THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(Coram: Mwondha, Mugamba, Buteera, Muhanguzi, Tuhaise, JJ.S.C)

CIVIL APPEAL NO. 03 OF 2019

1. KITHENDE APPOLONARIS KALIBOGHA
2. PETER KALIBOGHA
3. KITHENDE HOSTELS PROJECT (KITHOP)::::::::::::: APPELLANTS

VERSUS

ELEANORA WILSMER (suing through her lawful Attorneys: Mr. Aaron Muhindo and Fr. Laurent Bwambale)::::::::::::::::::::::::::::: RESPONDENT

(An appeal arising from the judgment of the Court of Appeal in Civil Appeal No. 34 of 2010 before Kavuma, DCJ, Nshimye, Kasule, JJA dated 28th October 2015).

JUDGMENT OF EZEKIEL MUHANGUZI, JSC

This is a second appeal. It arises from the judgment of the Court of Appeal in which the Justices of the Court of Appeal dismissed the appellants' appeal with costs to the respondent.

Brief background

The facts giving rise to this appeal as accepted by the learned trial Judge are that the 1st appellant met the respondent in Europe where a memorandum of understanding was signed between the 1st and the 2nd appellants on the one hand and the respondent on the other for construction of hostels for needy students in Kasese under a project known as Kithende Project (Kithop). In fulfilment of the objectives of the memorandum a Non-Governmental Organization (NGO) called Kithende Hostels Project (Kithop) was registered on 3rd November 1995 under the

Non-Governmental Organizations Act. It had a constitution, which was registered with the registrar of documents on 2nd January 1994. The NGO was to be managed by an executive committee comprising of a chairman, a general secretary, a coordinator/adviser, treasurer and a public relations secretary. The 1st and 2nd appellants were named as the first chairman and general secretary respectively. One Mantilda Kanyere Mutokambali was named as the first coordinator and in another document also referred as the constitution of the NGO but which was not registered, the respondent was named as the first coordinator.

The NGO became operational, hostels and other properties were duly acquired with the financial support of the donor funds from the respondent. The appellants purchased a house on Plot 3 Rubaga Road, which the respondent donated to the NGO for its activities but while she retained some proprietary interest in it.

The 3rd appellant was incorporated as a company limited by guarantee in order to create a legal entity which could own land and property. The certificate of incorporation is dated 25th January 1996. Consequently, upon the incorporation of the 3rd appellant, the house on Plot 3 Rubaga Road was transferred into its names. A dispute arose about the change of the status of the organization from an NGO to a company and the above mentioned transfer of Plot 3 Rubaga Road into the names of the 3rd appellant and as a result the respondent sued the appellants through her attorneys Mr. Aaron Muhindo and Rev. Fr. Laurent Bwambale for recovery of land and buildings allegedly purchased with donor funds from the respondent. She sought for a declaration that the suit properties do not belong to the three appellants, a permanent injunction, an order for an account, special and general damages and costs of the suit.

The learned trial Judge heard and determined the suit finding for the respondent. Dissatisfied with his decision and orders, the appellants appealed to the Court of Appeal in Civil Appeal No. 34 of 2010 on 11 grounds. They asked court to set aside the judgment of the High Court. The learned Justices of the Court of Appeal dismissed that appeal with costs to the respondent. Hence the appeal to this court in Civil Appeal No. 3 of 2019 on the following eight grounds; -

1. ***The learned Justices of appeal erred in law and in fact by not properly evaluating the evidence concerning the respondents' purchase of the said property, Plot 3 Rubaga Road and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.***
2. ***The learned Justices of appeal erred in law and fact by finding that Plot 3 Rubaga Road was fraudulently transferred into the names of the 3rd appellant and thereby arrived at a wrong decision occasioning a miscarriage of justice.***
3. ***The learned Justices of appeal erred in law and fact by not properly evaluating the evidence on the respondents' locus to sue in the matter and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.***
4. ***The learned Justices of appeal erred in law and fact by failing to find that the respondents' suit was time barred and thereby arrived at wrong conclusion occasioning a miscarriage of justice.***
5. ***The learned Justices of appeal erred in law and fact by not properly evaluating the evidence touching on the respondents' role as a donor and thereby arrived at a wrong conclusion occasioning a miscarriage of justice.***
6. ***The learned Justices of appeal erred in law and fact by appointing the respondents' two attorneys Mr. Aaron Muhindo and Rev. Fr. Laurent Bwambale as trustees for and on behalf of the respondent over the land at Rwentutu and thereby arrived at a wrong decision occasioning a miscarriage of justice.***
7. ***The learned Justices of appeal erred in law by not properly evaluating the evidence concerning the award of the special and general damages by the***

trial court and thereby arrived at a wrong decision occasioning a miscarriage of justice.

