

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA CRIMINAL DIVISION

CRIMINAL DIVISION

CRIMINAL APPEAL NO.69 OF 2014

**(Arising from Buganda Road Magistrates’ Court Holden at Mwangi II, Case No.
687 of 2010)**

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MBAZIIRA FAROUK:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction.

The appellant was represented by Wanamama Mics – Isaiah, Senior State Attorney, working with the Directorate of Public prosecutions. The appellant is being aggrieved and dissatisfied with the decision and judgment of Her Worship Jessica Chemeri, Magistrate Grade I, delivered on 1/8/2014, at Mwangi II Road Court whereby the respondent was acquitted of uttering a false document Contrary to Section 351 of the Penal Code Act and Fraudulently disposing of trust property Contrary to Section 322 (2) (d) of the Penal Code Act.

And whereas the respondent was represented by M/S Ngaruye Ruhindi, Spencer & Co. Advocates. They opposed this appeal.

2. Facts of the appeal.

The respondent was charged on two counts. On count I: Uttering a false document Contrary to Section 351 of the Penal Code Act. That on the 26/10/2003 at Amama House, in the Central Division, Kampala District, Mbaziira Farouk Ssenyonga knowingly and fraudulently uttered a false document to wit a Memorandum and Articles of

Association purporting to have been signed by Najjibi Ssenyonga and Kazibwe Ssenyonga Salim among others.

On count 2, Trustee fraudulently disposing of Trust property Contrary to Section 322 (2) (d) of the Penal Code Act. That on 4/2/2009 at Buganda Road in the Kampala District Mbaziira Farouk Ssenyonga and others still at large being a trustee of late Sulaiman Ssenyonga's estate on Plot 814 Block 10 Bekesa, with intent to defraud disposed of the estate at Shs. 187,000,000/= (one hundred and eighty seven million) to Hajji Musa Katongole to the detriment of the beneficiaries. The prosecution adduced evidence from eight (8) witnesses. And the defence called two witnesses. At the end of the trial the respondent was not found guilty of the charged offences, and was acquitted accordingly. Hence this appeal.

2. Grounds of the appeal

3.1 The appellant brought this appeal under the following grounds; that:

- a) The learned Trial Magistrate erred in law and fact when she acquitted the respondent of uttering a false document and Trustee fraudulently disposing of Trust Property.
- b) The learned Trial Magistrate erred in law and fact when she failed to evaluate the evidence before her and came to a wrong conclusion/decision.
- c) The learned Trial Magistrate did not properly evaluate all the ingredients of the two (2) counts thus contradicting herself when she held that the Articles and Memorandum of Association were indeed forged but the respondent was not aware of the forgery.
- d) The learned Trial Magistrate erred in law and fact when she held that the time the property was disposed of, it was no longer in the hands of the Trustees yet the property (land) was allegedly sold under a company formed by the Trustees property to be formed by all the beneficiaries whereas not.

3.2 The appellant made the following prayers; that:-

- i. The acquittal of the respondent be quashed.
- ii. Evidence be re-evaluated.

iii. The respondent be convicted on both counts.

4. Consideration of the appeal by Court.

It is trite law that as the first appellant Court, this Court has a duty to re-evaluate the evidence on the lower Court record as a whole, subject the same to strict and fresh Scrutiny and come to its own conclusions; bearing in mind that it did not see any of the witnesses testify. See the case of **Dan Weraga-vs- Uganda HCT Criminal appeal No. 39 of 2008.**

It is equally important to note that in all criminal cases except in a few statutory offences, the prosecution bears the burden to prove the charged offence (s) against the accused person. The standard of proof is proof beyond reasonable doubt. This burden of proof does not shift to the accused to prove his/her innocence. The burden of proof always rests on the prosecution. **See the case of Woolmington –vs-DPP [1935] AC 462.**

In the instant case my duty is to find out whether the prosecution proved its case against the accused person beyond reasonable; and whether the trial Magistrate discharged her duty in her judgment.

It should also be noted that both Counsel for the parties filed in Court written Submissions. In his written submissions Counsel for the appellant resolved grounds 1, 2 and 3 of appeal together, and ground 4 of appeal alone. In reply, Counsel for respondent followed the same sequence. In the consideration of this appeal I shall follow the same format.

