THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 16 OF 2018

Coram: Mwondha, Buteera, Muhanguzi, Tuhaise & Chibita, JJ.SC

John Bwiza ..... Appellant

Versus

Patrick Yowasi Kadama ..... Respondent

(Appeal arising from the judgment of the Court of Appeal (Kakuru, Egonda-Ntende, JJA & Kasule, Ag. JA) in Civil Appeal No. 35 of 2011 delivered on 25th October 2018)

Judgment of Percy Night Tuhaise, JSC.

This is a second appeal following the dismissal of the appellant's suit by the High Court, and the dismissal of the subsequent appeal by the Court of Appeal.

The background to this appeal is that in 1986 the appellant, John Bwiza, as a sitting tenant of House No.14 of Leasehold Register, Volume 829, Folio 1, Block 15, Plot 268 at Nsambya Estate (the suit property), agreed to purchase the suit property from his landlord Patrick F. Kunya (now deceased) a husband to Sarah Kibuuka Kunya (also deceased), at Uganda shillings (UGX) 100,000,000/= (one hundred million). The appellant paid UGX 9,000,000/= (nine million) as the first installment to Patrick F. Kunya before the agreement was executed. In the said agreement, Patrick F. Kunya agreed to execute a Power of Attorney in favour of the appellant authorizing him to borrow money on security of the suit property in order to pay the balance of the

purchase price. Patrick F. Kunya also gave the appellant signed blank transfer forms.

Patrick F. Kunya died testate in 1991, naming his wife Sarah Kibuuka Kunya and Dr. Patrick Yowasi Kadama (the respondent) as executors of his will in which he bequeathed the suit property to his wife and daughters. After his death, Patrick Kunya's wife demanded for the balance of UGX 91,000,000/= (ninety one million) from the appellant. The appellant claimed to have paid off the entire purchase price of the suit property to the late Patrick Kunya. He produced signed copies of the transfer and application for consent to transfer, or sub-lease forms, before Sarah Kibuuka Kunya. On 25th August, 1992, Sarah Kibuuka Kunya lodged a caveat on the title of the suit property, which prevented the appellant from registering the suit property in his names. The appellant filed a suit by way of originating summons against Sarah Kibuuka Kunya, requiring her to show cause why the caveat should not be vacated.

Sarah Kibuuka Kunya passed away on 24th February 2005 during the pendency of the suit, and her name was substituted with that of Patrick Yowasi Kadama, who was a co-administrator with her, of the estate of the late Patrick F. Kunya. The appellant sought orders to have the caveat vacated, and to be registered as the rightful proprietor of the suit property. The learned trial Judge found in favour of the respondent, and accordingly dismissed the suit.

The appellant appealed to the Court of Appeal on the following grounds:-

1. *The learned Judge erred in law and fact in framing the issues as he did.*
2. *The learned Judge erred in law and fact in placing the burden of proof the way he did.*

3. *The learned Judge erred in law and fact in holding that, "in the circumstances, court has to agree with DW2 that the documents met his professional requirements satisfactorily".*
4. *The learned Judge erred in law and fact in holding that money paid to the deceased prior to 3rd November, 1986 was recorded in exhibit P7 as having been paid on 15th and 16th December greatly erodes the credibility in the genuineness of exhibit D7.*
5. *The learned Judge erred in law and fact in relying on what he called "the more fundamental question of why did the deceased leave the suit property bequeathed to DW1 and two of his daughters up till the date of this death on 3rd January 1991" and relying on it to decide against the appellant.*
6. *The learned Judge erred in law and fact in holding that DW3 should not have merely physically witnessed the payments without signing anywhere as a witness.*
7. *The learned Judge erred in law and fact in relying on the following "lastly, there is the question as to why the plaintiff had to wait for all those years until the death of the deceased in order to try to enforce his claim to the suit property" to decide against the appellant.*
8. *The learned Judge erred in law and fact in his evaluation of the evidence.*

The learned Justices of Appeal agreed with the findings of the learned trial Judge and found that he correctly framed the first issue the way he did; that he made a correct finding as to who bore the burden of proof; and that he properly and carefully evaluated all the evidence and arrived at the correct

conclusion. They accordingly dismissed the appeal on all the grounds of appeal.

The appellant lodged an appeal to this Court on the following grounds:-

1. **The learned Justices of Appeal erred in law in holding that the learned trial Judge correctly framed the issues.**
2. **The learned Justices of Appeal erred in law in holding that the learned trial Judge did not err in placing the burden of proof the way he did.**
3. **The learned Justices of Appeal erred in law in holding that;**
   (a) the appellant's evidence lacked sufficient corroboration and that the exhibits adduced by the appellant confirming receipt of money were forgeries.
   (b) in entirely agreeing with the findings of the learned trial Judge.
4. **The learned Justices of Appeal erred in law in holding that grounds 3, 4, 5, 6, 7 and 8 also fail.**

The appellant prayed that this Court allows this appeal and sets aside the decision of the Court of Appeal with costs in this Court and the courts below.

Representation

At the hearing of this appeal, the appellant was represented by learned Counsel Joseph Byamugisha, Senior Counsel, and learned Counsel Brian Othieno. The respondent was represented by learned Counsel Bamugye Ahmed. The parties filed written submissions.