8. ***The learned Justices of appeal erred in law and fact by finding that the 1st appellant forged the 2nd appellant's signature on the memorandum and articles of association of the 3rd appellant and thereby arrived at a wrong decision occasioning a miscarriage of justice.***

The appellants prayed for their appeal to be allowed and the judgments of the Court of Appeal and the High Court to be set aside and that the respondent's claims against the appellants be dismissed. The appellants prayed for costs in this court and the courts below.

Representation.

At the hearing of this appeal, Mr. Brian Othieno learned counsel, represented the appellants while Mr. Joseph Muhumuza Kaahwa represented the respondent. The 1st appellant was in court but the rest of the appellants and the respondent were not in court.

Both counsel filed written submissions which they asked court to adopt in determination of this appeal and in addition they made some corrections to their submissions.

Appellants' submissions

Ground one

Counsel for the appellants contended that it was an error in law for the Court of Appeal to fail to evaluate the evidence in regard to the purchase of Plot 3 Rubaga Road and thus wrongly confirm the respondent as the owner of the property.

Counsel submitted that at the time the respondent purchased the land in question it was not registered in the names of Sherali Bandali Jaffer

but was registered in the names of Abdulrasul Gulamhussein Makalai and Gulamhussein Datardina and as such the former had no right to sell.

Counsel relied on **Sections 92** and **146** of the Registration of Tittles Act and submitted that it is only a registered proprietor of land, or his attorney who can deal in the land which in this matter was not the case. He further relied on **Molly Turinawe & Ors V Eng. Ephraim Turinawe, Supreme Court Civil Appeal No. 10 of 2018**, where this Court stated the principle of *nemo dat quod non habet* that one can only transfer what one owns or possesses.

Further, counsel contended that the learned Justices of Appeal did not make any finding on this issue even though the same was brought to the attention of court. He relied on **Bogere Moses & Anor V Uganda, Supreme Court Criminal Appeal No. 1 of 1997** where this court held that:-

> ***"While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court in its judgment, even if the adjudication be handed out in summary form."***

He submitted that the learned Justices of Appeal did not evaluate the evidence and therefore came to a wrong conclusion that the respondent was the owner of the land in issue. He prayed that this ground be upheld.

Ground two.

Counsel for the appellants submitted that the learned Justices of Appeal did not properly evaluate the evidence of PW1, PW2, DW1 and DW2 to find that Plot 3 Rubaga Road was fraudulently transferred. Counsel pointed out that the evidence of PW1 and PW2 on record does not prove

fraud on the part of the appellants. He added that the courts below inferred fraud from the documentary evidence on record as opposed to the principle that fraud has to be specifically pleaded and strictly proved. He relied on **Davy Vs. Garrett, (1878) 7 CH 473 at 489,** where it was held that ***"in the common law courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts".***

Counsel submitted that PW1 and PW2's evidence does not point to the fact that the 1st appellant knew of the registration of the NGO at the time of the donation. Counsel argued that the said documents that is; the Agreement between Sherali Bandali Jaffer and Eleanora Wismer and the Certificate of Title on Block 1 Plot 33 Old Kampala Volume 152 Folio 12 though admitted as exhibits in court, were not supported by evidence from any of the witnesses.

Grounds three and four.

Counsel for the appellants submitted that the respondent was not the only donor to the project. He pointed out that PW2 in cross examination testified that Hope Foundation in which the respondent was a director, was also a donor. Further, that the respondent also mentioned churches, government, private people, friends and family where she got money to fund the project. According to counsel, the respondent did not have the capacity to sue on their behalf without a representative order pursuant Order 1 rule 8 of the Civil Procedure Rules.

