from the suit land, and the attendant order to pay interest on the said awards at court rate from the date of the judgment of the trial Court till payment in full, are set aside.

d) By majority decision (Musoke and Musota, JJA with Kasule, Ag. JA dissenting), the order of the learned trial Judge for the appellants to pay to the respondents Ug. Shs. 30,000,000/= as refund of the monies advanced by the latter to the former to purchase the suit land is upheld. Kasule, Ag. JA would have enhanced the amount of the said refund to Ug. Shs. 60,000,000/=.

e) By majority decision (Musoke, JA and Kasule, Ag. JA with Musota, JA dissenting), the order of the learned trial Judge dismissing the appellants' counterclaim is upheld.

f) By majority decision (Musota, JA and Kasule, Ag. JA with Musoke, JA dissenting), the appellants shall pay to the respondents 2/3 of the costs of this appeal. Musoke, JA would have awarded the entirety of the costs of this appeal to the respondents.

g) By unanimous decision (Musoke and Musota, JJA and Kasule, Ag. JA), the learned trial Judge's order for the appellants to pay to the respondents, the costs of the proceedings in the Court below, is upheld.

It is so ordered.

Dated at Kampala this .....22nd..... day of.....July.....2021.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Civil Appeal No. 18 of 2017

[(Arising from the Judgment delivered on 13.04.2015 (Wangutusi, J) in HCCS No. 276 of 2007 (Commercial Division)]

1. Biyinzika Enterprises Limited
2. Samuel Mukasa
3. Milly Mukasa ::::::::::::::: **Appellants**

Versus

1. Biyinzika Farmers Limited
2. Agrobusiness Development A/S :::::::::::: **Respondents**

Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Mr. Justice Stephen Musota, JA
Hon. Mr. Remmy Kasule, Ag. JA

Judgment of Hon. Justice Remmy Kasule, Ag. JA

Background:

The 1st appellant, a limited liability company incorporated in Uganda, and the 2nd respondent a foreign limited liability company of Denmark, each one contributed to the shareholding of UGX. 100,000,000= in incorporating in Uganda the 1st respondent on

19.08.2004. The 1st appellant acquired 88% while the 2nd respondent had 12% of the shares in the 1st respondent, incorporated in 2004. The 1st respondent was to carry out the business of production of broiler chicken for both local and international market.

Later, on 06.08.2005, through a shareholders agreement, executed amongst the 1st appellant and both respondents Exhibit P3 the shareholding in the 1st respondent was altered with each shareholder owning 50% of the shares. The share capital was increased to UGX. 600,000,000= divided into 10,000 shares.

On 24.05.2005 the 1st appellant obtained a loan of US$ 529,377 from the 2nd respondent. It was secured by a debenture, Exhibit P9.

Mailo land comprised in Kyaggwe Block 118 Plot 7 measuring 24.3 hectares, at Budo, Kyaggwe County was acquired with money availed by the 2nd respondent to the appellants. It was registered into the 1st respondent as owner. The broiler chicken production was to be carried out on this land.

The 1st appellant then encountered problems in the business. It became necessary to alter the shareholding in the 1st appellant. Through a written memorandum of Satisfaction of Debenture executed on 01.07.2006, Exhibit P10, the 1st appellant transferred its 50% shareholding in the 1st respondent to the 2nd respondent. The 1st appellant also undertook to hand over the assets including the acquired land that it was now looking after to the respondents.

However, unknown to the 2nd respondent, the acquired land: Kyagwe Block 118 Plot 17 at Budo registered into the 1st

respondent, as owner, had been sold and transferred, with the 2nd and 3rd appellants signing the transfer forms, purportedly on behalf of the 1st respondent as transferor to one Emmanuel Bwanika.

On 25.08.2006 the respondents, under the impression that the said land was still their property, started developing the structures for production of broiler chicken on the said land, until when on 5th – 7th September, 2006, auctioneers and Court Bailiffs instructed by the said Emmanuel Bwanika, now the registered owner of the said land, with the knowledge and support of the 2nd and 3rd appellants, evicted the respondents from the said land and destroyed whatever infrastructures had been put thereon. It is then that the respondents came to know that the land in question had long been transferred to Emmanuel Bwanika by the 2nd and 3rd appellants signing for and on behalf of the 1st appellant.

Alleging fraud and breach of contract by the appellants together with Emmanuel Bwanika, the respondents jointly and severally sued the appellants and Emmanuel Bwanika for loss of income, damage to properties, legal and security fees, for the value of the suit land or its recovery in physical form, the purchase price or its balance for that land and for general damages. The Civil Suit No. HCCS No. 276 of 2007 was lodged in the High Court (Commercial Division) on 24.04.2007.

The appellants as well as Emmanuel Bwanika, the 4th Defendant, as defendants, denied the respondents claims in the suit. They too alleged fraud and misrepresentation on the part of the 2nd respondent. The 1st appellant counter-claimed as against the 2nd

respondent for a refund of US$ 218,674 allegedly being an over payment to the 2nd respondent by way of loan repayment.

The hearing of the suit was completed by His Lordship Wangutusi, J. who delivered Judgment on 13.04.2015.

Judgment was entered in favour of the respondents jointly and severally against the appellants, with the suit being dismissed against the 4th defendant, Emmanuel Bwanika with an order that the appellants pay his costs of the dismissed suit.

The appellants were ordered to pay to the respondents:

(i) The current value of the land Kyaggwe Block 118 Plot 7 at Budo as determined by a qualified valuation surveyor;

(ii) UGX 30,000,000= being the balance of the land purchase price money with interest thereon at 22% p.a. from 27.03.2009 till payment in full;

(iii) UGX 70,895,000= money lost in construction and labour on the land with interest thereon at Court rate from the date of Judgment till payment in full.

(iv) UGX 100,000,000= general damages with interest at Court rate from date of Judgment till payment in full.

