

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 166 OF 1992

TEOPISTA MUGENZE PLAINTIFF

VERSUS

PASCAL BYRON MUGENZE}

M/S KYAMPENGERE COOPERATIVE SOCIETY}

CHIEF REGISTRAR OF TITLES} DEFENDANTS

BEFORE: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The plaintiff was the lawful wife of the first defendant. Following their separation in 1992 the first defendant sold their matrimonial home to the second defendant, which entity subsequently sold the same property to a one Edrisi Nsubuga, the registered proprietor thereof. The plaintiff instituted the present suit against the first and second defendants claiming an interest in numerous properties acquired during the subsistence of the marriage by virtue of her contribution to its purchase, as well as seeking cancellation of its present proprietorship or, in the alternative, recompense for her stake therein. The suit initially proceeded *ex parte* against both defendants but the resultant judgment dated 2nd April 2004 was subsequently set aside by the first defendant, hence the present proceedings.

The second defendant was not party to the application to set aside the *ex parte* judgment. Order 9 rule 27 of the Civil Procedure Rules (CPR) provides for the setting aside of any decree passed *ex parte* against a defendant. The rule provides as follows with regard to multiple defendants against whom a decree has been passed *ex parte*:

“Except that where the decree is of such a nature that it cannot be set aside as against such a defendant only, it may be set aside as against all or any of the other defendants also.”

In her ruling dated 3rd November 2011, my sister Lady Justice Tuhaise does appear to have set aside the *ex parte* judgment and decree in their entirety. Therefore, all orders against the second defendant were also set aside.

On the other hand, vide paragraph 2 and 3 of the amended plaint dated 17th June 1994 the plaintiff would appear to have abandoned her suit against the third defendant. Therefore, the third defendant was neither party to the *ex parte* proceedings and judgment nor, indeed, to the present proceedings. Conversely, the second defendant; though a party thereto, did not participate in the present *inter parte* proceedings. As stated earlier hereinabove, it did transpire that the second defendant had since sold the suit premises to a one Edrisi Nsubuga.

The subsisting parties framed the following issues:

1. Whether the suit properties were jointly acquired by the plaintiff and first defendant, thereby becoming matrimonial property.
2. Whether the plaintiff, as wife to the first defendant, is entitled to proceeds or a share in the suit/ matrimonial property.
3. Whether the removal of the caveats and the resultant sale of Buddu Block 278 plots 14, 16 and 17 to the second defendant was lawful.
4. Remedies available to the parties.

I propose to address issues 1 and 2 together.

Issues 1 & 2:

In a nutshell, it was the plaintiff's case vide her pleadings that some time in 1977 she pooled Ushs.70,000 with the first defendant's Ushs.30,000 to invest in the operation of a petrol station in Masaka. The plaintiff contends that it was out of the proceeds of the said business venture that she and the first defendant acquired numerous family properties. She thus sought declarations that she was a beneficial owner of the said properties; had a beneficial interest therein; and she and the first defendant jointly owned that property as tenants in common, the latter merely holding the matrimonial home in trust for her and her children. Conversely, the first defendant in his pleadings denied either pooling resources with the plaintiff for any business venture or acquiring the alleged property with contribution from the plaintiff; or, indeed, that she had any beneficial or other equitable interest in the said property. He specifically denied owning the matrimonial home jointly with or in trust for the plaintiff.

I must clarify from the onset that reference herein to suit property entails the titled properties at Kibubbu and Kijjabwemi, Masaka, which are described in paragraphs 4(h)(i), (ii) and (iv) of the plaint. The properties described in paragraph 4(h)(iii) and (v) are hereinafter referred to as household property and vehicles.