Submissions for the Appellant

The appellant abandoned grounds 1 and 2 of the appeal. His Counsel submitted on only grounds 3 (a), (b) and 4. The respondent's Counsel replied on the same only as well.

On **ground 3(a),** Counsel for the appellant faulted the learned Justices of Appeal for finding that the appellant's evidence lacked corroboration. He referred this Court to the evidence of PW4 who testified that the discrepancies in the signatures were normal variance in a person's handwriting. Counsel submitted that this was a true and honest statement and should not have been brushed aside only for that reason. Regarding the first appellate court's brushing away PW3's not having signed on any of the exhibits, Counsel submitted that Section 58 of the Evidence Act provides that all facts, except contents of documents, may be proved by oral evidence. Counsel also cited Section 59 of the same Act which provides that oral evidence must, in all cases whatever, be direct, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it.

Counsel submitted that the evidence of PW3 that he was present when the appellant paid UGX 58,000,000/= (fifty eight million) to the deceased at his house at Nsambya around January 1987, was corroborated by the evidence of DW1 (Sarah Kunya) who testified regarding exhibit P1, a letter dated 14/7/87 (it should be 14/1/87), that it bore her husband's signature, and it mentions money paid below his signature as UGX 58,000,000/=. Counsel submitted that, in addition, PW3 did not claim that he was present when all the exhibits were prepared, nor is there any law that requires any witness to have signed on any of the documents he testifies about.

Counsel for the appellant submitted that two witnesses, one of them the defendant herself, corroborate the appellant's evidence that a sum of UGX 58,000,000/= was paid by the appellant towards the purchase of the house. He submitted that DW1 further corroborated the appellant's case in her testimony when she confirmed a letter dated 24th February 1987 as an original for receipt of UGX 1,650,000/=, referring to the house on Plot 4 at Nsambya. Counsel submitted that it was therefore wrong for the learned Justices of Appeal to hold that the exhibits adduced by the appellant confirming receipt of money were forgeries, as was explained in length by the handwriting expert. Counsel submitted that the learned Justices of Appeal were in error when they made the said finding because the evidence of DW1 shows that the said handwriting expert lied when he stated that exhibits P1 and P2 were forgeries.

Counsel further submitted that if the appellant paid a total of UGX 68,000,000/= out of UGX 100,000,000/=, why should he have failed to pay the balance? He contended that the appellant's evidence, and that of his witnesses, should have been accepted; and that the evidence of the defendant's handwriting expert was wrongfully and illegally accepted as the truth.

On **ground 3(b)**, Counsel for the appellant submitted that the defendant's admitting the genuineness of exhibit P1 and P2, which acknowledge receipt of a total UGX 59,660,000/= by the deceased, shows that the learned Justices of Appeal erred in holding that the documents the appellant relied on were forgeries. It also shows that the defendant's witnesses had told lies to court; and that the defendant was herself in fact a liar.

Counsel submitted that the learned Justices of Appeal erroneously relied on the speculation by the learned trial Judge who treated the fact that the deceased bequeathed the property he had sold to the appellant, to his wife and daughters, as a fundamental question when making the decision, yet it was not pleaded and was not an issue, nor was it put to the appellant at the trial.

Counsel submitted that the appellant was not accorded his right to a fair hearing under Article 28 of the Constitution. He cited the case of **Mukasa V Bakireke [2009] 2 EA 254 at 260** and submitted that the learned trial Judge was speculative and not impartial because he went out of his way to speculate against the appellant; that in his speculation the learned Judge was not evaluating any evidence. Counsel argued that the Court of Appeal overlooked more than an illegality but rather, an unconstitutionality and a breach of the appellant's right to a fair hearing by a High Court Judge. He contended that the Court of Appeal was in error on this point to hold that the learned trial Judge properly and correctly evaluated all the evidence and arrived at a correct conclusion.

On **ground 4**, Counsel for the appellant submitted that it was erroneous for the learned Justices of Appeal to find that grounds 3, 4, 5, 6, 7, and 8 of the appeal before them also fail. He highlighted the duties of the first appellate court and those of a second appellate court and cited the case of **The Executive Director, National Environment Management Authority (NEMA) V Solid State Limited, Supreme Court Civil Appeal No. 15 of 2015** (unreported), which cited with approval the case of **Kifamunte V Uganda [1999] 2 EA 127**.

Counsel maintained that the reliance by the learned Justices of Appeal on the trial Judge's decisions, which were based on speculation, was a violation of the appellant's constitutional right to a fair hearing, which renders the decision of the Court of Appeal illegal, unconstitutional, unfair, unjust, and a violation of the appellant's right to be heard. He submitted that the learned judge shut his eyes and mind to the appellant's evidence that he did not take steps to register the title in his names because the suit property had been mortgaged by Patrick F. Kunya who was still paying the money for the mortgage, which evidence is supported by the certificate of title to the land which shows it was mortgaged to Bank of Baroda (Uganda) Ltd.

He concluded that the learned trial Judge did not properly and correctly evaluate the evidence and the Court of Appeal erred in agreeing with him. Counsel proposed to this Court to allow the appeal and set aside the decision of the Court of Appeal with costs here and in the Court of Appeal.