(v) The appellants were ordered to pay costs of the suit to the respondents.

Grounds of Appeal:

Dissatisfied with the High Court decision the appellants lodged this appeal on the following grounds as per amended Memorandum of Appeal dated 20.12.2017 and supplementary Memorandum of Appeal dated 03.05.2018.

1. ***The learned trial Judge erred in fact and law, when he found that the 2nd respondent lawfully obtained a transfer of the 1st appellant's shares in the 1st respondent.***
2. ***The learned trial Judge erred, in fact and in law, when he found that the appellants acted fraudulently in transferring land from the 1st respondent's name to Mr. Emmanuel Bwanika.***
3. ***The learned trial Judge erred in law and fact, when he wrongly evaluated evidence and consequently awarded compensation amounting to UGX 480,000,000= for mailo land that the 1st respondent (foreign company) couldn't legally own.***
4. ***The learned trial Judge wrongly evaluated the evidence and consequently arrived at an incorrect decision that the appellant's counter-claim for a refund of money overpaid to the respondents was lacking in merit.***
5. ***The learned trial Judge wrongly evaluated the evidence and failed to apply the correct principles of damages resulting in an excessive award.***

Legal Representation:

Learned Counsel Ebert Byenkya and Anthony Bazira represented the appellants, while Mohammed Mbabazi, Edward Sekabanja Kato and Moses Opio were for the respondents.

Submissions:

Counsel for all parties filed conferencing notes and written submissions which they adopted.

Submissions for Appellants:

Appellants' learned Counsel submitted on the grounds in the order of grounds 3, 1 and 2 together, 4 and 5.

Ground 3:

It was contended for the appellants that the learned trial Judge erred to award compensation to the respondents in respect of mailo land comprised in Kyaggwe Block 118 Plot 7 at Budo. Being mailo land, this was protected land and could not by law be owned by the respondents who were not citizens of Uganda.

As to the 1st respondent its shareholding from the time of incorporation was shared between Ugandan and non-Uganda Citizens. Further, its Articles and Memorandum of Association did not prohibit transfer of shares to non-Ugandan citizens. It was thus a foreign company. As to the 2nd respondent, this was a foreign company registered in Denmark.

Section 40 of the Land Act and **Section 19 of the Contracts Act** and the case authorities of **Singh vs KulubyA [1963] ALLER 499** and **Kyaggwe Coffee Curing Estates Ltd & Another vs Emmanuel Lukwaju: Court of Appeal Civil Appeal No. 187 of 2014** were authorities in law that the 1st respondent could not have owned the suit land. It was prayed that ground 3 be allowed.

Grounds 1 and 2:

Ground 1 faulted the learned trial Judge for holding that the 2nd respondent lawfully obtained a transfer of the 1st appellant's shares in the 1st respondent.

For the appellants, it was submitted that the transfer of the 1st appellant's shares in the 1st respondent to the 2nd respondent was unlawful being the result of duress, and deceit by the 2nd respondent upon the other shareholders in the 1st appellant and 1st respondent companies. The transfer was also effected due to the incompetence of the Uganda Registration Services Bureau (URSB) who registered the share transfers inspite of being told not to do so by the other shareholders in the 1st respondent companies.

Duress and deceit was exercised upon the appellants by the 2nd respondent through execution of the unimix contracts which were a fraudulent arrangement of the 2nd respondent to get access to funds from Denmark. Duress was also asserted by the 2nd respondent publishing receivership advertisements in the newspapers in Uganda negatively affecting the business of the appellants as to the financial credibility of the companies in which they held shares.

As to the transfer of the suit land to Emmanuel Bwanika, it was contended for the appellants that, being a Uganda citizen, there was nothing wrong on the part of the appellants to transfer the said land to him. In doing so, the appellants acted out of a spirit of self-preservation after the respondents had purportedly acquired all their shares in the 1st respondent. Accordingly grounds 1 and 2 had to be allowed.

Ground 4:

The learned trial Judge is said to have erred in this ground as having wrongly evaluated the evidence thus arriving at an

incorrect conclusion that the counter claim of the appellants against the respondents was lacking in merit.

It was contended for the appellants that though the contract for supply of unimix were described as sham ones by Dw1, this did not mean that money never changed hands under these contracts so as to give rise to a claim for damages, as the learned trial Judge reasoned. The learned trial Judge thus erred in so reasoning. All that the evidence of Dw1 meant was that the unimix contracts were in reality not what they said they were. Money exchanged hands as credit was provided under the guise of these contracts with funds from the Danish Embassy. The respondents handled these funds in such a way that the appellants were made to repay for them to the 2nd respondent with interest thereon under the guise that the same had been utilised as credit by the appellants, whereas not.

The appellants made repayment of the funds to the 2nd respondent for all obligations under this credit arrangement, to the extent of repaying more than what was due. The over re-paid amount constituted the appellant's counter-claim against the respondents. The evidence of over payment was never rebutted by the respondents. Therefore the counter-claim was proved on a balance of probabilities. The learned trial Judge ought to have held so but he did not. Learned Counsel for the appellants prayed that ground 4 be allowed.

Ground 5:

The essence of this ground is to fault the learned trial Judge for granting multiple awards to the respondents for the same alleged

loss. A sum of money representing the market value of the suit land was awarded, then there was an order of return of part of the purchase price for the same land and also an order of payment of general damages for deprivation of the same suit land. There was also a sum ordered to be paid under the heading of special damages being for labour expended on the suit land. The awards so made were contrary to the principles of indemnification and thus excessive. Accordingly ground 5 had to be allowed.

