

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

CIVIL SUIT NO. 432 OF 2005

NAMATOVU

.....

**MARGARET
PLAINTIFF**

VERSUS

1. TOM KAAYA

**2. STANLEY NDYABAHIKA
DEFENDANTS**

.....

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The plaintiff, Margaret Namatovu, was the registered proprietor of land comprised in Kibuga Block 8 plot 1196 at Namirembe, hereinafter referred to as the suit premises. Whereas she purports to have pledged the title deed in respect of the suit premises to the 1st defendant as security for a loan; the said defendant contends that he obtained the title deed to the suit property following his purchase of the said property from the plaintiff. The 1st defendant subsequently sold the suit premises to the 2nd defendant who, in turn, has since sold the same to a one Moses Seruwo. The plaintiff instituted the present proceedings against both defendants alleging fraud in the transfer of the suit property to both defendants. The 2nd defendant maintains that he was a *bonafide* purchaser for value with no notice of fraud. Pursuant to a scheduling conference held on 31st August 2009 both parties agreed to the following issues:

1. Whether the transaction between the plaintiff and the 1st defendant was a sale.
2. Whether the transfer of the suit property from the plaintiff to the 1st defendant was valid/ lawful.

3. Whether the transfer of the suit property to the 2nd defendant was valid/lawful.
4. Available remedies.

Issue No. 1 *Whether the transaction between the plaintiff and the 1st defendant was a sale.*

It was the 1st defendant's case both in his pleadings and oral evidence that he purchased the suit property from the plaintiff by virtue of a sale agreement dated 31st May 2004. He explained the circumstances under which the plaintiff approached him to sell her property, stating that she was introduced to him by a one Tony Kazibwe whom he referred to as a broker in the said sale transaction. The 1st defendant produced a sale agreement in support of his evidence, which agreement was admitted in evidence as exhibit D7. The witness denied his purported signature on exhibit P1 - a written 'commitment' allegedly endorsed by him whereby he undertook to submit the title to the suit premises to DFCU Bank if Ushs. 27,000,000/= was paid to him by the plaintiff. He testified that following a complaint of forgery by the plaintiff, his and the plaintiff's signatures were subjected to a hand writing expert and he was exonerated of forgery of the plaintiff's signature as depicted in the sale agreement. On the other hand, DW2 - a hand writing expert - narrated to this court his findings in respect of the signatures on the sale agreement and the alleged commitment wherein he had concluded that whereas there was evidence consistent with the plaintiff having been the author of the signature attributed to her in the sale agreement; there was no evidence that the 1st defendant was the author of the signature attributed to him in the 'commitment' to DFCU Bank, but he did author the signatures attributed to him in the sale agreement. DW2's report was admitted on the record as Exh. D7. In turn, DW3 - the 1st defendant's advocate, attested to having witnessed the signing of the sale agreement by the plaintiff and the 1st defendant.

Conversely, it was the plaintiff's contention that on 31st May 2004 the 1st defendant advanced her a loan of Ushs. 17,000,000/= payable in 2 months at 20% interest; whereupon she pledged the title deed to the suit premises and signed transfer forms as security for the loan, but subsequently discovered that the 1st defendant had fraudulently transferred the property to himself. The plaintiff's allegations were supported by her own oral