The circumstances under which the suit property was acquired were attested to by the plaintiff (PW1) and PW2, Abdu Seruga. PW1 testified that she ferried building materials for the construction of a family property in Kijjabwemi, Masaka; identified and negotiated the purchase of the property comprised in Block 278 plots 16 and 17 at Kibubbu, Masaka; and witnessed the sale agreements in respect of the property comprised in Block 278 plots 14, 16 and 17 at

Kibubbu, Masaka. The sale agreements in respect of plot 14, on the one hand, and plots 16 and 17 were admitted on the record as exhibits P1 and P2 respectively. Under cross examination PW1 conceded that she did not make a monetary contribution to the purchase of the property at Kijabwemi, but contended that she was the one that converted the said land into a leasehold; contributed Ushs.200,000 to the purchase of land at Kibubbu; and that she contributed Ushs. 70,000/= towards the purchase of the petrol station.

The plaintiff's evidence was materially corroborated by PW2. The witness testified that following the purchase by the plaintiff of a plot (kibanja) of land at Kibubbu, she was introduced to his family as her landlords; he later led her to his aunt who was the mailo owner of the said piece of land; represented his aunt in negotiations with the plaintiff for the purchase of his aunt's mailo interest in the said land, and witnessed the sale agreement by which the plaintiff purchased the said land. The witness identified his signature on Exhibit P1, a sale agreement in respect of land comprised in Block 278 plot 14 at Kibubbu. It was his evidence that the plaintiff supervised the construction of the matrimonial home thereon, tilled and lived on the said land with her children. Under cross examination, PW2 stated that the first defendant was never involved in the pre-sale negotiations or the execution of the sale agreement, but was represented at all times by the plaintiff. For the defence, the first defendant (DW1) categorically denied any monetary contribution by PW1 towards the purchase of any of the suit properties; he initially limited her contribution to domestic duties, but later conceded that the plaintiff had signed some sale agreements on his behalf. Under cross examination, however, the first defendant feigned ignorance about the 'Mugenze' who signed the agreements on his behalf.

It is quite apparent from the evidence that the suit property was solely acquired by the first defendant, while the plaintiff played a supportive role. This is borne out by the sale agreements and land titles in respect thereof. The sale agreements establish that the first defendant acquired the property at Kibubbu individually, while the plaintiff simply witnessed them. In the same vein, the land titles to the said properties do reflect the first defendant as having been the sole proprietor thereof prior to their subsequent sale. I do, therefore, find that the suit properties were not jointly acquired by the plaintiff and first defendant. I would add that, similarly, this court finds no evidence whatsoever of joint ownership of the said properties by the plaintiff and first defendant as tenants in common or at all. I so hold.

Be that as it may, it was the contention of the plaintiff that by virtue of her contribution to the acquisition of the suit properties, she was entitled to a share therein or proceeds therefrom. This court, however, does not find sufficient proof of her alleged monetary contribution. First, it was conceded by the plaintiff herself that she made no monetary contribution towards the purchase of the land comprised in LRV 1450 folio 4 plot M.38 at Kijjabwemi, Masaka; having only contributed her oversight during the ferrying of materials and construction of the house. Secondly, the only evidence on record with regard to the alleged monetary contribution is the plaintiff's singular, uncorroborated evidence that she contributed Ushs. 200,000/= towards the purchase of the properties at Kibubbu, and Ushs. 70,000/= towards the petrol station business

from which proceeds for the registration of the land were sourced. The first defendant categorically rebutted this evidence. In the absence of supportive evidence such as documents to shed more light on the authenticity of her monetary contribution, the veracity of the plaintiff's evidence remained in issue and the said evidence fell short on cogency. In my judgment, it does not satisfactorily discharge the onus of proof on her in this matter or tilt the balance of probabilities in her favour. I, therefore, find that the plaintiff has not proven her purported monetary contribution to the required standard. I so hold.

Nonetheless, the evidence on record does support a finding that the plaintiff did make a non-monetary contribution towards the acquisition of the suit properties. She attested to having identified and negotiated the purchase of the property comprised in Block 278 plots 16 and 17 at Kibubbu, Masaka, as well as witnessing the sale agreements in respect thereof on behalf of the first defendant. Her oral evidence was substantiated by her signature on the sale agreements in respect thereof. This evidence was not discredited by cross examination. In fact, under cross examination the plaintiff shed more light on her contribution towards the conversion of the land in Kijabwemi into a leasehold. As illustrated earlier in this judgment, the plaintiff's evidence was articulately corroborated by PW2. I am satisfied, therefore, that the plaintiff did make a non-monetary contribution to the acquisition of the said property.