Submissions for the Respondents:

Ground 3:

Learned Counsel for the respondents contended that since at incorporation of the 1st respondent the 1st appellant, a Ugandan company held 88% shares and the 2nd respondent, a non-citizen, held 12% shares in the 1st respondent, then the 1st respondent was a Uganda company under the control of Ugandans. This was the position as of 11.07. 2005, when the 1st respondent acquired the suit land of Kyaggwe Block 118 Plot 7 at Budo. Therefore the said suit land was properly acquired by the 1st respondent wherein the majority control of the affairs of the 1st respondent was in the hands of Ugandan shareholders. When in August, 2005 the shareholding in the 1st respondent became 50%: 50% the suit land had already been properly acquired. The owning of the land by the 1st respondent then reverted to a 99 year lease under the leasehold tenure system by operation of **Section 40(6), (7) and (8) of the Land Act.**

Further it was the appellants who carried out the entire process of identification, acquisition and registration of the suit land into the

names of the 1st respondent and as such they are estopped from denying the fact that the 1st respondent is legally the owner of the same. The award of UGX 480,000,000= compensation for thc said land was accordingly lawfully made. Ground 3 had no merit. It ought to be disallowed.

Grounds 1 and 2:

It was submitted for the respondents that no arm twisting, duress or fraud had been exerted upon the appellants to transfer their shares to the respondents. The counter-claim had no pleading in it claiming that the shares were fraudulently acquired by the respondents.

Advertising to put the 1st appellant under receivership was necessary under the circumstances and was not intended and did not result into economic duress forcing the appellants to transfer the shares to the respondents.

Relying on the case of **The Sibeon & The Sibotre [1976] 1 Lloyd's Rep. 293,** respondents' Counsel contended that the consent of the appellants to transfer the shares was never obtained through compulsion. The appellants did so through their free consent and agreement. No evidence was adduced by the appellants to prove otherwise. The appellants had also taken no action at all to show they had acted through duress. Exhibits P10, P.29 and P35 cleary proved that the appellants freely transferred their shares to the respondents. The appellants were therefore estopped by **Section 114 of the Evidence Act** from denying that they did not voluntarily transfer their shares in the 1st respondent to the 2nd respondent.

As to consideration, the Memorandum of Satisfaction of Debenture constituted that consideration as it provided for a set off of the outstanding balance that the appellants owed to the 2nd respondent. Therefore the trial Judge rightly held that the respondents lawfully obtained a transfer of the shares of the 1st appellant. Ground 1 had therefore no merit.

In respect of ground 2, learned Counsel for the respondents contended that Exhibit P7, the Certificate of Title of the suit land, shows that during the period 11.07.2005 and 22.06.2006 the land was transferred several times into the names of either the 1st respondent or those of the 1st appellant until the 25.08.2006 when it was transferred into the names of Mr. Emmanuel Bwanika. Yet in the Memorandum of Satisfaction of the debenture executed on 28.06.2005 and 01.07.2005, Exhibit P10, the 1st appellant had already purportedly handed over the said land to the 2nd respondent in satisfaction of the debenture as per paragraph 6 of that Memorandum of Satisfaction. This was fraud on the part of the appellants, respondents' Counsel so argued.

Further, under Article 6(1)(a) of the Shareholders Agreement, Exhibit P3, executed amongst the appellants and respondents, the sale of land had to first require approval in writing by all members of the Board of the 1st respondent. However only the 2nd and 3rd appellants, and not all the Board members of 1st respondent approved and signed the transfer of the suit land to Emmanuel Bwanika. Thus the appellants defrauded the respondents by so acting. There was thus no merit in grounds 1 and 2 of the appeal.

Ground 4:

In their written statement of defence, the appellants counter claimed US$ 86,000 as over paid money from the 2nd respondent. However while submitting to Court the appellants asserted their counter-claim was for US$ 182,283. The appellants were bound by their pleadings in the counter-claim. The claim for a higher amount was thus unlawful.

Learned Counsel for the respondents contended that the counter-claim had no merit since, through exhibit P11 whereby the appellants acknowledged their indebtedness to the 2nd respondent, the appellants had no basis for the counter-claim. Appellants had produced no evidence to rebut exhibit P10 which was a reconciliation of accounts between the appellants and the respondents. The amount claimed by the appellants by way of counter-claim was not reflected in that reconciliation.

Counsel for the respondents reiterated that contracting partics have to remain confined to the four corners of the contract and relied upon **Printing & Numerical Registering Co. vs Sampson [1875] LR EQ 462**. The four corners of the contract between the appellants and the respondents provided no room for the counter-claim. Ground 4 of the appeal was thus devoid of merit.

Ground 5:

It is contended for the respondents that there are no valid grounds advanced by the appellants for this Court to interfere with the award of damages made by the learned trial Judge. The damages were not so high or so low to amount to an erroneous assessment. They had also not been made as a result of an error in law or

principle applicable in assessment of damages. The learned trial Judge had also not failed to consider relevant factors. He had not taken into account matters that he ought not to have considered in making the award. Learned respondents' Counsel relied upon **Lukenya Ranching and Farming Co-operative Society Ltd vs Kasovoloto [1970] EA 417 at 418** for this submission.

The learned trial Judge considered the fact that the respondents had been deprived of the use of the land for about 9 years within which period the appellants were using the money for personal gain paid to them for the land by Emmanuel Bwanika.

There was money lost by the respondents in carrying out construction, labour, paying for security which all fetched for special and general damages as well interest. The learned trial Judge rightly considered these factors. Ground 5 therefore had no merit and ought to be dismissed.

Resolution of the Grounds of Appeal:

It is recalled that this is a first appeal and as such, this Court has a duty to carefully and exhaustively re-evaluate the evidence as a whole and make its own decision. This Court does so bearing in mind that as an appellate, there was no opportunity for the Court to see or hear the witnesses testify, which opportunity the trial Court had. Therefore if the demeanour of the witnesses is key to the findings made, this Court has then to rely on the observations of the trial Court as to the demeanour of such witnesses, unless there are factors to the contrary.