evidence, as well as that of a one Samuel Sserwanga (PW2), her spouse. In a nutshell, the plaintiff explained the circumstances under which she secured a loan from the 1st defendant; her attempts to process a loan from DFCU Bank to repay the said loan from the 1st defendant, as well as her discovery that the latter had transferred the suit property into his names prior to the expiry of the 2 month loan period. It was her evidence that the 1st defendant subsequently revoked his written 'commitment' to the Bank and sold the property to someone she subsequently discovered to have been a one Stanley Ndyabahika, who had been introduced to her previously as a loans officer with Diamond Trust Bank. Under cross examination the plaintiff attested to having previously endorsed a transfer form in favour of a one Christine Namusoke (Exh. D2) who subsequently re-transferred the property back to her vide Exh. D3. She did also confirm that the signature in exhibit P2 was hers. She attested to having submitted specimen signatures for purposes of the forgery investigation, and acknowledged the specimen signatures in Exh. D7 (lab report) as hers. She did also state that the contested signature in the sale agreement was similar to her specimen signatures but maintained that she did not endorse the said agreement. She contended that her purported signature thereon was forged. In the same vein, PW2 testified that upon being informed by the plaintiff that DFCU Bank was no longer willing to advance her a loan to repay the 1st defendant's loan, he got involved in trying to secure a loan from another financial institution and, in the process, discovered from the Land Office that the 1st defendant had transferred the suit property into his names before the expiry of the 2 month loan repayment period. The witness testified that a caveat that he lodged in respect of the property was subsequently removed without notice to the caveator. Under cross examination, the witness was referred to a transfer form purportedly bearing the plaintiff's signature and asserted that the signature on the said transfer form did not belong to the plaintiff. It was not clear from the record of the previous trial judge which particular transfer form was referred to. Suffice to note that 4 different transfer forms had, at the time, been admitted on the record - a transfer form dated 23rd October 2001 authorising the transfer of the suit land from its original owner, a one Aida Namaganda, to the plaintiff (exhibit D1); one dated 4th November 2002 authorising the transfer of the said land from the plaintiff to a one Christine Namukasa, the plaintiff's cousin (exhibit D2); another dated 10th May 2004 authorising the transfer of the land from the said Christine Namukasa back to the plaintiff (exhibit D3), and finally, one dated 20th July 2007 sanctioning the transfer of the suit land from the plaintiff to the 1st defendant. In the

premises, this court cannot draw any conclusions as to which of the transfer forms PW2 was referring to when he denied the authenticity of the plaintiff's signature therein or, indeed, whether the plaintiff had conceded the authenticity thereof in her evidence.

Be that as it may, this court has carefully scrutinised the documents referred to by the plaintiff in her evidence. She did acknowledge the authenticity of the signatures in exhibits P2, D2 and D7. Whereas the signature in exhibit P2 and the specimen signatures in exhibit D7 (which she acknowledged providing) are markedly similar; the signature in exhibit D2 is totally different from the other 2 conceded signatures. The signature attributed to the plaintiff in that exhibit (exhibit D2) is similar but slightly different from that similarly attributed to her in exhibit D1; while her signatures in exhibits P2 and D3 are relatively similar to the contested signature on the sale agreement under issue presently. It would appear, therefore, that the plaintiff had a minimum of 2 signatures. The question is whether the contested signature attributed to the plaintiff in the purported sale agreement was, indeed, one of her known signatures.

Section 43 of the Evidence Act underscores the relevance of handwriting experts' evidence when a court is required to make a finding on the identity of a handwriting. I do recognise that generally the testimony of an expert is likely to carry more weight and more readily relate to an ultimate issue than that of an ordinary witness. See **'Cross & Tapper on Evidence', Butterworths, 1995, 8th Edition, p.557.** Nonetheless, expert evidence is not necessarily conclusive on an issue under scrutiny. The evidential worth of expert evidence must be subjected to scrutiny before reliance upon it by courts. In the present case, learned counsel for the plaintiff did refer this court to **Sarkar's Law of Evidence, 17th Edition, 2010** on the evidential value of expert evidence. At p. 1258 the said literature reads:

"The infirmity of expert evidence consists in this that it is mostly matters of opinion and is based on facts detailed by others, or assumed facts and opinions against opinion; and experts are selected by parties by ascertaining previously that they will give an opinion favourable to the party calling them. Expert evidence is, however, of value in cases where courts have to deal with matters beyond the range of common knowledge and they could not get along without it, eg matters

of scientific knowledge_or when the facts have come within the personal observation of experts.”

The author then concludes:

“The evidence of an expert is not conclusive. It is for the courts to assess the weight of the evidence and come to its own conclusion. An expert is fallible like all other witnesses and the real value of his evidence lies in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or has been told by others. Therefore in cross-examining him it is advisable to get at the grounds on which he bases his opinion. There is great difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution; they are too often partisans - that is they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence. ... Their duty is merely to assist the court by calling its attention to, and explaining, matters the true significance of which would not be clear to persons who have received no scientific training, or have had no special experience in such matters.” (*emphasis mine*)

In the matter before this court, DW2 conceded in oral evidence that he did not personally observe the plaintiff providing her specimen signature. He affirmed as much when, in evidence in chief, he testified that he did not know who took the specimen signatures from the 2 parties. Under cross examination, the witness also confirmed that the documents forwarding the 2 parties' specimen signatures came from police and he did not know who paid for them. In re-examination DW2 stated that it was not the practice to have people provide specimen signatures in handwriting experts' presence as this would be cumbersome, and affirmed that they could not guarantee the authenticity of the specimen provided to them but trusted that the police had provided genuine specimen. It seems to me that conclusive conclusions as to the author of a questioned signature would depend largely on the authenticity of the specimen signature provided for comparison purposes. If such authenticity cannot be guaranteed, any purported conclusions would be inconclusive. Be that as it may, in the present case the plaintiff herself conceded to having submitted specimen signatures for purposes of the forgery investigation and acknowledged the authenticity of the specimen signatures in Exh. D7 (lab report). It is reasonable to

conclude, therefore, that DW2's conclusions in respect of the plaintiff were premised on authentic specimens.