On grounds 1, 2 and 3 of appeal, the appellant's main complaint is that despite the over whelming evidence adduced by the prosecution, the Trial Magistrate was wrong to find the respondent not guilty and acquitted him of the offence of uttering a false document contrary to Section 351 of the Penal Code Act. Counsel for the appellant evaluated the evidence as whole in his written submissions while bitterly criticizing the Trial Magistrate of wrong doing in her judgment. In reply, Counsel for the respondent also endeavoured to evaluate the evidence of both the prosecution and the

defence. He, in essence supported the whole judgment and decision of the Trial Magistrate.

In her judgment, the Trial Magistrate at pages, 2 and 3 addressed her mind the burden of proof and the ingredients of the offence of uttering a false document as charged.

Then at pages 3 and 4 of her judgment, the Trial Magistrate endeavoured to evaluate the evidence of both the prosecution and the defence. On page 4, paragraphs 3 and 4 of the judgment the Trial Magistrate held that:-

“Paragraph 3 thereof:

From the prosecution evidence it has been proved accurately that there were Articles and Memorandum of Association and the signatures of the complainants indicated as directors are or were not and in fact their signatures going by the samples taken by the forensic experts.”

“Paragraph 4 thereof:

I find that forgery has been proved. This brings me to the matter of whether the accused uttered the said document knowing it to be forged and with intent to injure or defraud.”

For the fact that Counsel for the respondent does not dispute that Articles and Memorandum of Association were forged, I need not bother myself on that issue. The issue to resolve is just the participation or not on the part of the respondent.

The reasons for acquitting the respondent of the charged offence or count 1 of uttering a false document are given on page 4, paragraphs 5 and 6 of the judgment of the lower Court. The Trial Magistrate based her decision on evidence given by the defence (respondent) without due regard to the evidence of all the prosecution witnesses. Even on the alleged meeting of all the 31 children of the late Hajji Ssenyonga, she relied on, in her judgment the Trial Magistrate had doubts in her mind, when at page 4, paragraph 5, lines 3, 4,5 and 6 of her judgment, she held; that:-

“On his parts, accused stated the children (31) held a meeting, he however does not state when and that they agreed to create a company called Ssenyonga and Family Co. Ltd to enable them sale the property.”

I perused the proceedings of the lower Court, looked at and considered the Special Resolution, the letters of administration, the Memorandum and Articles of Association of Ssenyonga and Family Limited, the document of particulars of Directors and Secretaries, which are all exhibited in this case. I also re-evaluate the evidence on record as a whole. The Trial Magistrate never gave proper attention to the documentary evidence and the oral evidence adduced by the prosecution and the accused. The prosecution adduced enough evidence to show and prove that the main architect in the forgery of the Memorandum and Articles of Association was the respondent (accused), which evidence was ignored by the Trial Magistrate.

The special resolution relied by the Trial Magistrate at page 4 paragraph 6 in her judgment; reads:-

“Special Resolution

BE IT RESOLVED by the members of the Company sitting in a general meeting at Nakulabye Kampala HEREBY RESOLVED BY SPECIAL RESOLUTION that:-

- i. The company do sell plot 814 Block 10 belonging to the Company.**
- ii. That FAROUK SSENYONGA IS HEREBY appointed to negotiate and effect such as sale at a price not lower than Shs. 100,000,000/= (one hundred million Uganda Shillings only) and is hereby further authorizes to sign any document necessary to conclude the transaction.**
- iii. That the Registrar of companies be notified accordingly.”**

From the wording of this special Resolution, the same is not dated. It is also clear that the complainants were not a party to the alleged meeting. The Secretary one Najjembwe Sarah, did not state the date and month in 2006 when she certified the contents of the said

special resolution. Again, according to the particulars of Directors and Secretaries Form of Ssenyonga and Family Limited, the Secretary of the Company is Nanyonga H. Wherefore, outright the Special Resolution is a total forgery. No Court can rely on a forged document to give effect to any transaction based on the same document.

For the Memorandum and Articles of Association, the Trial Magistrate in her judgment found that it is a forged document.