This Court may also reverse the decision of a trial Judge if it is of the view that, considering all the evidence and circumstances, the

decision of the learned trial Judge cannot stand. See: **Rule 30(1) of the Judicature (Court of Appeal) Rules SI 13-10** and also **Supreme Court Civil Appeal No. 08 of 2009 Rwakashaija Azarious, Dr. Kaggwa James and Muhangi Katto v Uganda Revenue Authority.**

Further in **Father Nasensio Begumisa and 3 Others v Eric Tibebaga: Supreme Court Civil Appeal No. 17 of 2002 (unreported):** It was stressed that:

> *"The legal obligation on a first appellate Court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions".*

I now proceed to resolve the grounds of appeal on the basis of the above stated principles of law. I am to follow the order in which the grounds were argued by the parties.

Ground 3:

The issue for this Court to determine is whether the 1st respondent was a non-citizen company and could therefore not own mailo land in Uganda.

The 1995 Constitution entrusts all land in Uganda to the citizens who hold the land in accordance with the various land tenure

systems the Constitution sets out. According to **Article 237(1) of the Constitution**:

> ***237. Land Ownership.***
>
> ***(1) Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.***

Then **Article 237(2)(c)** continues that:

> ***(2) Notwithstanding clause (1) of this Article___***
>
> ***(c) noncitizens may acquire leases in land in accordance with the laws prescribed by Parliament, and the laws so prescribed shall define a noncitizen for the purposes of this paragraph.***

In this regard, a "non-citizen", as provided under **Section 40(7)** and **(8)** of the Land Act is:

> ***"(7) For the purposes of this Section, "non-citizen" means***
>
> ***(a) a person who is not a citizen of Uganda as defined by the Constitution and the Uganda Citizenship Act;***
>
> ***(b) in the case of a corporate body, a corporate body in which the controlling interest lies with non-citizens;***
>
> ***(c) in the case of bodies where shares are not applicable, where the body's decision making lies with non-citizens;***
>
> ***(d) a company in which the shares are held in trust for non-citizens;***

(e) a company incorporated in Uganda whose Articles of Association do not contain a provision restricting transfer or issue of shares to non-citizens.

(8) For purposes of subsection (7), "controlling interest" means__

(a) in the case of companies with shares, the majority shares are held by persons who are not citizens; and

(b) in the case of companies without shares, a company in which decisions are arrived at by the majority who are not citizens".

The 1st respondent, Biyinzika Farmers Limited, was incorporated on 17.08.2004 with a share capital of UGX. 100,000,000=. From the Memorandum and Articles of Association, the 1st appellant owned 88% shares while the 2nd respondent owned 12% shares in the 1st respondent. The 1st respondent's Articles and Memorandum of Association, do not contain any clause restricting transfer or issue of shares to non-citizens. As already stated, **Section 40(7)(e) of the Land Act** provides that a non-citizen company is, among others, one incorporated in Uganda whose Articles of Association do not contain a provision restricting transfer or issue of shares to non-citizens.

From the foregoing, the 1st respondent company was, at all material times, a non-citizen company and as such was and is barred from owning mailo land.

Section 19 of the Contracts Act 2010 provides that:

"19. Lawful consideration or objects:

(1) A consideration or an object of an agreement is lawful, except where the consideration or object__

(a) is forbidden by law;

(b) is of such nature that, if permitted would defeat the provisions of any law";

The purchase and subsequent registration of the land comprised in Kyaggwe Block 118 Plot 7 at Budo by the 1st respondent was thus void and an illegality *ab initio.*

A Court of law cannot sanction what is illegal, and an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission thereof. See: **Active Auto Mobile Spares Ltd v Crane Bank Ltd and Another: Supreme Court Civil Appeal No. 21 of 2001;** and **Makula International v His Eminence Cardinal Nsubuga: Court of Appeal Civil Appeal No. 4 of 1981; [1982] HCB 11.**

It has been submitted for the respondents that under **Section 40(7)(b)** and **(8)(a) of the Land Act** because the 1st respondent had at incorporation (19.08.2001) a shareholding of 88% owned by a Uganda citizen company and only 12% were owned by the foreign company, therefore the majority control of the company was in the hands of a Uganda citizen shareholder and as such the 1st respondent properly acquired and owned the suit land: Kyaggwe Block 118 Plot 7 on 11.08.2005. When in August, 2005 the ratio of shareholding altered and the 1st respondent could be referred to as a truly foreign company, then the land tenure of ownership of the suit land also changed so that the 1st respondent became

leaseholder of the said land for 99 years under **Section 40(6) of the Land Act**.

I am unable to accept the above submission of the respondent. The 1st respondent company was from its registration a non-citizen company in terms of **Section 40(7)(e)** because it was

> ***"(e) a company incorporated in Uganda whose Articles of Association do not contain a provision restricting transfer or issue of shares to non-citizens".***

Therefore the position of the 1st respondent was not that of a company that was a Uganda citizen at the beginning and lost that citizenship later. The 1st respondent was a non-citizen company from the very beginning and at all material time of acquiring the suit land. Under **Article 237(1) of the Constitution** and **Section 40(4) of the Land Act**, the 1st respondent was barred from acquiring or holding mailo land, which the suit land is.

The fact that the appellants, particularly the 2nd and 3rd appellants participated together with the 2nd respondent in having the 1st respondent buy and register the said land into the 1st respondent as owner, cannot in any way stop the operation of **Article 237(1) of the Constitution** and **Section 40(4) of the Land Act.**

The learned trial Judge thus erred in not addressing this issue at all and also for holding that the 1st respondent was a lawful owner in law of the suit land.

It follows therefore that the learned trial Judge acted wrongly in ordering that the 1st, 2nd and 3rd appellants pay to the respondents

the current value of the suit land determined by a qualified valuation surveyor. Ground 3 is hereby allowed.

My finding on ground 3 is that the 1st respondent never obtained valid title to the suit land. It is up to Mr. Emmanuel Bwanika, the transferee, who is not a party to this appeal, to take appropriate legal steps to get the right title and secure his interests in the said suit land, if he so wishes.