That notwithstanding, I am cognisant of the need for caution before reliance on DW2's expert evidence. I do recognise that the evidential value of expert evidence lies in the logical inferences that experts draw from what they have personally observed, and courts rely on them to explain matters, the true significance of which would not otherwise be clear to persons that have received neither scientific training nor special experience therein. In the present case, this court did carefully scrutinise the specimen signatures attributed to the plaintiff and attached to DW2's report as Annex. B, as well as her contested signature in the sale agreement. Magnified versions of both sets of signatures were admitted on the record as exhibit D8(a). The magnified version presented a more graphic picture of the said signatures for comparative purposes. Even to my untrained, inexperienced eye the last numeral 't' therein did appear to vary significantly from the same letter in a signature attributed to the plaintiff at page 3 of the alleged sale agreement. Whereas the said letter curved quite significantly in the contested signature in the sale agreement, it did not curve at all in the specimen signatures provided. Curiously, despite his expertise in the subject, when asked about the apparent variation in the plaintiff's signature, DW2 oscillated between conceding that it was a significant variation and denial that it was not so significant. He did not make much attempt to explain his conclusion that the variation in the 2 sets of signatures was not significant. To compound matters, he did not, either in his report or in oral evidence, provide any logical inference upon which he premised his conclusion that the plaintiff was the author of the contested signature. He alluded to evidence consistent with this finding but did not substantiate that evidence either in his report or in oral evidence. The same witness attested to the possibility of different experts arriving at variant conclusions in respect of the same specimen samples although this was rare. In my judgment, therefore, DW2's report was not grounded in such logical, scientific deductions as would reasonably explain his deference for one conclusion over the other. This raises the inference of the report having been skewed in favour of the party that called him to testify in this matter, and thus greatly impeaches on its evidential value. I would, therefore, reject the expert evidence in this case in so far as it relates to the plaintiff's contested signature.

With regard to the 1st defendant's contested signature, DW2's conclusions were that there was no evidence that the 1st defendant was the author of the signature attributed to him in the 'commitment' to DFCU Bank but he did

author the signatures attributed to him in the sale agreement. Similarly, DW2 did not procure the specimen signature from the 1st defendant personally but relied on samples forwarded to him by police. This court has expressed its reservations on this *modus operandi*. As rightly conceded by DW2, the authenticity of the specimen signatures submitted to them under such an arrangement cannot be guaranteed. Be that as it may, in the present case the witness did identify his known signature as that depicted in the sale agreement, as well as exhibit P2, and it was completely different from the signature attributed to him in exhibit P1. I do, therefore, accept DW2's conclusions that the 1st defendant was not the author of exhibit P1, the commitment to DFCU Bank.

It would appear that in the absence of a loan agreement in proof of her allegations, the plaintiff had sought to rely on the alleged 'commitment', as well as exhibit P4 - a letter written by the Deputy RDC of Rubaga. Having found that the alleged 'commitment' was not signed by the 1st defendant, this court attaches no evidential value to the said document. Exhibit P4 does, however, remain in issue. It is a letter dated 28th June 2005 from the then Deputy RDC of Rubaga, a one Fred Bamwine, to the CID Headquarters forwarding the plaintiff's complaint against the 1st defendant's transfer of the suit property to himself. It contains a statement to the effect that the 1st defendant, while in the RDC's office, did acknowledge that the loan transaction attested to by the plaintiff. The statement in issue reads:

"However Kaaya while in my office revealed that it was true he had lent out money to Namatovu worth 17 m, but when time was about to lapse he merged the land title to his names using the transfer of ownership she had signed for the security of his money."

The 1st defendant sought to discredit the contents of exhibit P4. Under cross examination, when asked to narrate all the meetings he had ever had with the plaintiff after the transaction of 31st May 2004, the 1st defendant narrated 3 meetings as follows:

- i. Meeting at CID when the plaintiff reported him to police.
- ii. When Brigadier Kayanja purported to arrest him but the encounter turned into a meeting.
- iii. When he called into a radio station that had hosted the plaintiff.