Submissions for the Respondent

In reply, learned Counsel for the respondent submitted on **ground 3(a)** that the learned Justices of appeal dutifully, properly and ably re-evaluated and scrutinized the evidence of PW1, PW2, PW3 and PW4 prior to reaching their decision as they did by stating that despite PW1 testifying that he fully paid the purchase price and was witnessed by PW3, the said PW3 did not sign on any of the documents so executed, just like PW2 who claimed to have signed on the transfer documents which he never prepared.

Counsel submitted that the learned Justices of Appeal considered the fact that PW4, a handwriting expert had also confirmed or conceded to the existence of discrepancies in the signatures alleged to be that of the deceased, which all

pointed to non-payment of the full consideration by the appellant, despite PW4 contending during re-examination that the discrepancy was a normal variance. Counsel submitted that the learned Justices of Appeal specifically re-evaluated the evidence of PW4 at length and concluded that the appellant's evidence was unreliable in so far as it lacked sufficient corroboration.

Counsel also submitted that the learned Justices of Appeal re-evaluated the testimony of DW2 (John Patrick Mujuzi) the handwriting expert who emphatically testified that the questioned signatures were not written by the deceased; and the evidence of PW3 Andrew Sengooba who testified that he drafted the agreement but did not witness the appellant paying money, thereby showing that the exhibits presented by the appellant as confirmation of receipt of the money were forgeries.

Counsel submitted that it is overwhelmingly evident that the appellant's witnesses' evidence was never dismissed and/or brushed aside by the learned Justices of Appeal, but instead, was properly re-evaluated and found to be wanting and or insufficient, and court went ahead to provide reasons for believing and/or preferring the testimony of DW2, and not that of PW4, which they clearly stated on the record.

Regarding the evidence of PW3, Counsel submitted that Section 58 of the Evidence Act stipulates that all facts, except contents of documents, may be proved by oral evidence. He also submitted that Section 106 of the Evidence Act states that the burden of proof in civil proceedings rests upon the person with any fact within his or her knowledge and who desires court to give judgment as to any legal right or liability. He submitted that the authenticity of exhibit P7 furnished by the appellant as proof of having fully paid the

purchase price was a fact within the knowledge of the appellant and his witnesses, who all failed to prove the same in court.

Counsel submitted that while it is true that DW1 testified about the letter of 14/01/87 (exhibit P1) mentioning UGX 58,000,000/= being paid, the proof or confirmation of the alleged payment of UGX 58,000,000/= was by the said letter (exhibit P1) whose contents PW3, by virtue of not having signed on them, was incompetent to testify on the veracity of its contents. He argued that the learned Justices of Appeal were therefore justified in considering but not preferring the evidence of PW3 as having any corroborative value to that of PW1.

Counsel further submitted, without prejudice, that the proper evaluation of the evidence of DW1 at pages 115 and 116 of the record does not by any stretch of imagination confirm, admit to or corroborate payment of UGX 58,000,000/= as submitted by the appellant, especially when all the evidence as adduced in court is put into consideration. Counsel submitted that the appellant's submission that he had at least paid a total of UGX 68,000,000/= out of the UGX 100,000,000/= and could therefore not fail to pay the balance cannot be true, is flimsy, and lacks merit as it is not supported by any evidence on record, especially since the appellant's case was that he had fully paid the consideration.

Counsel concluded that the learned Justices of Appeal were right not to believe the evidence of the appellant and his witnesses due to its apparent inconsistencies and falsehoods, and to hold that the appellant's evidence was uncorroborated and all their documents were forgeries.

On **ground 3(b)** Counsel for the respondent submitted that it is not true that the learned Justices of Appeal mainly relied on the judgment based on the learned trial Judge's speculation, but they rather had regard to all circumstances of the case and properly re-appraised the evidence on record, prior to reaching their decision. Counsel referred this court to the first appellate court's findings that there are several facts and circumstances which if considered would lead to the conclusion that the documents purporting to show that the plaintiff paid the balance to the deceased are not genuine but were forgeries; and that all those factors and circumstances considered with the expert opinion of DW2 on the documents produced by the plaintiff, point to the inevitable conclusion that the plaintiff's claim that he paid off the balance of UGX 91,000,000/= in respect of the suit property is neither genuine nor credible.

Counsel submitted that the allegation that DW1 admitted to the genuineness of exhibit P1 and P2 that purported to acknowledge receipt of a total of UGX 59,000,000/=, was also wrong because the sum value of the respondent's evidence is to the effect that the signatures on the letters were not that of her husband albeit their resembling that of her husband; that this, considered together with the expert evidence of DW2 and PW4 who had both testified to having noticed discrepancies in the signature alleged to be that of the deceased, led to the Justices of the first appellate court concluding that they were forgeries and that the balance of UGX 91,000,000/= was never paid by the appellant as alleged. Counsel submitted that the learned trial Judge who had the opportunity of seeing all the witnesses' demeanour as they testified had observed that the question why money purportedly paid by the plaintiff to the deceased prior to 3rd November 1986 was recorded in exhibit P7 as

having been paid on 15th and 16th December 1986, which erodes the credibility of exhibit P7.

Counsel referred this Court to DW1's affidavit in support of the caveat and her testimony which show that DW1 only confirmed that her husband owned the suit property which they had decided to sell to the appellant as the sitting tenant, but who instead claimed to have bought the same from the deceased (Patrick F. Kunya). He submitted that the appellant's submission that DW1 admitted to her husband having sold the suit property is baseless and untenable as it is not supported by any evidence on record; and that DW1 and all her witnesses told no lies to court, which explains why her evidence was found to be truthful and that of her witnesses as credible and reliable, by both the trial Judge and the Justices of Appeal. Counsel invited this court to uphold the findings of the first appellate court.