Counsel also submitted that the respondent's suit was barred by limitation as provided for under Section 3(1) of the Limitation Act, Cap. 80. Counsel argued that by April of 1999, the respondent knew of the creation of the 3rd appellant and did not write about it in her letter to the

1st appellant dated 15th April 1999 which was admitted in evidence as Exhibit D5. He argued that the suit to deregister the 3rd appellant was barred in law since the respondent knew of the formation of the latter in 1999 until 7 years later when she brought a suit against the appellants. Counsel prayed this court to find grounds three and four in the affirmative.

Ground five.

Counsel for the appellants submitted that the Justices of Appeal erred in finding that the respondent was a member of the Executive Committee as a Coordinator and Advisor of the NGO. He pointed out that PE1(b), which the learned trial Judge admitted as the NGO's Constitution mentioned one Mantilda Kanyere as the Coordinator.

Counsel faulted the learned Justices of Appeal for not making a finding on the legality of the respondent's position in the NGO since the applicable law then prohibited foreigners from being participants and or employees of NGOs. He referred to regulation 13(c) of the Non-Governmental Organization Registration Regulations, SI 113-1.

Ground six.

Counsel for the appellants submitted that the respondent as a foreigner could not own customary land in Uganda contrary to the finding of the learned Justices of Appeal.

Counsel argued that it was an error for the learned Justices of Appeal to find that the appellants had not cited any relevant laws in support of this argument when the appellants had cited Article 237(c) of the Constitution and Section 40 of the Land Act in both the High Court and Court of Appeal.

Further, counsel faulted the learned Justices of Appeal for reaching two contradictory finding as to who purchased the land in issue. He pointed out that the Justices of Appeal found that the respondent was the purchaser of the land and on the other hand found that Hope Organization was the purchaser as per Exhibit DE2.

Counsel submitted that the court's order that the respondent's attorneys Mr. Aaron Muhindo and Rev. Fr. Laurent Bwambale be trustees for and on behalf of the respondent over land at Rwentutu was in furtherance of an illegality given that the respondent couldn't enter into a sale agreement or own land.

Ground seven.

Counsel for the appellants submitted that the learned Justices of Appeal shifted the burden of proof to the appellants to account for the funds received from the respondent and thus the finding that the appellants should refund the monies pleaded in the plaint by the respondent.

He submitted that no evidence was led to prove special damages as upheld by the Court of Appeal. Counsel pointed out that the appellants admitted to have received the money pleaded in paragraph 6 of the plaint but denied embezzling the same and that it was the duty of the respondent to prove there was embezzlement. Counsel contended that neither the respondent nor PW2 proved embezzlement in their testimonies.

Counsel argued that the respondent had a duty to prove the crime of embezzlement against the appellants but that she failed to do so. Further, counsel submitted that the courts below relied on allegations of failure to account for the funds received by the appellants to find that embezzlement was proved against the appellants. Counsel relied on

Musisi Dirisa Vs. Sietco, Supreme Court Civil Appeal No. 24 of 1993, where this court held that the evidential burden does not shift to the defendant unless there is cogent and credible evidence adduced by the plaintiff on the issue.

Counsel further contended that there was no evidence adduced to support the award of general damages in the sum of 150,000,000/= as none of the actions alleged against the appellants were proved. He submitted that there was no evidence adduced to prove that the appellants willingly, intentionally and fraudulently turned the charitable intentions of the respondent to help the needy to their personal enjoyment and profit. He prayed that court on this ground finds in the affirmative.

Ground eight.

Counsel for the appellants submitted that the respondent did not prove fraud and neither did she prove that the 2nd appellant's alleged signature was actually that of the appellant beyond the required standard of proof which is above the balance of probability but below proof beyond reasonable doubt.

Counsel argued that since the trial court found DW1 a prolific liar, it was an error for both courts to rely on his evidence to find that the 2nd appellant's signature was forged. He added that no corroborative evidence was led to support his evidence and thus the burden to prove fraud was shifted to the appellants yet it was an allegation from the respondent. Counsel prayed court to uphold this ground.