Asked whether he had ever met the plaintiff in Mr. Bamwine's office, the witness responded in the negative. When referred to exhibit P4, he clarified that he had never met Mr. Bamwine in the latter's office as stated therein but had met him on 2 occasions. For her part, the plaintiff testified that she

reported the dispute between herself and the 1st defendant to Mr. Bamwine when the 1st defendant evicted her tenants from the suit property, and both of them were summoned to Mr. Bamwine's office, where the 1st defendant conceded that he had lent her money. On the other hand, DW4 testified that the tenants left the suit premises in December 2004. The sum effect of this evidence is that the plaintiff engaged the RDC in December 2004 when the 1st defendant reportedly evicted the tenants from the suit property. This evidence materially corroborates the contents of exhibit P4 in so far as it confirms that the plaintiff indeed approached the office of the RDC in December 2004 as stated in the first paragraph of exhibit P4. I therefore find no reason to disallow the plaintiff's evidence that the 1st defendant did, in fact, acknowledge the loan arrangement he had with her as stated in exhibit P4.

In comparison, the 1st defendant impressed this court as an evasive witness who, under cross examination, was not forthright in his answers, tending to only yield direct answers after repeated prodding. This did reflect in the untruthfulness of his evidence. For instance, whereas under cross examination the 1st defendant denied any dealings with the 2nd defendant beyond their banking relationship; the 2nd defendant did in evidence-in-chief testify that he had dealings with the 1st defendant and clarified that the latter run a transport business and he had 2 vehicles deployed alongside his vehicles. The 2nd defendant reiterated the same assertion under cross examination. Furthermore, whereas the 1st defendant denied forcefully evicting tenants from the suit premises, under cross examination DW3 testified that they were 'thrown out'. In the case of **Chesakit Matayo v Uganda Criminal Appeal No. 95 of 2004** (CA) the court upheld the principle advanced by my brother Rugadya J. who, citing the case of **Juma Ramadhan Vs Republic Crim. Appeal No. 1 of 1973** (unreported), found lies by the defence to be inconsistent with innocence. I do respectfully agree with that principle. I do also find that the same principle is applicable to matters of a civil nature in so far as such untruths are, more often than not, deliberate distortions and misrepresentations that are intended to mislead court and avert the course of justice. Consequently, I attach little weight to the 1st defendant's evidence. Similarly, this court observed DW3 to be an untruthful witness. I would agree with learned counsel for the plaintiff that this observation was best reflected in his demeanour and response to a question posed to him under cross examination as to whether he knew PW2. To this very simple question, DW3 was hesitant to respond, was not very forthcoming with his answer and tried to avoid providing a

direct answer. This raised questions as to the truthfulness of his answer to that question, and indeed the truthfulness of his entire testimony. In fact, this court did note the witness' reluctance to provide forthright answers throughout his testimony. This court also observed him to have been evasive with regard to his role in the transfer of the property to the 1st defendant. Whereas the 1st defendant had testified that DW3 handled everything to do with the said transfer, DW3 denied absolute responsibility for the said transfer and sought to apportion responsibility therefor to a clerk whom he then declared deceased.

Even if this court considered giving both DW1 and DW3 the benefit of the doubt, the overall circumstances of this case point to the contrary with regard to the alleged sale transaction. The circumstances in reference are that the 1st defendant supposedly purchased the suit property from the plaintiff for a consideration of Ushs. 17 million vide a formal sale agreement, but when he re-sold the same property to the 2nd defendant he was comfortable with a loose, 'gentleman's agreement for a consideration of Ushs. 85 million. As testified by the 2nd defendant, the latter sale transaction was only reduced into writing for purposes of enabling him (2nd defendant) secure a bank loan to pay an outstanding balance of Ushs. 50 million, having made a cash payment of Ushs. 35 million. Otherwise, it would appear the same gentleman that had been meticulous enough to reduce his sale transaction with the plaintiff into writing, was suddenly so careless that he was happy to leave the payment of consideration due to him to a loose, verbal arrangement. Having regard to all the evidence on this issue, I find it most improbable that the 1st defendant could have diligently taken trouble to engage his lawyers to reduce his purported sale transaction with the plaintiff into writing, then turned around to treat the subsequent sale involving more colossal sums of money so casually. In my judgment, this circumstantial evidence further buttresses the very real probability of the purported sale agreement having been a fabricated piece of evidence. In the result, I am unable to agree with the position advanced by the defence that the transaction under consideration was one of sale of land. I find that the said transaction was a money lending arrangement. I so hold.