I now turn to resolve the ingredient of participation by the accused in the commission of the offence charged. Under Section 351 of the Penal Code Act; the prosecution had a duty to prove that the accused (respondent) uttered a false document, knowingly and fraudulently and participation of the respondent.

From the evidence on record, it is clear that the formation of Ssenyonga and Family Limited the respondent was the leader of its formation together with his Counsel Mr. George Spencer of M/s Ngaruye Ruhindi, Spencer & Co. Advocates. From the point of incorporation of the Company to which the land in issue was transferred, the respondent (accused) knew that PW1 and the other 3 brothers had not subscribed to the Memorandum and Article of Association. He had full knowledge that what him and his lawyers, did was to defraud the complainants.

From the letters of Administration of the estate of late Ssenyonga Sulaiman were granted to Hajji Isaac Mulindwa (relative) Hadijah Namubiru (mother) Hajji Mahamood Malanga (relative) Ssenyonga Farouk (son), Mayanja Ssenyonga (son) and Ssenyonga Hadijah (Daughter) on 19/3/2003.

From evidence on record, none of the administrators of the said estate other than the respondent participated in the formation of the said company and sale of the disputed property. The respondent as far as the formation of the said company and presenting the Memorandum and Article of Association, from the evidence on record were done with his actual participation and knowledge. The respondent, therefore under Section 19 (2) of the Penal Code Act is put at the scene of crime as a principal offender. And under

Section 22 of the Penal Code Act, he is dragged in the commission of the charged offence as a person who had a common intention to commit the charged offence. Again, in the case of **Uganda –vs- Teddy Seezi Cheeye, HCT Criminal case No. 1254 of 2008** at page 13, Katutsi JBA, Judge of the High Court held: when commenting on the conduct of the accused and Section 19)2) of the Penal Code Act, that:

“A procurer uses the hands of the procured to commit a crime as his own. The action of the procured becomes the action of the procurer.”

In sum total, therefore, I hold that there was enough evidence that was adduced by the prosecution against the accused, and that the prosecution proved its case on count I of uttering a false document to wit: Memorandum and Article of Association against the accused (respondent) beyond reasonable doubt. In the result grounds 1, 2 and 3 of appeal are allowed.

On ground 4 of appeal, Counsel for the appellant in his written submissions faulted the Trial Magistrate on her decision of acquittal of the respondent on count 2 of Trustee fraudulently disposing of Trust property Contrary to Section 322 (2) (d) of the Penal Code Act. In reply, Counsel for the respondent (accused) in his written submissions supported the judgment and decision of the Trial Magistrate.

On this point, the Trial Magistrate in her judgment at page 5, last paragraph held, that:-

“As regards the 2nd offence of a Trustee disposing of the property, I will point out that at the time the property was disposed of it was no longer in the hands of Trustees but rather in the company names with all the beneficiaries as directors of that Company. And the disposal was done by special resolution. This offence therefore cannot stand against the accused person and it is for that reason I find the accused not guilty on the 2nd count and accordingly acquit him of that offence as well.”

Underlining is mine for emphasis only.

In her judgment at page 4, the Trial Magistrate held that PW1's and other complainants' signatures in the Memorandum and Articles of Association for the said company, Ssenyonga and Family Limited were forged. In my instant judgment, hereinabove, I confirmed her finding and further held that the impugned document is a forgery. Thus, Ssenyonga and Family Limited was and is still a sham Company. Again, I have found that the impugned "Special Resolution" by the said company was, too, a forgery. Thus, the alleged transactions by the said company are tainted with fraud. From the evidence of both the prosecution and the defence, the respondent sold the disputed property on the basis of the company special Resolution which is a forged document.