Regarding the appellant's right to a fair hearing, Counsel submitted that the learned trial Judge, while resolving the main suit, framed new issues which in his wisdom would solve to finality the controversy between the appellant and the respondent, and by so doing, the question of why the deceased would bequeath the suit premises to his wife and daughters, if at all he had sold the same to the appellant also came to his mind (despite not forming an issue out of it) and he considered and determined it in light of the evidence before him, which was not a failure to accord a fair hearing to the appellant. Counsel also submitted that since the appellant abandoned the ground of appeal under which this issue was covered, he cannot be heard to submit on it; but that, be that as it may, the question was a sub-issue in the trial Judge's determination of the issue whether the plaintiff/appellant had in fact fully paid the balance of the consideration; that this was not being speculative and or a departure from

pleadings on the part of the learned trial Judge who addressed the same as a consequential issue.

On **ground 4**, learned Counsel for the respondent contended that since the allegation of unfair trial or hearing was not raised as a ground of appeal before the Court of Appeal or an issue raised and submitted on by the parties for consideration by court, the appellant cannot be seen to raise it in this appeal. He submitted that the authority of **Mukasa V Bakireke [2009] 2 EA 254** cited by appellant is distinguishable from the facts of this appeal. Counsel reiterated his submissions on ground 3(a), but added that the learned Justices of Appeal rightly carried out their duty of re-evaluating the evidence on record and arrived at the right inference that the appellant did not fully pay the outstanding consideration for the suit property, and that exhibit P7 which was tendered in evidence as proof of the appellant having paid fully was a forgery. He relied on the court decisions in **Odd Jobbs V Mubia [1970] EA 476, Oriental Insurance Brokers V Transocean (U) Ltd SCCA No. 55 of 1995**, and **Hwan Sung Industries Ltd V Tajdin Hussein & 2 Others SCCA No. 08 of 2008**, to the effect that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter, in order to arrive at a correct decision in the case and to finally determine the controversy between the parties.

Counsel submitted that the record in the instant appeal shows that all the parties led evidence orally and their counsel addressed court on all the issues raised in the pleadings and by court during the hearing. He contended that the learned Justices of Appeal had the record of appeal which included the record of proceedings from the High Court regarding all transactions that led to the sale of the suit property. He submitted that although the questions as raised

by the learned trial Judge and upheld by the Justices of Appeal were not specifically pleaded by the respondent, the same naturally flowed from the evidence adduced in court and, as it appears on record, were consequential findings got from the evidence as a whole, and the learned Justices of Appeal did not err at all in holding as they did.

Counsel prayed this Court to dismiss the appeal with costs, issue an eviction order against the appellant, order the appellant to pay *mesne* profits to the respondents for the period he occupied the respondent's house without paying rent, and to uphold the judgments in the lower courts.

Submissions in Rejoinder for the Appellant

Counsel for the appellant submitted **in rejoinder** to the respondent's submissions, that, contrary to the respondent's submissions, not only was DW1 very explicit in her admission to the receipt of the two payments by her husband, she also very clearly acknowledges that her husband received UGX 1,650,000/= and signed for it. He submitted that DW1 did not retract what she had said in cross-examination that in the two letters, her husband signed for the receipt of the respective sums of UGX 1,650,000/= and UGX 58,000,000/=. He contended that DW1 corroborated the appellant's evidence when she admitted the veracity of the two exhibits and her husband's receipt of UGX 59,650,000/= shown on the exhibits; that this demonstrated that the courts below were wrong in holding that all the exhibits produced by the appellant were forgeries.

Regarding the respondent's submissions that the question of unfair trial was not raised as a ground of appeal, the appellant's counsel submitted that grounds 5 and 7 of the memorandum of appeal in the Court of Appeal are the

substance of the unfair trial. He submitted that no evidence was led and no submissions were made to the trial Judge on the unpleaded issues.

The appellant's Counsel further submitted that the reliefs sought by the respondent, that is, an eviction order and payment of *mesne* profits to the respondents for the period the appellant has occupied the respondent's house without paying rent, were not prayed for in the High Court and the said court could not therefore, and did not even consider and decide on them. Counsel submitted that the High Court denied the reliefs sought by the plaintiff and dismissed the suit with costs. He argued that since there was no counterclaim filed by the defendant, no relief could be given to the defendant. He also submitted that there was no cross appeal, and that, therefore, the respondent's prayers are an abuse of court process.

Resolution of the appeal.

This being a second appeal, this Court is not required to re-evaluate the findings of fact of the trial court, unless the first appellate court failed to do so, even if it would not have itself come to the same conclusion. This Court will only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. On a second appeal, it is sufficient to decide whether the first appellate court, in approaching its task, applied or failed to apply such principles. See **The Executive Director National Environment Management Authority (NEMA) V Solid State Limited SCCA No. 15 of 2015.**

The grounds of appeal for resolution by this Court are ground 3(a), 3(b) and 4, the appellant having abandoned grounds 1 and 2 of his appeal. I will address them in the order in which they were argued by both counsel.