Issue No. 2: *Whether the transfer of the suit property from the plaintiff to the 1st defendant was valid/ lawful.*

The plaintiff attested to having secured a loan from the 1st defendant on 31st May 2004 and was required to repay it within 2 months at 20% interest. She provided the title deed to the suit premises, as well as signed transfer forms as security for the said loan. In submissions, learned counsel for the plaintiff contended that the 1st defendant wrongfully transferred the suit property into his names prior to the expiration of the 2 months loan period, and the said transfer was void *ab initio* for lack of spousal consent. Conversely, it was argued for the defence that the 1st defendant was not a money lender and therefore could not have advanced any money to the plaintiff in furtherance of a loan; fraud in the transfer of the suit property to the 1st defendant had not been proved, and the question of spousal consent raised by Mr. Baingana had not been pleaded.

The term 'money lender' is defined in section 1(h) of the Moneylenders Act to include '**every person whose business is that of moneylending or who advertises or announces himself or herself or *holds himself or herself out in anyway as carrying on that business whether or not that person also possesses or earns property or money derived from other sources other than the lending of money and whether or not that person carries on the business as a principal or agent.***' In the present case, I am satisfied that the evidence on record established the 1st defendant as a person who, though not possessed of a moneylending license, nonetheless held himself out as carrying out the business of moneylending.

The terms of that money lending transaction were well articulated by the plaintiff. The specific term with regard to the 2-month loan repayment period was re-echoed by PW2. Both witnesses' evidence on this issue was not discredited by cross examination. On the contrary, the defence simply sought to build a case for the transaction having been a sale of land, the evidence in support of which has been found wanting by this court. I therefore find no reason to disallow the plaintiff's evidence with regard to the loan repayment period. I find that the plaintiff was required to repay the loan advanced to her within 2 months from 31st May 2004, which period would have expired on 31st July 2004. The documentary evidence on record, however, points to the 1st defendant's purported interest in the suit premises having been registered prior to the expiration of the 2-month period. The title deed to the suit premises (exhibit D4) indicates that the 1st defendant was registered as the proprietor of the suit premises on 22nd July 2004 vide instrument No. KLA262313. The question would be whether the absence of spousal consent would nullify the said transfer and, secondly,

whether there was any fraud underlying the said transfer, as this court understood learned counsel for the plaintiff to suggest.

On the issue of spousal consent, I do agree with learned counsel for the 1st defendant that this was not pleaded by the plaintiff. I do also find that the spousal relationship between the plaintiff and PW2 was not established before this court. No proof was furnished either of a statutory marriage or a customary marriage between them as by law required. The question of spousal consent therefore does not arise.

On the other hand, fraud in the transfer of the suit land to the 1st defendant was pleaded in paragraph 5 of the plaint. The particulars of fraud pleaded can be categorised as follows:

- i. Actions arising from the 'terms' of the money lending transaction.
- ii. Actions related to the transfer of the property to the 1st defendant and subsequently the 2nd defendant, well knowing the transaction between the plaintiff and the 1st defendant to have been a money lending arrangement.
- iii. Under-declaration of the consideration in the course of implementing the transfers to the 1st and 2nd defendants.
- iv. The forged sale agreement.

In the case of **Zaabwe vs Orient Bank & 5 Others Civil Appeal No. 4 of 2006** fraud was *inter alia* defined as 'a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or suppression of the truth and includes all surprise trick cunning, dissembling and any unfair way by which another is cheated.' It has also been defined to include dishonest dealing in land, or sharp practice intended to deprive a person of an interest in land. See **Kampala District Land Board & Anor vs National Housing & Construction Corporation Civil Appeal No. 2 of 2004** and **Kampala Land Board & Another vs. Venansio Babweyaka & Others Civil Appeal No. 2 of 2007**.