The question would be whether such contribution *per se* would entitle her to proceeds therefrom or a stake therein. The plaintiff did seek declarations that she was a beneficial owner of the suit premises; had a beneficial interest therein; she and the first defendant jointly owned the suit property, the first defendant merely holding the said matrimonial home in trust for her and her children. The properties in issue were outlined in paragraph 4(h) of the plaint.

Black's law dictionary defines a beneficial owner as '***one recognised in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else.***' It seems to me that beneficial ownership is premised on the existence of an equitable interest in property. An equitable interest in land may be created by written instrument between parties or where parties enter into a legally recognized contract to convey or transfer a legal interest in land. In the case of **Lysaght vs. Edwards (1876) 2 Ch D 499 at 506** the creation of an equitable interest that passed beneficial ownership from a vendor to a purchaser was explained as follows:

"The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of the purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivery of possession." (*emphasis mine*)

The foregoing decision aptly illustrates the creation of an equitable interest in land by a contract for sale of land. On the other hand, an equitable interest could also be deduced from written instruments such as wills or applicable trust deeds. It would appear, then, that an equitable interest in land is rooted in parties' written intention to create such an interest, the sum effect of which is to pass legal title in land. In the instant case no such instrument was furnished before this court. Consequently, there is no proof whatsoever on record that the plaintiff had an equitable interest in the suit property. I, therefore, find that the plaintiff is not a beneficial owner to the suit premises. I so hold.

On the other hand, the term 'beneficial interest' is defined as the rights of a beneficiary in respect of property held in trust for him or her. See *Oxford dictionary of law, Oxford University Press, 2009, 7th Edition, p.58*. Conversely, a 'beneficiary' in the present context is defined as a person entitled to benefit from a trust or the holder of a beneficial interest in property of which a trustee holds the legal interest. See *Oxford dictionary of law (supra)*. Black's law dictionary defines a 'beneficiary' as '**a person for whose benefit property is held in trust.**'

It was the contention of the plaintiff that she had a beneficial interest in the suit premises. In general terms a trust is an arrangement in which property is held or managed by one person or entity for the benefit of another. Within the context of land transactions, a land trust would entail an agreement whereby a trustee agrees to hold ownership of a piece of land for the benefit of a beneficiary or indeed a trust relationship premised on an equitable interest in the suit premise as illustrated by *Lysaght vs. Edwards* (supra). Section 1(r) of the Trustees Act, Cap. 164 does also extend the definition of a trust to include circumstances where a trustee has a beneficial interest in the trust property. This seems to be the contention in the matter before me; the first defendant is purported to be a joint beneficiary with the plaintiff with regard to the suit properties.

It is trite law that for a trust to exist 3 certainties must be present: first, certainty of intention (there must be intention to create a trust); secondly, certainty of subject matter (the assets constituting the trust fund must be readily determinable), and thirdly, certainty of the objects (the people to whom the trustees are to owe a duty must be readily determinable). See *Knight vs. Knight (1840) 49 ER 58*. In that case Lord Langdale MR held:

“As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended or entreated or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust: first, if the words are so used, that upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.” (my emphasis)

In the matter before this court, no evidence was adduced as to any written instrument or statement that portrays an intention to create a trust; neither were the properties that would form the subject of such trust demarcated, or the beneficiaries thereof stated. The first defendant was not entrusted with the suit properties by another person or entity, but rather, the evidence indicates that he purchased them. It does follow that the first defendant did not hold the suit property in trust for the plaintiff or their children; the plaintiff was neither a beneficiary of the suit property, nor was she vested with a beneficial interest therein. I therefore find that the plaintiff is not entitled to a share of or proceeds from the sale of any of the suit properties. I do also find that save for general statements made in evidence, no attempt was made to prove the circumstances under which the household property and cars outlined in paragraph 4(h)(iii) and (v) were acquired. I so hold.