Ground 3(a)

The appellant's argument under this ground of appeal is that the evidence he presented at trial was corroborated, and that the exhibits he presented confirming the vendor's receipt of money towards the appellant's purchase of the suit property were not forgeries. According to the appellant, his evidence should not have been disregarded by the trial court and the first appellate court.

I will address the submissions of the appellant alongside the evidence on record to enable me ascertain whether or not the learned Justices of Appeal re-evaluated the findings of fact of the trial court, and or correctly applied the relevant principles before they reached their decision or conclusions.

The appellant submitted that DW1 in her testimony corroborated the testimony of PW3 whose evidence was that he witnessed the appellant pay the UGX 58,000,000/= to the deceased. PW3 testified during cross examination that he witnessed the payment but never signed anywhere. The alleged acknowledgement of receipt of UGX 58,000,000/= from the appellant by the deceased is handwritten, at the end of a letter (also handwritten) written by the deceased to the appellant on 14th January 1987 (the date 14/7/87 in the record of appeal was clearly an error). The handwritten acknowledgement of payment, purportedly written and signed by the deceased, is dated 15th January 1987. The letter, on which the acknowledgement was also written, was admitted in evidence as exhibit P1.

There is nothing on exhibit P1 to show that PW3 Christopher Kahigi witnessed the payment of UGX 58,000,000/= as he claimed in his testimony. It beats all understanding as to why PW3 would witness the payment of such a

huge sum of money but fail to indicate on the same document that he witnessed the transaction by signing or thumb printing on the document on which the acknowledgement of payment was written and signed.

The appellant argues that the evidence of PW3 should not have been rejected by the lower courts since Sections 58 and 59 of the Evidence Act provide that all facts except contents of documents may be proved by oral evidence which must be direct in all cases. This argument is, in my considered opinion, misconceived. Section 58 of the Evidence Act, which the appellant's Counsel cited, specifically states that contents of documents may not be proved by oral evidence. This, in my opinion, would infer that PW3, by virtue of not having signed on the document (exhibit P1) was incompetent to testify on the veracity of its contents. In that respect, the learned Justices of Appeal were justified in taking the evidence of PW3 as not having any corroborative value to that of the appellant (PW1).

The appellant also submitted that the evidence of the defendant (DW1) corroborated the appellant's case when, on being shown exhibit P1, agreed with the appellant on the payment of UGX 58,000,000/= towards the purchase of the suit property. He argued that the learned Justices of Appeal erred to hold that the plaintiff's evidence lacked corroboration.

The record of appeal shows at page 114 that DW1 while being cross examined in reference to exhibit P1, stated as follows:-

> *"The letter dated 14/7/87 bears my husband's signature. It mentions money paid below his signature it is indicated 58 million.* ***The costing of the money is not in his handwriting at all. The counter signature***

resembles my husband. The main body of the letter is my husband's handwriting." (emphasis mine).

Regarding exhibit P2, the testimony of DW1 during cross examination on page 115 of the record of appeal was that:-

> *"Yes this is the original of that letter the date 24th February 1987. It is written by my husband and signed by him. The body of the letter looked like his handwriting...."*

In re-examination, on page 116 of the record, DW1 stated as follows regarding exhibits P1 and P2:-

> *"Yes I was shown 2 letter (sic) one dated 24/7/87 and the bottom was written by my husband for 1,650,000/= acknowledge receipt at the side 1,650,000/= the other letter is signed by my husband 8 million shillings.* ***That is not his handwriting.***" (emphasis mine).

On careful perusal of exhibit P1 and the quoted testimony of DW1, I agree with the respondent's submissions that this evidence does not, by any stretch of imagination, confirm, admit to, or corroborate payment of UGX 58,000,000/= as the appellant invites this Court to believe. First it has to be appreciated that the purported acknowledgement of payment (dated 15/1/87) of the said money was written on a letter earlier written by the deceased (on 14/1/87) to the appellant. This would explain why DW1, who was the deceased's wife, confirmed that the main body of the letter is in her husband's handwriting and that it bears her husband's signature. She was referring to the deceased's letter dated 14/1/87 addressed to the appellant. In the same testimony however, when referring to the so called acknowledgement of payment of UGX 58,000,000/= which was written below

his signature on the same letter, she stated that the costing of the money paid below her husband's signature was not in his handwriting at all, and that the counter signature "resembles" her husband's. This was far from agreeing that the acknowledgement was written or signed by her husband (deceased), or far from corroborating the appellant's evidence.

Regarding exhibit P2, the gist of DW1's testimony, just like was the case for exhibit P1, is that while the main body of the letters were written by her husband, the acknowledgements, which were written on the same letter, purportedly a day after, were not in her husband's handwriting or signature. Again this cannot be an agreement on the part of DW1 that her husband acknowledged payment as the appellant would want this Court to believe.

Regarding exhibit P3, DW1 stated in cross examination that:-

> *'Another letter the date is 27th February, 1987, It is addressed to Mr. Kunya. The body resembles Mr. Kunya's handwriting....That letter seems not to be my husband's signature. The body is not his...."*

The appellant also relied on exhibit P7, an exercise book with a number of entries or recordings showing that the deceased received the full purchase price for the suit property in instalments.