With regard to the first category of complaints outlined above, the plaintiff took issue with the 1st defendant for asking her to deposit her title deed and signed transfer forms as security for the loan without a formal loan agreement, and later purporting that the said transaction was a sale transaction; and secondly, she questioned the 1st defendant holding himself out to be a licensed moneylender whereas not. I note that from the

plaintiff's own evidence she testified that the reason the 1st defendant declined to execute a loan agreement with her was because he told her that he was not a licensed money lender. It is not true, therefore, that he held himself out as having a money lending license. He did however advance the plaintiff a loan of Ushs. 17 million in a typical money lending arrangement, that is, he demanded a land title and signed transfer forms as security for the loan. As observed by my brother Kiryabwire J. (as he then was) in the case of **George David Wakanyira vs. Ben Kavuya & Others Civil Suit 560 of 2006**, there is a trend in moneylending business today whereby borrowers are expected to secure monies lent by depositing land titles and signed transfer forms with the moneylender. Similarly in the present case, the terms dictated by the 1st defendant underscored his transaction with the plaintiff as a money lending transaction, his non-possession of a license notwithstanding. In his evidence, the 1st defendant attested to being engaged in other business activities, making no reference to money lending. However, section 1(h) of the Moneylenders Act addresses persons that are engaged in money lending alongside other business activities. They too are money lenders within the definition of the Act. The inference herein that the 1st defendant deliberately misled the plaintiff into depositing her title and signed transfer forms so as to gain unfair advantage over her with regard to the suit property goes to the issue of the mental element underlying the said defendant's action. This was not sufficiently proved before this court. I find that, far from being evidence of fraud *per se*, the terms of the money lending transaction between the plaintiff and 1st defendant establish the incidence of the said transaction. Be that as it may, however, the 1st defendant's transfer of the suit property to himself well knowing that the transaction between himself and the plaintiff was never a sale of land did amount to dishonest dealing in land that was intended to deprive the plaintiff of her proprietary interest in the suit land. This, therefore, established fraud on his part. His subsequent transfer of the same property to the 2nd defendant further perpetuates the said fraud. In the result, I find that the purported transfer of the suit property to the 1st defendant was unlawful, premised as it was on fraud.

In respect of the allegation of forgery, learned plaintiff counsel referred this court to the following decision in the case of **Chao & Others (Trading as Zung Fu Co.) vs British Traders & Shippers Ltd (N. V. Handelsmaatschappij J. Smits Import-Export Third Party) [1954] 1 All ER 779 at 787** as cited with approval by my brother Madrama J. in

Sheik Mawanda Abdu Jabbar Iddris & Another vs. Kobil Uganda Ltd
Civil Suit No. 350 of 2008:

“Counsel for the Plaintiffs relied on broad statements, in Kreditbank Cassel v Schenkers in particular, that a forged document is null and void. In that case Bankes LJ said ([1927] 1 KB 835):

‘To mere irregularities the principle of [Mahony v. East Holyford Mining Co.] no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void.’

But such general dicta must be related to the circumstances in which they are made. If someone forges the signature to a document, that document is wholly fictitious from beginning to end, and it is, of course, null and void as soon as forgery is proved, but I do not think that that is any authority for the view that any material alteration to a document destroys it and renders it null and void. ... I think the true view is that one must examine the nature of the alteration and see whether it goes to the whole or to the essence of the instrument, or not. If it does, and if the forgery corrupts the whole of the instrument or its very heart, then the instrument is destroyed, but if it corrupts merely a limb, then the instrument remains alive, though, no doubt, defective.”

I do agree with the principle enunciated in the **Chao & Others (Trading as Zung Fu Co.)** case (supra) that forgery of a signature, when proved, renders a document null and void. For purposes of proof of fraud as is in issue presently, the standard of proof required is proof to higher balance of probability. This court has pronounced itself on the evidence on record, on balance of probability, pointing to a money lending arrangement rather than a sale of land transaction. This decision was premised *inter alia* on the discredited expert evidence that failed to establish for a fact that the plaintiff signed the contested sale agreement. In the absence of cogent proof that the signature on the sale agreement was the plaintiff’s known signature, the signature thereon remained unexplained, disputed and unauthentic. It seems to me highly probable that the said signature was forged. I would, therefore, find that fraud in that regard has been established. I so hold.