I now revert to a specific consideration of the claims made in respect of the matrimonial home. The matrimonial home in this case was the last known family residence, which was the property at Block 278 plot 14 Kibubbu, Masaka. It was pleaded in the plaint that the first defendant held the matrimonial home in trust for the plaintiff and her children. This court has disallowed this claim. In submissions it was argued for the plaintiff that where spouses pooled resources and acquired property during the subsistence of their marriage, such property became joint property and each spouse was entitled to a share therein regardless of the respective contributions of either spouse. Learned counsel cited the case of **Julius Rwabinumi vs. Hope Bahimbisomwe Supreme Court Civil Appeal 10 of 2009** in support of this argument.

The fact of legal marriage between the plaintiff and first defendant was conceded by both parties. So too was the fact that they had ceased to live together in 1992. It was pleaded in the first defendant's written statement of defence that there was a pending petition for the dissolution of the said marriage in Masaka Chief Magistrates Court. At the hearing of the present case no proof of formal grant of divorce was presented to this court; neither were the particulars or status of the alleged divorce cause provided. In fact, in their evidence neither the plaintiff nor the first defendant alluded to any such divorce having been granted. It would therefore appear to me that they are still legally married.

This court has carefully read the decision in **Julius Rwabinumi vs. Hope Bahimbisomwe** (supra). It pertains to an appeal arising from a divorce petition. Indeed, the remedies that the respondent sought from the trial court included a divorce order, child maintenance and, more significantly, a share of the property to which she had contributed. For present purposes, therefore, the decision therein relates to the proprietary rights of spouses upon dissolution of marriage. It does not, in my judgment, pertain to the proprietary rights of spouses within a subsisting marriage, as is the case presently. It would only be applicable to the present circumstances upon the grant of the divorce sought by the first defendant.

The 1995 Constitution and the Marriage Act, Cap. 251 are silent on property ownership and/ or distribution in so far as they relate to a subsisting marriage. Article 31(1)(b) of the Constitution

does provide in general terms for the rights of spouses in a marriage. For ease of reference the article is reproduced below:

“A man and woman are entitled to marry only if they are each at the age of 18 years and above and are entitled at that age to equal rights at and in marriage, during marriage, and at its dissolution.” (*emphasis mine*)

In **Julius Rwabinumi vs. Hope Bahimbisomwe** (supra) Kisaakye JSC espoused the provisions of article 31 as follows:

“The article prohibits the discrimination in treatment which the Constitutional Court struck down in the *Uganda Association of Women Lawyers vs. Attorney General, Constitutional Petition No.2 of 2003*, when it declared as unconstitutional several provisions in the Divorce Act relating to grounds of divorce, damages etc that treated men and women differently. Article 31(1) (b) of the Uganda Constitution (1995) guarantees equality in treatment of either the wife or the husband at divorce ...”

I do respectfully agree with the above position. I might add that the article does also guarantee equality in treatment of spouses during the subsistence of the marriage. For present purposes, it would seem to me that this constitutional provision simply underscores non-discrimination of either spouse in a marriage without necessarily prescribing equal ownership or division of property during the life span of the marriage. Thus the present plaintiff and first defendant would each have the right to own property (individually or jointly) before or during the subsistence of their marriage. However, they are not necessarily entitled as of right to own all property acquired in their marriage jointly and equally during the subsistence of the marriage, as this court understood the plaintiff’s claim to entail. Indeed, section 39(7) of the Land Act read together with section 38A(4)(a) of the same Act does appear to recognise sole (as opposed to joint) ownership of family land and/ or the matrimonial home by one spouse.

In the present case, section 39(1) (a) of the Land Act might have been applicable to the matrimonial home but for 2 issues. First, the provision for spousal consent was not in force at the time the matrimonial home was sold therefore there was, at the time, no statutory duty upon the first defendant to seek the plaintiff’s consent prior to the sale thereof. Secondly, the Land Act does not contain any provision for it to apply retrospectively. In the result, I find that the plaintiff is not entitled to a share of the suit properties or the proceeds from the sale thereof.