The evidence of DW1 is that she saw exhibit P7 for the first time when she was served with the Originating Summons. She described the writings in exhibit P7 as unusual. There is evidence on record showing that the appellant never showed exhibit P7 to DW1 on two previous occasions when they met after the death of Patrick F. Kunya. On the first occasion the appellant claimed to have paid the full purchase price. On the second occasion, the appellant only produced to DW1 photocopies of signed transfer forms and the three

letters written by Patrick F. Kunya (exhibits D8, D9 and D10) to justify his claim that he had paid off the purchase price in respect of the suit property. Exhibit P7 was produced by the appellant much later to challenge the caveat lodged by DW1 to stop the appellant from transferring the suit property into his names.

The recordings in exhibit P7 (also exhibit D14) included recordings or entries of UGX 8,000,000/= and UGX 1,000,000/= on the dates 15th December 1986 and 16th December 1986, yet, as shown by exhibits D2A and D2B, Patrick Kunya had already acknowledged having received the said money by 3rd November 1986. So, the recording in exhibit P7 about the date of the said two payments is false. The appellant's evidence is that the said payments were effected in the chambers of DW3, yet DW3 the Advocate who prepared the memorandum of sale testified that no money was ever paid in his chambers. The appellant's testimony that UGX 9,000,000/= was a loan to Patrick F. Kunya is not supported by any other evidence. The signatures the appellant claims belong to Patrick F. Kunya were superimposed on other writings, and the payments recorded far exceeded the purchase price.

The report (exhibit D13) of DW2 the handwriting expert stated that a comparison of the signatures on exhibit P7 and the specimen signatures of the deceased revealed differences in letter design, letter proportion, size and writing habits. The most outstanding difference was the design and the positioning of letter "F" in the signature. DW2 in his expert opinion concluded that the signature in exhibit P7 was written by a person who tried to copy or imitate the signature of Mr. Patrick F. Kunya. PW4, another handwriting expert also agreed that there were variations in the deceased's specimen signatures and those in exhibits P1 to P7 especially the design and positioning

of the letter "F" although his expert opinion was that it is normal. A careful analysis of all this evidence, alongside all other adduced evidence, would make it very difficult to believe the genuineness of exhibit P7.

Throughout her testimony DW1 was very positive about the handwritings and signatures which were in the letters written by the deceased to the appellant, but she clearly testified that the respective handwritings regarding the acknowledgements of payments were not in her husband's handwriting, and that the counter signatures on the acknowledgments, though they were written on the same documents, resembled that of her deceased husband. This is not the same as agreeing that the deceased acknowledged the payments indicated in exhibits P1 and P2, as the appellant would want this Court to believe. The responses of DW1 that the signatures in the said exhibits resemble those of her husband is rather a pointer to the truthfulness of the witness, since forgeries always aim at making similar handwritings or signatures.

The evidence of DW1 is corroborated by the expert evidence of PW4 and DW2 that there were variations in the handwritings and signatures appearing in the letters written by the deceased to the appellant, and the purported acknowledgements which were written and signed on the same letters. The bone of contention, however, is that, while PW4 interpreted the variations between Patrick Kunya's specimen signatures and those in exhibits P1, P2 and P7 as normal, and accordingly gave an opinion that this must have been written by the deceased, DW2's expert opinion was that they were not written by the same person, and that the deceased's signatures were forged.

A court does not ordinarily subject its own opinion to that of experts. However, with the help of experts, it must form its own opinion on the subject matter. Thus, before acting on such expert evidence, it is precautionary to see whether it is corroborated either by direct or circumstantial evidence.

Section 45 of the Evidence Act Cap 6 provides that when the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed by that person is a relevant fact.

It is explained in the same section 45 that a person is said to be acquainted with the handwriting of another person when he or she has seen that person write, or when she or he has received documents purported to be written by that person in answer to documents written by himself or herself or under his or her authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him or her.

DW1 was the wife of the deceased and they had been married for many years. She must have been well versed with the deceased's signature and handwriting. The evidence of DW1 and DW2, when considered together with other adduced evidence on record suggests that the exhibits presented to the trial court by the appellant to show that he paid the balance of UGX 91,000,000/= towards the purchase of the suit property are not genuine.

The record shows that the first appellate court re-evaluated the appellant's testimony that he paid all the money he owed to the deceased in instalments and that it was fully acknowledged by the deceased in an exercise book (exhibit P7). They also re-evaluated the testimony of PW3 Christopher Kahigi,

who is said to have witnessed the said payments, but who did not sign on any of the documents as a witness; and the testimony of PW2 Paul Byaruhanga which was to the effect that he signed on the transfer form which was not prepared by him. The first appellate court re-evaluated at length the testimony of PW4, a handwriting expert who testified that there were variations in the deceased's signatures in exhibits P1 and P2, but that these were normal and of no remarkable importance.

After re-evaluating the foregoing evidence, the learned Justices of Appeal noted that it lacked sufficient corroboration. They, on the other hand, on re-evaluating the evidence of DW1 which was that the appellant, who had paid only UGX 9,000,000/= (nine million) to the deceased towards the purchase price of the suit property, did not show DW1 any proof of payment other than a photocopy of the transfer form, application for consent to transfer, and three letters purported to have been written by the deceased when first confronted by DW1. DW1 contested exhibits P1, P2 and P7 which were indicating receipt of the money by Patrick Frederick Kunya (deceased) who was her husband.