In such circumstances as stated hereinabove, it is my finding that where a company is incorporated with forged documents, and it is used to defraud innocent persons, like the complainants in this case, then no Court of Justice can again validate any transfer of any property to such company which had been unlawfully formed. The law is that such veil of incorporation can no longer hold it has to be lifted, penetrated, and torn off, to see the people behind it and such persons under the veil of incorporation once exposed, like in this case the respondent has to be found personally liable. The Corporate personality cannot be used as a clock or mask. My findings in this regard are supported by the following cases: - Uganda –vs-Teddy Seezi Cheeye, HCT Criminal Case No.1254 of 2008, at pages 15-16 where Katutsi JBA, on fraud being proved against the accused person held that courts are prepared to piece the corporate veil to combat fraud. In that case the said Judge relied on the words of Lord Russel J in the case of Jones –vs- Lipman [1962] all ER 442. It can be ably deduced from the evidence on record and the law that the said company is the creative of the respondent and his lawyers, a device and a sham, a mask which the respondent held before his face to avoid reorganization by the eyes of equity. See also the cases of **Lubega Matovu-vs-Mukwano Investments Ltd, Miscellaneous application NO. 156 of 2012, and Salim Jamal and 2 others –vs- Uganda Oxygen Ltd and 2 other [1997] KALR 38**, in which it was held that a corporate personality cannot be used as a clock or mask.

From the authorities cited above, it is clear to me that once forgery/fraud is established the corporate veil must be lifted to see who is behind the said corporate veil. In this instant case the respondent was at all times behind such incorporation leading to fraudulent disposal of the trust property.

There is also evidence on record to show that the respondent and the complainants were raised up in that property in dispute by the mother of the complainants. Thus, the accused/respondent very well knew that the said property belonged to the mother of the complainants. And the way the respondent got involved in the formation of a sham company and to forge the Special resolution of the said company and personally got involved in the disposing of the property on behalf of the said sham company, clearly show that the respondent defrauded the complainants and their mother.

Wherefore from the entire evidence on record and the authorities cited in this judgment, plus my analysis and the re-evaluation of the evidence as a whole, I find that ground 4 of appeal has merit. It is accordingly allowed.

5. Conclusion

In closing, having found grounds 1, 2, 3 and 4 of appeal in the affirmative. I give a judgment in this appeal in favour of the appellant pursuant to Sections, 34 and 35 of the Criminal Procedure Code Act, Cap 116 of the following terms and orders:-

- a) The appeal is allowed.
- b) The Trial Magistrate's order of acquittal on Counts 1 and 2 of the accused/respondent are quashed and set aside.
- c) The respondent (accused) is found guilty on each count and convicted as charged on each count.
- d) The sale of plot 814 block 10, Bukesa the subject matter of the dispute in this appeal by Ssenyonga and Family Limited to one Alex Kigongo and who had not completed the transfer into his names, sold the said property to Hajji Musa

Katongole despite the caveats on the land Title are hereby nullified. The said transactions were null and void.

- e) Pursuant to Section 175 of the Registration of Titles Act, Cap.230 the Commissioner Land Registration is hereby directed to cancel the entries of Senyonga and Family Limited and Hajji Musa Katongole from the Certificate of Title for Plot 814 Block 10 Bukesa and from the Register Book.

The certificate of title should return to the names of Hajji Sulaiman Ssenyonga, within thirty (30) days from the date of judgment.

- f) Plot 814 block 10 Bukesa is property of the complainants and their mother, it being the Matrimonial home of their mother.

- g) The said certificate of title shall be handed to the complainants' mother to effect the necessary transfers into her names as the owner, within thirty (30) days from the date of this judgment.

Dated at Kampala this 12th day of November, 2015.

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Joseph Murangira

Judge.

Court:

The respondent's bail is hereby cancelled. The original file together with judgment is returned back to the trial Court to pass the appropriate sentences, on 16/11/2015 at 9:00 a.m.

I so order.

Dated at Kampala this 12th day of November, 2015.

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**Joseph Murangira
Judge.**

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CRIMINAL DIVISION

**CRIMINAL APPEAL NO.69 OF 2014 (Arising from Buganda Road Magistrates'
Court Holden at Mwanga II, Case No. 687 of 2010)**

UGANDA APPELLANT

VERSUS

MBAZIIRA FAROUK:..... RESPONDENT

REPRESENTATION

12/11/2015

Mr. Wanamama Mics Isaiah, Senior State Attorney for the appellant.

The respondent is in Court.

His lawyer George Spencer is absent.

Ms. Margaret Kakunguru the Clerk is in Court.

Court: Judgment is delivered to the parties in open Court.

Right of appeal is explained.

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**Joseph Murangira
Judge.**

12/11/2015.