Grounds 1 and 2:

These two grounds are considered together. Ground 2 which states that the learned trial judge erred in law and in fact, when he found that the appellants acted fraudulently in transferring land from the 1st respondents' name to those of Mr. Emmanuel Bwanika, has now to be resolved from the stand point of how ground 3 has been resolved.

The 1st respondent never owned the suit land in law. It therefore had no valid title to pass on to a third party, Mr. Emmanuel Bwanika.

As to fraud, the appellants, notwithstanding the lack of title to the suit land by the 1st respondent, acted fraudulently, when after undertaking in writing on 01.07.2006 in the Memorandum of Satisfaction of Debenture, Exhibit P10, to hand over to the respondents the suit land, amongst other properties, under the control of the 1st respondent, they proceeded to sell and transfer the ownership and use of the said land purportedly from the 1st respondent to Emmanuel Busulwa on 25.08.2006. They did so without informing the 2nd respondent on 27.06.2006, when the 2nd and 3rd appellants signed a sale agreement for and on behalf of the

1st respondent, Exhibit P25, selling the suit land to Emmanuel Busulwa. This was fraudulent as an undertaking had been executed under the shareholders' agreement executed on 22.03.2004 between the 1st appellant and the 2nd respondent Exhibit P3, whereby the 1st respondent was created. Article 6 of that agreement provided that Board decisions shall be unanimously agreed upon by all Board members when such decisions shall concern sale of land, amongst others.

No evidence was adduced to implicate Emmanuel Bwanika in the said fraud.

The learned trial Judge thus acted correctly when he so held as above. Ground 2 of the appeal has therefore no merit.

Ground 1 faults the learned trial Judge for finding that the 2nd respondent lawfully obtained the transfer of the 1st appellant's shares in the 2nd respondent. The appellants argued that economic duress was put upon them by the 2nd respondent and this coerced them into signing the transfer of shares of the 1st appellant to the 2nd respondent in the 1st respondent company. The economic duress was by the 2nd respondent carrying out a newspaper advert to the general public threatening the 1st appellant to be put under receivership.

Dw1 testified that he signed exhibit P.10 but did not sign willingly. He stated that it was a condition imposed by the 2nd respondent to remove the advert in the newspapers. In addition, that he signed because the banks would recall their loans in view of receivership and the company's credibility would be damaged.

For the respondents, it was argued that exhibit P. 35 indicated that the buy out of the appellants' interest in the 1st respondent was acceptable as a set off of the outstanding balance. This indicated that the appellants freely transferred their shares.

Regarding this issuc, thc lcarncd trial Judge held that:

"I find it difficult to agree that placing advertiscmcnts in thc newspapers which have no foundation would lead a managing director and shareholder to sign off his shares in a company he has been managing.

It is even more inconceivable where the company allegedly indebted has already paid off its loan for it to be threatened with advertisement of receivership.

Furthermore, the advertisement was run in the Daily Monitor of 1st July, 2006 much later over a year, after the memorandum of satisfaction of debenture was executed, which was signed on 28th June, 2005; Exhibit P.10.

So threats of advertisement of receivership could not have been the reason why the 1st, 2nd and 3rd defendants transferred their shares in the 1st plaintiff to the 2nd plaintiff. The 1st, 2nd and 3rd defendants also contended that since there was no resolution to transfer shares there was no valid transfer ...."

From the above excerpt, and from the evidence adduced by the appellants at the trial, in respect of which I have carried out a serious review, I find it difficult to agree with the appellants that the transfer of shares was done under duress. The Memorandum of Satisfaction, Exhibit P10, was executed and signed by all the

directors including the appellants and as such, I find that the appellants failed to prove the element of coercion in signing the transfer of shares. The Memorandum of Satisfaction included a clause stating that "*the borrower shall sign transfer of all shares in Biyinzika Farmers Ltd in favour of the lender or its nominee and accordingly relinquishes all its interests and shareholding in Biyinzika Farmers Ltd*". I therefore find that the element of duress was not proved by the appellants.

In all civil matters, a plaintiff bears the burden to prove his/her case on a balance of probabilities. By virtue of **Sections 101, 102 and 103 of the Evidence Act**, the appellants had the burden to prove the facts alleged by them. **Section 101 of the Evidence Act** provides therein that:

"Whoever desires any Court to give Judgment as to any legal right or liability, dependent on the existence of facts which he or she asserts must prove that those facts exist"

In a contractual situation, commercial pressure is not enough to prove economic duress. The burden is on the one alleging duress to satisfy the Court that the consent given was overborne by compulsion so as to deprive him or her of free consent and agreement. Whether or not there was protest against the duress when the demand was being made and whether or not the victim of the duress regarded the transaction as closed or whether he or she intended to repudiate the new agreement, are pertinent considerations that the Court looks at. See: **The Sibeon and the Sibotre [1976] 1 Lloyds Rep. 293.**

It is my considered conclusion, having appreciated the facts and the law, that the appellants failed to prove that the transfer of shares was done under coercion. I uphold the decision that the learned trial Judge made regarding this aspect of the case, as correct. Both grounds 1 and 2 therefore fail.

Ground 4:

At trial, the appellants counterclaimed against the respondents for payment in excess of what was due from the loan arrangement with the 2nd respondent. The basis of the counterclaim was that in the end, the appellants paid back more than what was due and owing to the respondents under the financial arrangement.

The issue to determine is whether the appellants proved an overpayment that would entitle them to a refund of the claimed US$ 182,283.

In the written statement of defence, the 1st appellant, then the 1st defendant at trial, pleaded counter-claiming a refund of US$ 86,000 as the overpaid money to the 2nd respondent. The Court record does not show any amendment of the counter-claim pleadings claiming a sum higher than US$ 86,000.