Issue 3:

Fraud was pleaded and particularised in paragraph 6 of the amended plaint. It is now well settled law that the courts may look beyond the fact of registration and impeach the indefeasibility of a registered proprietor’s interest on account of fraud by the transferee in the registration of land. See **David Sajjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985 (CA)**. Proof of

fraud that may invalidate the title of a registered purchaser for value, as is the case presently, must be brought home to the person whose registered title is impeached or to his agents. Fraud by his predecessors in title would not affect such a registered proprietor unless knowledge of it or notice thereof is brought home to him or his agents. See **Robert Lusweswe vs. Kasule & Another Civil Suit No. 1010 of 1983** (unreported) and **Assets Co. Ltd vs. Mere Roihi & Others (1905) AC 176 at 210**. For present purposes, therefore, the proof of fraud required of the plaintiff is two-pronged. First, she must prove fraud by the first defendant in the registration of his interest in the suit property, and also prove that the second defendant or its agents had knowledge of the said fraud; in the alternative, she would have to prove fraud by the second defendant or its agents in the registration of its interest in the sold property.

It is trite law that the standard of proof for fraud, while not as onerous as proof beyond reasonable doubt, should be slightly higher than a balance of probabilities. See **R. G. Patel vs. Lalji Makanji (1957) E.A 314**. This court has already pronounced itself on the authenticity of the first defendant's proprietary interest in the suit land. The plaintiff takes issue with the sale and transfer of the property comprised in Block 278 plots 14 and 16 at Kibubbu by the first defendant to the 2nd defendant. However, the plaint does not clearly demarcate the role of each defendant in the particulars of fraud. To compound matters the current registered proprietor of those premises is not a party to this suit. Nonetheless, the second defendant (the predecessor in title to the registered proprietor, Hajji Nsubuga) does state in paragraph 3 of its written statement of defence that it is a *bona fide* purchaser for value without notice of any defects in title. The allegations of fraud herein shall be determined on that premise.

Beyond the fact of the sale and transfer of the cited properties to the second defendant, this court has not seen any evidence in support of the allegation of fraud against the first defendant. The plaintiff testified that on 18th October 1991 vide instrument MSK 73960 she lodged caveats in respect of the property at Kibubbu, Masaka, but subsequently discovered that the said caveats had been removed without notice to her. The caveat was admitted in evidence as Exh. P4. The first defendant, on the other hand, confirmed that he did sell the said property to the second defendant but did not concede to having, in any way, participated in the registration of the second defendant on the title deed. It is quite possible that he sold the property with the caveat still registered on the title deeds, leaving the purchaser to sort out the issue of the caveat. Indeed, the caveat expressly prohibited registration of any person as transferee or proprietor; it did not prohibit a purported sale. The legality of the said sale was an issue before this court. This court has adjudged the first defendant to have been the sole proprietor of the suit premises duly registered as such. It does follow that he had legal authority to sell the said property; the registration of a transfer arising therefrom would be another matter. The effects of a non-registerable, unenforceable sale of land are quite debatable, hence the need for due diligence by vendors prior to purchase of land. Nonetheless, for present purposes, I find that the plaintiff has not proven any fraud by the first defendant. Accordingly, it is unnecessary to inquire into the question as to whether the second defendant was a *bona fide* purchaser for value because it did

not buy the property from a party that was registered through fraud or otherwise had any defect in title.

The question would be whether the second defendant or its agents were culpable for fraud in the registration of its interest in the sold property. The certificates of title that were admitted in evidence as Exhibit P3 clearly indicate that the plaintiff lodged a caveat in respect of the suit premises on 18th October 1991 vide instrument MSK 73960 but subsequently discovered that the said caveats had been removed on 23rd January 1992 vide instrument MSK 74241. No oral evidence was adduced by either party as to the circumstances under which the said caveat was removed, nor was this court availed with any evidence that would prove whether or not the plaintiff was notified of an application to vacate the caveat, as by law required.