Issue No. 3: *Whether the transfer of the suit property to the 2nd defendant was valid/ lawful.*

It was the case for the plaintiff that the transfer of the suit land to the 2nd defendant by the 1st defendant was tainted with fraud, and the 2nd defendant was knowledgeable about the alleged fraud. The particulars of fraud complained of were pleaded in paragraph 6(a) - (d) of the plaint and included the under-declaration of the property's value by both defendants; the purported transfer of the property by the 2nd defendant with full knowledge of the plaintiff's opposition to the earlier transfer to the 1st defendant, and the 2nd defendant's registration as proprietor of the said property in full knowledge that he had no interest therein. In proof thereof, the plaintiff testified that in 2004 she had been introduced to the 2nd defendant by the 1st defendant for purposes of securing a loan from Diamond Trust Bank where the former worked. It was argued for the plaintiff that this evidence was corroborated by DW1 (1st defendant) in so far as he admitted in his testimony to having known the 2nd defendant for 3 years as his banker. It was further argued that the 2 gentlemen's acquaintance with each other was further attested to by DW4 (2nd defendant) who acknowledged knowing the 1st defendant prior to the transaction.

Conversely, it was the 2nd defendant's case that he was a *bona fide* purchaser for value whose title could not be impeached. It was contended for the 2nd defendant that at the time he entered into dealings with the 1st defendant the latter was armed with a certificate of title duly registered in his names and there was no encumbrance registered thereon therefore he could not have been on notice of any fraud underlying the 1st defendant's interest in the suit property. Mr. Tusasirwe distanced his client from any purported meeting with the plaintiff for purposes of a loan, arguing that not only did the 2nd defendant deny any such meeting in his oral testimony; no evidence was adduced to prove that the plaintiff ever applied for a loan from Diamond Trust Bank. Learned counsel argued that mere business association with the 1st defendant or even friendship per se were insufficient reason to impute knowledge of fraud on the 2nd defendant's part. Furthermore, he absolved the 2nd defendant of the false information inserted in Exhibit P3 (transfer forms relating to his transfer), and maintained that the decision in **Samuel Kizito Mubiru vs. Byensiba & Another (1985) HCB 106** cited by learned plaintiff counsel was inapplicable to the present case given that the 2nd defendant did not

personally enter false information on the transfer forms as transpired therein.

I have carefully considered the evidence on record, as well as the arguments of either party on this issue. I quite agree with learned counsel for the 2nd defendant that his client's knowledge of, business association and friendship with the 1st defendant *per se* would not prove knowledge by him of fraud in the registration of the latter's interest in the suit property, or his being party to fraud. Such knowledge must be specifically proved to the required standard. I do also agree that the plaintiff's purported attempt to secure a loan from Diamond Trust Bank was not sufficiently proved. Save for her testimony, PW2 simply relayed to court what he had been told by the plaintiff. In any event, even if her introduction to the 2nd defendant by the 1st defendant had been proved, it would not necessarily prove to the required standard that the 2nd defendant knew of the proven fraud in registration of the 1st defendant's interest, or indeed was party to any fraud himself. It would simply establish a nexus between the 2 defendants. In my judgment, such nexus on its own, in the absence of more relevant evidence, would not establish that the 2nd defendant knew of, or was party to the fraud attributed to the 1st defendant in this case.

With regard to the transfer of the suit land to the 2nd defendant, however, there does not appear to be any dispute as to the incidence of anomalies in the transfer process. This, for instance, is borne out by the under-declaration of the consideration paid to the 1st defendant by the 2nd defendant, as well as the non-disclosure of obvious developments on the suit premises. The 2nd defendant attested to having paid a consideration of Ushs. 85,000,000/= for the purchase of the property but the transfer form in respect of that transaction (exhibit P3) reflects a consideration of Ushs. 7,000,000/=. The 2nd defendant sought to deny responsibility for that anomaly when he testified that the entire transfer process was handled by a one William Kibuuka, a land agent. Under cross examination the witness claimed that he had not seen the entry of Ushs. 7 million as consideration and, according to him, most likely the said figure had not been entered on the form when he signed the same. He explained that he signed a blank document and invited this court to observe the alleged difference in his handwriting and the handwriting that entered the consideration amount. It is apparent from the transcribed record that the witness was evasive and inconsistent at this point in his evidence. He sought to deny page 2 of the transfer form having been attached to page 1 when he signed the form, but subsequently 'remembered' that it was there but blank or un-filled.

Furthermore, he could not yield a satisfactory explanation for his omission to disclose on the transfer form the developments he had attested to having observed on the suit property. He simply claimed that he had never dealt in land before.