However in the Judgment of the learned trial Judge, it was held that:

> *"Turning to the counter-claim, the 1st defendant claimed a refund of US$ 218,674 arising out of a contract between the 2nd plaintiff and the 1st defendant for the procurement of unimix to be supplied to the World Food Programme".*

The 1st appellant was bound by the pleadings lodged in Court which restricted the claim to US$ 86,000. In the absence of any amendment of the pleadings to the counter-claim, the leaned trial Judge was not justified in law to consider a higher claim for the 1st appellant than that of US$ 86,000 pleaded in the counter-claim.

However, the learned trial Judge, the pleadings to the counter claim notwithstanding, considered the 1st appellant's counter claim as being US$ 218,674 arising out of a contract between the 2nd respondent and the 1st appellant for procurement of unimix to be supplied to the World Food Programme.

The 1st appellant's case was that, based on the stated unimix contract, the 2nd respondent received US$ 833,039 instead of US$ 614,364.68, and as such the difference of the US$ 218,674.32 ought to have been passed on to the 1st appellant.

The learned trial Judge considered the evidence that was before him, particularly the fact that the 1st appellant was basing his claim on the umimix contracts entered into on 27.09.2004, which contracts, the very same 1st appellant, had referred to as being "sham contracts" Exhibits P21 and P22. By this the 1st appellant meant that, though those contracts were signed, they were never implemented. No transactions were done by way of executing them. As such, the 1st appellant could not base the claim for US$ 218,674, or at all, on those contracts.

Further, on 14.03.2005, in a written "confirmation of account balance", Exhibit P11, in effect a reconciliation of accounts, the 1st appellant had in writing confirmed that it was the 1st appellant who owed US$ 529,377 to the 2nd respondent. Therefore the 1st

appellant's counter-claim against the 2nd respondent had no basis at all.

In **Printing & Numerical Registering Co. v Sampson (1875) LR ER 462,** the fundamental principle of enforceability of contracts between and amongst parties was reiterated by Lord Jessel that:

> *"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that their contracts, when entered into freely and voluntarily, shall be held enforceable by the Courts of Justice".*

The 1st appellant was inconsistent as to the amount he pleaded in the counter-claim and that he claimed in submissions to the learned trial Judge, which amount was the one considered in the Judgment of the learned trial Judge.

The 1st appellant also based his counter-claim amount as arising from the unimix contracts that the 1st appellant knew very well as having not been implemented and that is why he, the 1st appellant described them as "sham" contracts. Lastly, the 1st appellant turned around to claim the amount he claimed by way of counter-claim after having acknowledged in writing as per exhibit P11, a confirmation of account balance, that he, the 1st appellant is the one who owed money to the 2nd respondent, and not the other way round.

On the basis of the above stated reasons, I, on a re-appraisal of all the relevant evidence, have arrived at the same conclusion that the learned trial Judge came to, that there is no merit in the counter-

claim of the 1st appellant and the same stands dismissed. Ground 4 therefore fails.

Ground 5:

The learned trial Judge is faulted in this ground for having failed to apply the correct principles of awarding damages resulting in an excess award.

As an appellate Court, this Court may only interfere with an award of damages, if the award is so high or so inordinately low, so as to amount to an erroneous assessment; or if the award is the result of wrong application of the law; or the principle applicable in assessment of damages; or if the trial Judge failed to take into account relevant factors; or took into account matters which he ought not to have taken into consideration. See: **Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto [1970] EA 414 at p. 418.**

The learned trial Judge ordered the appellants to pay to the respondents the current value of the suit land: Kyaggwe Block 118 Plot 7 land at Budo as determined by a qualified valuation surveyor.

I have already held that under the law the respondents never acquired valid legal interest in the suit land. They never became owners of the same. They ought to have known the law that they could not own mailo land in Uganda. Ignorance of the law is no excuse. They are accordingly, in my view, not entitled to be paid the current value or at all of the said suit land. I would accordingly vacate the order of the learned trial Judge to that effect.

As to the purchase price of the suit land, the learned trial Judge ruled, on reviewing the evidence before him, that the amount advanced was UGX 60,000,000=. I accordingly take this amount as the correct one, as the learned trial Judge properly considered the relevant evidence before he so held that this was the correct amount.

The transaction of the acquisition of the suit land having been null and void ab innitio, the respondents are entitled to recover the whole purchase price amount of UGX 60,000,000= jointly and/or severally from the appellants. Each one of the appellants ought to have been aware of the illegality of the whole land transaction. They are presumed to have known the law. They received the said sum of UGX 60,000,000= from the 2nd respondent to carry out a transaction prohibited by law. It was money received for no valid consideration under the law. It must be refunded. Accordingly, I hold that the appellants have jointly and/or severally to repay UGX 60,000,000= the land purchase price money, to the respondents.

The learned trial Judge awarded a total sum of UGX 70,895,000= to the respondents against the appellants as money for construction materials, labour and security on the suit land.

I have already held that the respondents had no legal right of ownership of the suit land. They cannot therefore base any claim on the right to ownership of the said land. However on the other hand, the appellants carried out fraudulent acts that led the respondents to incur losses in respect of the suit land. Though the appellants themselves had no legal title to the land, the circumstances of their dealings with the respondents were such

that they made the respondents be and occupy the suit land. They did this, when without any communication to the respondents, as they had undertaken to do in writing in Article 6 of the Shareholders Agreement, Exhibit P3, proceeded to deal with Emmanuel Bwanika purporting to sell the same suit land to him. It is this Emanuel Bwanika together with the appellants that purported to evict the respondents from the suit land and thus caused the respondents to suffer losses.

I therefore hold that, notwithstanding the fact that the respondents had no legal right of ownership over the suit land, given the circumstances under which they were made to suffer the losses when being evicted from the said land, the appellants are liable to them in damages for the said losses and suffering.

The losses were considered in detail by the learned trial Judge, rejecting some and allowing others. Those he allowed amounted to UGX 70,895,000=.