DW2 a handwriting expert corroborated the evidence of DW1 that the writer of the signatures found on exhibits D2, D4, A, A3 and K4 was not the same person who wrote the signatures appearing on annexure B. The learned Justices of Appeal went at great length to re-evaluate the testimony of DW2 explaining the variations in signatures, alongside those of PW4 who also gave evidence that there were variations in the deceased's signatures but who explained them away as normal.

The learned Justices of Appeal, after re-evaluating the plaintiff's as well as the defendant's evidence, agreed with the findings of the learned trial Judge that

the evidence of DW1 that exhibits presented to the trial court confirming receipt of the balance were forgeries. They thus gave reasons as to why they believed the evidence of the defendant as opposed to that of the plaintiff. I have no reason to fault or depart from the concurrent findings of the lower courts.

Thus, based on my analysis above, it is my conclusion that the learned Justices of Appeal were justified in not believing the evidence of the appellant and that of his witnesses, and for finding that such evidence was not corroborated, and for holding, in agreement with the trial court, that the documents presented by the appellant to prove his case were forgeries.

Ground 3(b)

The appellant faulted the learned Justices of Appeal for agreeing with the learned trial Judge's finding that DW1 as the wife of the deceased was well acquainted with his signature. He argued that admitting the genuineness of exhibits P1 and P2 by DW1 shows that the learned Justices of Appeal erred in holding that the documents the appellant relied on were forgeries. I have, in ground 3(a) above, already rejected the appellant's contentions that DW1 admitted the genuineness of exhibits P1 and P2. The said contentions are baseless and are not supported by any evidence on record. With respect, I therefore do not agree with the appellant's submissions that DW1 and her witnesses are liars. The learned Justices of Appeal, in my considered opinion, correctly re-evaluated the evidence adduced at trial and correctly applied the relevant laws and principles when they confirmed the findings of the learned trial Judge that DW1 and her witnesses were truthful and their evidence was reliable.

The appellant also faulted the learned Justices of Appeal for agreeing with the learned trial Judge based on pure speculation on matters that were not pleaded or formulated as issues. He contended that the statements by the learned trial Judge on page 269, lines 15 to 25 of the record were purely speculative and a departure from the pleadings, yet the learned trial Judge treated them as fundamental to his decision, and the learned Justices of Appeal erroneously agreed with it. He submitted that he was not accorded a fair hearing because this position was not put to the appellant before the Judge considered it as fundamental to his decision.

The statements of the learned trial Judge faulted by the appellant at page 269 of the record read as follows:-

> *"There is the more fundamental question of why did the deceased leave the suit property bequeathed to DW1, and two of his daughters up till the date of his death on 3rd January 1991, if he had sold the property to the plaintiff over four years prior to his death? It does not require simple common sense to see that, the deceased, who does not appear to have been a man of simple caliber, and who had enough time to reflect upon his will, would have prepared a codicil to remove the distribution of the suit property through his will if it had been genuinely sold and fully paid for by the plaintiff. That factor too weighs heavily against the claim by the plaintiff."*

The record shows on pages 268 onwards that the learned trial Judge preferred to take the expert opinion of DW2 rather than that of PW4. He proceeded to give several reasons for the position he took, the first being that DW2's expert opinion was corroborated by the evidence of DW1 who, being

the deceased's wife, was well acquainted with his handwriting and signature. Then he addressed several facts and circumstances, which if considered, would lead to the conclusion that the documents purporting to show that the plaintiff paid the balance to the deceased are not genuine but were forgeries. He posed a number of questions, including the question why the deceased left the suit property bequeathed to his wife and two daughters up to the time of his death. The questions were presented as mind boggling questions, and were not issues as such. There is nothing on record to suggest or show that the learned trial Judge relied on the questions he posed to make his decision. The record shows rather that he made his findings based on the evidence adduced by DW1 that the appellant did not pay the balance of the purchase price of the suit property, and after evaluating the appellant's evidence and finding that it lacked corroboration and his documents were forged.

The claims by the appellant that the question posed by the learned trial Judge was a breach of the appellant's right to a fair hearing, are, in my considered opinion, too far-fetched and untenable. They may be attempts to smuggle a ground of appeal in this appeal which was not initially raised before the first appellate court, nor was it framed as an issue or submitted on for consideration.

Ground 4

The appellant faulted the learned Justices of Appeal for holding that grounds 3, 4, 5, 6, 7 and 8 also fail.

The grounds which were dismissed by the learned Justices of Appeal, are set out above. The gist of these grounds was that the learned trial Judge failed to properly evaluate the evidence.

I have carefully perused the judgement of the learned trial Judge and that of the learned Justices of Appeal. The issue at trial was to establish whether the appellant paid the balance of the purchase price of the property. The first appellate court found that the learned trial Judge properly evaluated all the evidence and arrived at the correct conclusion, as a result of which ground 3, 4, 5, 6, 7 and 8 failed.

It is already my finding in grounds 3(a) and 3(b) above that the learned Justices of Appeal rightly and carefully re-evaluated all the evidence on record, applied the correct principles, before arriving at the correct decision that the appellant did not fully pay the purchase price for the suit property, and that the exhibits he tendered to the trial court to prove that he paid the balance of the purchase price were forgeries. This is clearly based on a comprehensive analysis of the totality of the evidence on record, and all circumstances of the case. Though the questions raised by the learned trial Judge and upheld by the learned Justices of the Court of Appeal were not specifically pleaded by the respondent, the same naturally flowed from the evidence adduced before court.