To begin with, I find it extremely dishonest and therefore fraudulent of the 2nd defendant to have omitted to disclose the developments he had personally observed on the land when he visited the suit property. His endorsement of 'nil' developments on the transfer form when the developments thereon had been personally observed by him cannot be explained any other way. Secondly, having been so invited by the 2nd defendant, this court observed no disparity in the handwriting that filled in the buyer and seller's details in exhibit P3 and that which inserted the false consideration therein. There appeared to be only 2 sets of signatures on the form in question. One of them, reflected in his known signatures therein, belonged to the 1st defendant. The second handwriting was responsible for all the other entries in that form. Given that the 2nd defendant conceded to having endorsed the said form, it is reasonable to conclude that the second handwriting belonged to him. Consequently, for him to claim that some parts of the form were filled in by a land agent further underscores this witness' dishonesty with regard to this transaction. In any event, the burden of proof with regard to the defence of bonafide purchaser for value without notice of fraud was upon him. See **David Sajjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985** (CA). However, he did not bother to produce a handwriting expert to explain to this court the so-called disparity in handwritings in exhibit P3, nor did he call the land agent whom he alleged to have undertaken the transfer process. It therefore cannot be said, as espoused by learned counsel for the 2nd defendant, that the case of **Samuel Kizito Mubiru vs. Byensiba & Another** (supra) is inapplicable to this matter. I find that the 2nd defendant was responsible for the false declarations in exhibit P3. In **Samuel Kizito Mubiru vs. Byensiba & Another** (supra) Karokora J. as he then was held:

“The mode of acquisition of the title deed in question was tainted by fraud and illegality because bonafide includes without fraud or without participation in wrongdoing. When the 2nd plaintiff inserted shs. 500,000/= the consideration for the land and factory when he had paid shs. 2.4 million for it the design was to defraud the government of its revenue by paying less stamp duty. ... The title procured by the 1st plaintiff was therefore void because of fraud.”

Similarly, I find that the transfer of the suit property to the 2nd defendant, tapered as it was with falsehoods, non-disclosures and blatant dishonesty, was tainted by fraud. The 2nd defendant was directly responsible for that fraud. I so hold.

Before I take leave of this issue I am constrained to comment briefly about statements in the 2nd defendant's submissions. With respect to learned counsel, this court does not share his views that adjudication of cases should be conducted at the behest of advocates. In my view, that is not the spirit or letter of section 98 of the Civil Procedure Act as buttressed by section 17(2)(a) and (b) of the Judicature Act (as amended). In this case, this court did rule that learned counsel's conduct did not merit further delay in the hearing of a matter that had already been before the judicial system for 9 years. That said, the question of the 2nd defendant's culpability herein has been arrived at on the basis of that party's own evidence as led and surmised by his esteemed advocate.

Issue No. 4: *Remedies available.*

Section 176 of the Registration of Titles Act (RTA) provides for the cancellation of a certificate of title obtained by fraud. However, in the present case the suit property was transferred to a third party who was not party to the present suit. He may well have been a genuine bonafide purchaser for value without notice or knowledge of the fraud that has been established herein. Natural justice dictates that he should not be condemned to loss of his property unheard. Nonetheless, the plaintiff is entitled to recompense for the fraudulent deprivation of her land, as well as utilisation thereof. I would, therefore, grant her prayer for general damages and mesne profits. Learned counsel for the plaintiff did draw this court's attention to the following dicta in **Obongo vs. Kisumu Council (1971) EA 91 at 96** as cited with approval in **Zaabwe vs Orient Bank & 5 Others** (supra):

"It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature."

The court then explained exemplary damages as follows:

“On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their objective is entirely punitive.”

The learned judge, Katureebe JSC, did also clarify the circumstances under which exemplary damages may be awarded, citing Spry VP in **Obongo vs. Kisumu Council** (supra) as follows:

“First, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.” (*emphasis mine*)

In the matter before this court, the defendants’ fraudulent conduct was calculated to procure benefits to them at the expense of the plaintiff. In my considered view, such conduct should not go unpunished. I am therefore inclined to make an award for exemplary damages. Finally, with respect, this court does not find sufficient proof to warrant grant of the plaintiff’s claim for special damages. In the final result, judgment is entered for the plaintiff with the following orders:

1. General damages are awarded in the sum of Ushs. 180,000,000/= payable jointly and severally by the defendants at 8% interest from the date hereof until payment in full.
2. Exemplary damages are awarded in the sum of Ushs. 50,000,000/= payable jointly and severally by the defendants at 8% interest from the date hereof until payment in full.
3. Mesne profits are awarded in the sum of Ushs. 30,000,000/= payable jointly and severally by the defendants.
4. Cost of the suit.

Monica K. Mugenyi
Judge

30th April 2014