A one Hajji Edrisi Nsubuga (DW2), did testify before this court as to the circumstances under which he purchased the sold properties from the second defendant. He attested to having seen the titles to the properties prior to purchasing the same and found the second defendant duly registered as proprietor thereof. An evaluation of this particular witness' evidence would be instructive. First, obviously the middle name of this witness differs from that by which the plaintiff knew the purchaser of the properties, whom she also claimed was the owner of the second defendant company. Nonetheless, given that DW2 did himself attest to having bought the suit land and does subscribe to the identity of Hajji Nsubuga, it would be reasonable to conclude on a balance of probabilities that Hajji Miiro Nsubuga alias Ganyana and Hajji Edrisi Nsubuga are one and the same person.

Throughout his evidence, however, DW2 made every effort to distance himself from the second defendant company. Under cross examination he repeatedly contradicted himself on the frequency of his dealings with the said company and how he got to know that the properties in issue were available for sale. He initially testified that he first went to the second defendant company to simply inquire into what the company traded in, but did not know any of the people there; then subsequently stated that the first time he went to the said company he had gone to greet some people he knew. In re-exam DW2 denied stating that he had gone to the company to greet people, asserting that he did not know these people well but was merely acquainted with them by virtue of their offices and had gone to them to inquire into the sale of the properties. Further, although under cross examination he had initially stated that he first went to the second defendant company to inquire into what they did and was on that occasion informed that they had land for sale; the witness shortly thereafter stated that he got to know of the properties for sale on his second visit to the company 3 years after the initial visit. The same witness then testified that he used to go to the company frequently given that he knew people there; but subsequently testified that he had only been to the company twice and did not know the people there well. This court did observe DW2 to have been a very evasive, untruthful and unreliable witness. I therefore attach very little credibility to his evidence, for what it was worth, with regard to whether or not the second defendant was party to fraud in its registration as proprietor to the sold properties.

Section 140 of the Registration of Titles Act (RTA) provides as follows on removal of caveats:

“(1) Upon the receipt of such caveat the registrar shall notify the receipt to the person against whose application to be registered as proprietor or, as the case may be, to the proprietor against whose title to deal with the estate or interest the caveat has been lodged; and that applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he or she thinks fit, summon the caveator to attend before the court to show cause why the caveat should not be removed; and the court may, upon proof that the caveator has been summoned, make such order in the premises either ex parte or otherwise, and as to costs as to it seems fit.

(2) Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement or by the registrar, every caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of sixty days after notice given to the caveator that the proprietor has applied for the removal of the caveat.”

Section 140(1) provides the court process entailed in the removal of caveats; while section 140(2) provides for the automatic lapse of a caveat upon the expiration of 60 days from the date the caveator is notified of the application for removal of caveat prescribed in subsection (1). In the present case, no evidence of the process prescribed in section 140(1) and (2) was furnished before this court. The onus to adduce such evidence lay with the party that would have court believe in its existence and stood to lose in the absence thereof. *See sections 102 and 103 of the Evidence Act.* In the absence of such evidence, it would be presumed that no such process was ever pursued by the 2nd defendant. In my judgment, therefore, such onus lay with the 2nd defendant; it was not discharged.

Fraud has been invariably defined to include dishonest dealing in land, sharp practice intended to deprive a person of an interest in land, or procuring the registration of a title in order to defeat an unregistered interest. See **Kampala District Land Board & Another vs National Housing & Construction Corporation Civil Appeal No. 2 of 2004 (SC)** and **Kampala Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007 (SC)**. In the present case the removal of the caveat lodged by the plaintiff with blatant disregard for prescribed legal process did smirk of dishonest dealing in land. I do therefore find that the registration of the 2nd defendant’s interest was tainted with fraud. The question, then, is whether this fraud is attributable to the second defendant or his agents.