I too find that, had it not been for the fraudulent conduct of the appellants, these losses could not have been incurred. Had the appellants informed the respondents that it was now Emmanuel Bwanika having use of the suit land, and or that the respondents vacate the suit land within a reasonably set period of time, the losses that were incurred would have been avoided by the respondents. Instead the appellants, particularly the 2nd and 3rd appellants, grouped and joined with Emmanuel Bwanika in evicting the respondents from the land in the manner that they did so.

I accordingly find that the learned trial Judge made the right decision in awarding the sum of UGX 70,895,000= special damages for the initial steps that the respondents had taken to acquire materials to develop the land in the areas of construction, labour and security.

As to general damages, the learned trial Judge addressed himself to the principles that he had to apply as to the award of general damages; namely to place the injured party financially in a position that injured party would have been in had the party being dealt with carried out his or her side of the bargain: See: **J.K. Patel v Spear Motors Ltd: Supreme Court Civil Appeal No. 4 of 1991**.

While it is appreciated that the 1st appellant and the respondents have themselves to blame for purporting to acquire ownership of the suit mailo land without first addressing themselves as to the law as to who owns mailo land in Uganda, it is an obvious fact brought out by the evidence, that the appellants, through the 2nd and 3rd appellants, acted fraudulently in their dealings with the respondents in their business.

Yet the respondents, particularly the 2nd respondent, were investors from Denmark bringing in expertise and financial resources to partner with Ugandans, who happened to be the 2nd and 3rd appellants, to develop the broiler chicken production business on a commercial scale to meet both the local and international markets.

The appellants however did not deal with the respondents honestly and in a straight forward manner. The appellants got from the respondents UGX. 60,000,000= as purchase price for the suit land

when actually the price was UGX 30,000,000=. The share transfers were not executed out in a straight forward and clear way in both the 1st appellant and in the 1st respondent companies. While the shareholders' agreement, Exhibit P3, called for Board members acting together and seeking consent of everyone in decision making, the appellants did the opposite as their dealing with Emmanuel Bwanika as regards the suit land clearly shows.

The learned trial Judge on considering the evidence came to the conclusion that the respondents suffered financial loss in their endeavours to invest in Uganda. They suffered loss and anguish. The learned trial Judge awarded them general damages of UGX 100,000,000= jointly and severally as against the appellants.

On reviewing the evidence and considering all the circumstances pertaining to the dealings between the appellants and respondents, I uphold the decision of the learned trial Judge in making the said award.

I also uphold the award of interest at 22% per annum on the sum of UGX 60,000,000= money advanced to the appellants by the respondents as purchase price for the land from the date of receipt of the money by the appellants i.e. 27.03.2004 till payment in full.

The learned trial Judge awarded interest at the Court rate on the UGX 70,895,000= for the losses incurred from the date of Judgment till payment in full. The learned trial Judge gave no reason why interest on this amount is to be from the date of Judgment, when actually the losses were incurred on 05.09.2006 when the eviction was carried out. Interest ought to run from that date. I would therefore vacate this part of the order of the learned

trial and order that the rate of interest on this sum of money is to run from 05.09.2006 when the loss was incurred till payment in full.

I uphold the order of the learned trial Judge awarding the rate of interest at Court rate on the UGX. 100,000,000= general damages from the date of Judgment, that is 13.04.2015 till payment in full.

The learned trial Judge, considered and disallowed as not proved the respondents claims of UGX 358,109,892= lost income for 7 months at UGX 51,158,5666= per month. I have no cause to interfere with the learned trial Judge's decision on this item.

The claim for UGX 25,000,000= legal fees by the respondents was also considered by the learned trial Judge and he came to the conclusion that there was no evidence to validate the claim. The same was disallowed. I agree with the decision of the learned trial Judge.

Ground 5 is therefore partly allowed and partly dismissed as stated above.

In conclusion I partly allow and partly disallow this appeal.

Ground 3 is allowed. Grounds 1, 2 and 4 are disallowed while ground 5 is partly allowed and partly disallowed.

I proceed to make the following orders to reflect the grounds of appeal I have allowed and those I have disallowed.

1. The 1st 2nd and 3rd appellants being the 1st, 2nd and 3rd defendants in the original suit i.e. HCCS No. 276 of 2007 jointly and or severally are to pay to the respondents being the plaintiffs in the said suit;

(i) UGX 60,000,000= being the amount advanced to the appellants by the respondents as purchase price for the suit land: Kyaggwe Block 118 Plot 7 land at Budo.

(ii) UGX 70,895,000= money lost by the respondents in construction, labour and security on the suit land before the respondents were evicted therefrom.

(iii) UGX 100,000,000= general damages.

2. The sum in 1(i) above shall carry interest thereon at 22% per annum from the date of receipt of the money by the appellants i.e. 27.03.2004 till payment in full.
3. The sum in 1(ii) above is to carry interest thereon at the Court rate from the date of the loss i.e. 05.09.2006 till payment in full.
4. The sum in 1(iii) above shall carry interest at the Court rate from the date of Judgment i.e. 13.04.2015 till payment in full.

As to costs, the appeal has partly succeeded in some grounds, and not succeeded in other grounds. In my assessment, given the special facts of this case, the respondents deserve to be awarded substantial costs of the appeal. Accordingly I award 2/3 of the costs of this appeal to the respondents. I leave the orders as to costs in the High Court undisturbed.

Dated at Kampala this ....22nd.... day of .....July..... **2021**.

.....

Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 18 OF 2017

(Arising out of Civil Suit No. 276 of 2007)

1. BIYINZIKA ENTERPRISES LIMITED

2. SAMUEL MUKASA

3. MILLY MUKASA :: APPELLANTS

VERSUS

1. BIYINZIKA FARMERS LIMITED

2. AGROBUSINESS DEVELOPMENT A/S :::::::: RESPONDENTS

CORAM: HON JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE STEPHEN MUSOTA, JA
HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my brother Justice Remmy Kasule, Ag. JA. He has already set out the background to this appeal. I will not reproduce the same here.