This ground of appeal fails.

The respondent made prayers to this Court through his Counsel's submissions, that this Court issues an eviction order against the appellant, and order the appellant to pay *mesne* profits to the respondent for the period he has occupied the respondent's house without paying rent. The said prayers, as correctly submitted by the appellant's Counsel, were not raised at the High Court and at the Court of Appeal. There was neither a counterclaim at trial, nor a cross appeal at the first appellate court regarding the said prayers. The

trial court merely dismissed the suit with costs, and the first appellate court also dismissed the appeal with costs.

It is now settled law that courts cannot give relief beyond the prayer made in the pleadings, that founding a court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law. In the case of **Ms Fang Min V Belex Tours and Travel Ltd, SCCA No. 06 of 2013, consolidated with Crane Bank Ltd V Belex Tours and Travel Ltd SCCA No. 1 of 2014,** this Court set aside the reliefs for recovery of land, cancellation of a certificate of title and a loan, plus *mesne profits* awarded by the Court of Appeal which were not prayed for in the plaint without amendment of the plaint. This was supported by Rule 102 (c) of the Rules of the Court of Appeal which this Court held to be mandatory in **Mohamed Mohamed Hamid V Roko Construction Ltd SCCA No. 1 of 2003.**

I would, in that respect, based on the foregoing decisions of this Court, decline to grant the prayers made by the respondent's Counsel in his submissions to this Court.

All in all, however, this appeal fails. I would confirm the judgment of the lower courts, and dismiss this appeal with costs to the respondent in this Court and in the courts below.

Dated at Kampala this 20th **day of** OCTOBER **2020.**

PNTuhaise

.....

Percy Night Tuhaise

Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: MWONDHA, BUTEERA, MUHANGUZI, TUHAISE, CHIBITA, JJSC

CIVIL APPEAL NO: 16 OF 2018

BETWEEN

JOHN BWIZA ::: APPELLANT

AND

PATRICK YOWASI KADAMA::RESPONDENT

[Appeal arising from the judgment of the Court of Appeal (Kakuru, Egonda-Ntende, JJ.A and Kasule, Ag. J.A) at Kampala, in Civil Appeal No. 35 of 2011 delivered on 25th October, 2018]

JUDGMENT OF MIKE CHIBITA, JSC

I have had the benefit of reading in draft the judgment of my learned sister, Justice Percy Night Tuhaise, JSC, and I agree with her judgment and the orders she has proposed.

Dated at Kampala this ......20th......day of ....OCTOBER.....2020

Justice Mike J. Chibita
JUSTICE OF THE SUPREME COURT

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(**Coram**: Mwondha, Buteera, Muhanguzi, Tuhaise, Chibita; JJSC)

CIVIL APPEAL NO. 16 OF 2018

JOHN BWIZA.....APPLICANT

VERSUS

PATRICK YOWASI KADAMA.....RESPONDENT

(Appeal arising from the judgment of the Court of Appeal before Kakuru, Egonda-Ntende JJA & Kasule Ag. JA in Civil Appeal No 35 of 2011 delivered on 25th October, 2018)

JUDGMENT OF MWONDHA JSC

I had the benefit of reading in draft the judgment of my learned sister, Tuhaise, JSC and I concur with the decision and orders she has proposed.

As the other members of the Court agree, this appeal fails and the judgment of the Court of Appeal is upheld.

The appeal in the result is dismissed with costs of this Court and the Courts below.

Dated at Kampala this ....20TH.... day of ....OCTOBER.... 2020

Mwondha

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: (Mwondha; Buteera; Muhanguzi; Tuhaise; Chibita; JJ.S.C)

CIVIL APPEAL NO.16 OF 2018

BETWEEN

JOHN BWIZA::APPELLANT

AND

PATRICK YOWASI KADAMA:::::::::::::::::::::::::::::::::::RESPONDENT

(An Appeal from the decision of the Court of Appeal at Kampala before Hon. Justices: Kenneth Kakuru, F.M.S Egonda Ntende, and Remmy Kasule, JJA, dated the 25th day of October 2018)

JUDGMENT OF BUTEERA, JSC

I have had the benefit of reading in draft the judgment of my learned sister, Percy Night Tuhaise, JSC.

I concur with her judgment and the reasoning therein. I also agree with the orders she has proposed.

....

Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: Mwondha, Buteera, Muhanguzi, Tuhaise & Chibita, JJSC)

CIVIL APPEAL NO. 16 OF 2018

BETWEEN

JOHN BWIZA::APPELLANT

AND

PATRICK YOWASI KADAMA:::::::::::::::::::::::::::::::::::::RESPONDENTS

[Appeal from the judgment of the Court of Appeal of Uganda (Kakuru, Egonda-Ntende & Kasule, JJA) in Civil Appeal No. 35 of 2011 dated 25th October, 2018]

JUDGMENT OF MUHANGUZI, JSC

I have had the benefit of reading in draft the lead judgment of my learned sister, Hon. Justice Percy Night Tuhaise, JSC.

I agree with her reasoning and orders she proposed. I have nothing more useful to add.

Dated at Kampala, this......20th...... day of.......October....2020.

....

Ezekiel Muhanguzi

JUSTICE OF THE SUPREME COURT.