The evidence on record is that the second defendant company was the beneficiary of the fraud underlying the removal of the caveat. It was registered on the title deed and subsequently transferred the same properties to Hajji Nsubuga. The sequence of events in that transaction was that the very same day that the caveat was removed (23rd January 1992), the second defendant

was registered as the proprietor of the properties. In fact, the said registration was effected by the very same instrument that vacated the caveat, instrument no. MSK 74241. It seems to me that the irregular removal of the caveat was not simply a case of an error or incompetence by land registry officials but, rather, a calculated, dishonest dealing in land most probably instigated by the second defendant for its fraudulent benefit. The said company thus was a party to the fraud. I am fortified in this conclusion by a similar approach adopted in the case of **Fam International Limited & another v Muhammed Hamid (Civil Appeal No.16 Of 1993)**. In that case, the registry of companies falsified critical records for the benefit of one of the parties. The trial judge did not find any acceptable explanation for the failure by a company registration official to follow the right procedure for the incorporation of companies. On appeal Odoki JSC (as he then was) held:

“In my judgment the Learned Judge properly evaluated the evidence regarding the issue of fraud and came to the correct conclusions. The evidence of fraud was mainly circumstantial and consisted of several pieces of evidence as identified by learned Counsel for the respondent. These irregularities which were discovered were not mere slips caused by incompetence in the Registry of Companies. No convincing reason was given why they occurred. The only reasonable conclusion to be reached is that they constituted a chain of actions and omissions calculated to commit a fraud The officials in the Registry of Companies could not have engaged in these fraudulent actions unless they had been approached by someone outside who stood to benefit by those actions. The person who stood to benefit was the second appellant In these circumstances, it cannot be maintained that the second appellant was not a party to the fraud, and that the act of a third party was merely imputed on him.”

In the same vein, it is most reasonable to conclude that the perpetrators of the irregularities identified in the present case undertook those fraudulent actions upon instigation by and for the benefit of the second defendant company. I find it most probable, therefore, that the said company was party to the fraud. I so hold.

Issue 4: Remedies

The remedies sought by the plaintiff were set out in paragraph 12(a) to (h) of the plaint. Given this court’s findings in respect of issues 1 and 2, the remedies sought in paragraphs 12(a), (b), (c), (d), (f) and (g) in so far as they pertain to the plaintiff’s unproven interest in the suit premises are hereby disallowed. It is to the remedies sought in paragraphs 12(e) and (h) that I now turn. For ease of reference, I reproduce the said paragraphs below.

“12(e) *An order of cancellation of the transfer and subsequent registration of the home into the names of the second defendant or any other person as purchaser, and in*

place thereof substitute the names of the plaintiff and the first defendant as tenants in common in equity.

12(h) *General damages, ancillary damages and/ or consequential reliefs in equity as the court may deem fit, just and equitable; plus the costs of this suit.”*

This court has pronounced itself on the absence of any interest in the suit premises in the plaintiff as per the laws then applicable to the facts of this case. Therefore her prayer for substitution on the title deeds as tenant in common with the first defendant is untenable. However, this court has found the second defendant party to fraud in the registration of his interest in the sold matrimonial home. I would not grant the prayer for cancellation of the said registration because the property has since been transferred to a third party, Hajji Nsubuga, who was never a party to this suit. For this court to condemn him unheard would go against the tenets of natural justice. I am, nonetheless, inclined to grant an award of exemplary or punitive damages against the second defendant for fraud.

In the final result, judgment is entered for the plaintiff against the second defendant with the following orders:

1. A declaration is hereby granted that the registration of the land comprised in Block 278 plot 14 and 16 at Kibubbu, Masaka by the second defendant was procured by fraud.
2. Exemplary damages in the sum of Ushs. 50,000,000/= are awarded against the second defendant to the plaintiff, payable at 8% interest per annum from the date hereof until payment in full.
3. General damages in the sums of Ushs. 20,000,000/= are awarded to the plaintiff as against the 2nd defendant, payable at 8% interest per annum from the date hereof until payment in full.
4. 65% costs of the suit are awarded to the first defendant as against the plaintiff, and 35% costs are awarded to the plaintiff as against the second defendant.

I so order.

Monica K. Mugenyi
JUDGE

16th April, 2014