I agree with the finding of my learned brother Hon. Justice Remmy Kasule, Ag. JA on ground 1 of the Memorandum of Appeal.

I also agree that the 1st respondent company was at all material times a non-citizen company that is barred from owning mailo land. The 2nd respondent, Biyinzika Farmers Limited, was incorporated on 17th August 2004 with a share capital of 100,000,000/=. From the memorandum and articles of association, the 1st appellant owned 88% shares while the 2nd respondent owned 12% shares. **Section 40(7) (e)** of the **Land Act** provides that a non-citizen company is, among others, one incorporated in Uganda whose articles of association do not contain a provision restricting transfer or issue of shares to noncitizens.

The purchase and subsequent registration of the land comprised in Kyaggwe Block 118 Plot 7 at Buddo was an illegality *ab initio.* Regarding the consequential orders, I agree with Elizabeth Musoke, JA on her finding that the 1st respondent's ownership of the suit land being illegal, no claim could succeed based on that illegal ownership. I would therefore decline to grant the claim for the appellants to pay to the respondents, monies equivalent to the value of the suit land; 2) the claim for general damages of Ug. Shs. 100,000,000/=; 3) the claim for special damages of Ug. Shs. 70,895,000/=; and the interest awarded on each respective damages award. I would also set aside all those claims.

I respectfully disagree with the finding on ground 4 and I state my reasons herein.

While arguing ground 4, the appellant's counsel submitted that there was no Unimix that was ever supplied even though money

exchanged hands. Credit was provided under the guise of these contracts since they led to an inflow of funds from the Danish embassy. There was an understanding that part of these Danish funds would be repaid to the 2nd respondent by the appellants with some interest. Counsel argued that the appellants had made full payment to the 2nd respondent for all obligations under this credit arrangement. From the testimony of DW1, full payment of all obligations under this credit financing arrangement to the respondent was made. The basis of the counter-claim was that in the end, the appellants paid back more than was due to the respondents under the financing arrangement.

In reply, the respondent's counsel submitted that the 1st appellant failed to present evidence to prove that they were entitled to a refund. The appellants and the respondents had a record of how mush was due and where they had a difference, there was no payment as both the appellants and the respondents balanced the records themselves and made a reconciliation as shown in Exh. P.10.

The appellants counterclaimed for a payment in excess of what was due from the loan arrangement with the 2nd respondent. The basis of the counterclaim was that in the end, the appellants paid back more than was due and owing to the respondent under the financial arrangement.

The 1st appellant's letter dated 6th April 2006 admitted indebtedness acknowledged that the burrower had paid US$165,000 out of the

US$529,000 leaving a balance of US$364,377 with return on investment of 10% to be paid within a period of 12 months from January 2006. The evidence of DW1 was that the loan was paid in a period of three (3) months.

The evidence of DW1 on page 100 of the record of appeal was that the amount owed to the 2nd respondent was US$557,000 and the money actually paid back after all the installments was US$711,660. The first payment made was US$188,000 but part of it was taken as interest and a small portion of US$54,627 was reduced from the original principal sum. DW1 testified that a wire transfer of US$100,000 marked Exh. D.19 was made which was following a meeting held with the respondent's lawyers regarding the payment scheme. The US$ 100,000 was paid on 8th May 2006 and on 24th May 2006, another transfer of US$163,400. On 22nd December 2005, a wire transfer of US$30,000. The 2nd respondent acknowledged receipt of US$20,000 and US$5000 on 7th October 2005 and 18th October 2005 respectively. On 22nd November 2004, a wire transfer of US$182,313 was made and on 17th November 2005, a wire transfer of US$100,000 was made totaling to US$600,000. The last payment was made to Nyanzi Kiboneka and Co. Advocates on the day the 1st respondent was advertised in the newspapers and a receiver appointed. The last payment was of US$101,177 and the receipt for this payment was Exh. D.17.

This evidence adduced by DW1 at the trial was neither rebutted by the respondent's witness nor during cross examination. The trial Judge held that;

"It is important to note that throughout his evidence, the 2nd defendant referred to the invoices for the Unimix dated 27th September 2004. Exhibits P.21 and P.22 as "sham contracts". He stated that there was no transmissions done based on them and that the contracts though signed, did not specifically mean anything.... Be that as it may, the 1st defendant cannot claim a refund for over payment since it acknowledged its indebtedness to the 2nd plaintiff as shown by confirmation of account balance dated 14th March 2005..."

The trial judge focused on the language used by DW1 to describe the contracts for supply of Unimix for which the loan was advanced and wondered how sham contract would give rise to a claim for damages. The loan was advanced for supply of Unimix which was never supplied however, money exchanged hands and credit was provided to the 1st appellants which had to be repaid. From the evidence of the defence on the record, I find that the appellants led evidence to show that there was an overpayment of the loan facility to the 2nd respondent. From the evidence on record, a total of US$ 701,177 was paid to the 2nd respondent and the amount owed was US$557,000 leaving a difference of US$144,177 being an overpayment of the loan.

From the foregoing, I summarize my orders as follows;

1. I would order that the respondent pays to the appellant US$ 144,177 being the amount overpaid on the loan.
2. I would decline to grant the claim for the appellants to pay to the respondents, monies equivalent to the value of the suit land; the claim for general damages of Ug. Shs. 100,000,000/=; the claim for special damages of Ug. Shs. 70,895,000/=; and the interest awarded on each respective damages award.
3. I would also decline to grant the UGX 60,000,000/= being the amount advanced by the respondents as purchase price of the land since there was no cross-appeal in that respect.
4. Since the appeal succeeded in part, I would also award 2/3 of the costs of this appeal to the respondents.

Dated at Kampala this.....22nd.....day of July.....2021

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Stephen Musota

JUSTICE OF APPEAL