Respondent's submission.

Counsel for the respondent opposed the appeal and contended that the learned Justices of Appeal properly evaluated and subjected the whole evidence to fresh and exhaustive scrutiny and came to the right findings and conclusions on facts and the law.

Ground one.

Counsel for the respondent submitted that this ground is baseless because the appellants did not plead to it in their written statement of defence and that it was framed as an issue for court's determination. He argued that as such court cannot be faulted for not making a finding on an issue that was not brought to its attention.

Further, counsel contended that the Registration of Titles Act Cap. 230 and the case of **Molly Turinawe & Ors (supra)** are not applicable to the instant case because the appellants admitted to have acquired Plot 3 Rubaga Road on 15th September 1994. Counsel argued that counsel's attempt to submit on the same from the bar is inadmissible. Counsel relied on **John Sanyu Katuramu & 49 Ors Vs. Attorney General, Constitutional Application No. 1 of 2016, Mugume Benjamin & 5 Ors Vs. Attorney General & Anor, Constitutional Application No. 1 of 2015, General Parts (U) Limited** and **Haruna Ssemakula Vs. Non-Performing Assets Recovery Trust (NPART), Supreme Court Civil Appeal No. 09 of 2005** in support of this argument.

Ground two.

Counsel for the respondent submitted that the learned Justices of Appeal evaluated both oral and documentary evidence on record and that the allegation by the appellants that fraud was inferred from documentary

evidence is unfounded. Counsel pointed out that fraud was pleaded in the plaint and proved by PW1 in her statement on oath and thus this ground should fail.

Ground three and four.

Counsel submitted that the learned Justices of Appeal evaluated the evidence in relation to *locus standi* of the respondent and came to the right conclusion that the respondent was the only donor to the project and the purchaser of the land comprised at Plot 3 Rubaga Road and therefore the respondent had the right to bring the action.

Further, counsel submitted that the issue of the suit being time barred was not a pleaded fact nor an issue raised by way of a preliminary objection as a point of law and also not an issue framed for court's determination. Counsel argued that the courts below cannot be faulted for not finding on an issue not brought to their attention.

Ground five.

Counsel for the respondent submitted that the learned Justices of Appeal properly evaluated the evidence in relation to the respondent's role as a donor. Further, that Court rightly found that Exhibits PE17 dated 13/8/1992 and PE16 dated 02/01/1994 had the names of the respondent as Coordinator and Advisor and the first Coordinator respectively. He argued that there was no evidence adduced by the appellants to explain why the respondent's name was substituted with the biological mother of the 1st and 2nd appellants Mantilda Kanyere Mutokambali when registering the constitution of the project.

Counsel also submitted that the learned Justices of Appeal rightly found that there was no evidence on record to prove the allegation by the

appellants that the respondent was not the only donor of the project. He pointed out that the respondent adduced evidence in respect of each particular project and that even if there were other donors, it would not deprive the respondent of *locus standi* to question the appellants through a law suit to ascertain whether or not the appellants complied with the donation conditions.

Ground six.

Counsel for the respondent submitted that this ground is misconceived. He argued that the respondent purchased the land at Rwentutu and donated it to the NGO because the law does not prohibit purchase but ownership of an interest other than leasehold. Counsel argued that the court was right to appoint the respondent's attorneys as trustees of the land because the NGO to which the land had been donated was found to be operating illegally since its registration certificate had not been renewed on grounds that it was no longer an NGO but was being run as a business.

Counsel submitted further that there was sufficient evidence that the appellants were renting out the land at Rwentutu and taking away income without accountability, contrary to the purpose for which the land had been bought and the NGO was formed. In concluding this issue, counsel submitted that it was not illegal for the respondent to buy the land in question and donate the same to the NGO and that the appointment of the respondent's attorneys as trustees to the same land was not illegal either.

Ground seven.

Counsel for the respondent submitted that since the 1st appellant admitted to have received the money from the respondent, special

damages were proved as facts admitted which need not be proved. He added that general damages were proved in the respondent's statement on oath and that these are awarded on court's discretion.

Counsel argued that given the nature of the dispute such as the inconveniences caused, the various humanitarian losses, the degree of defeating the donor's motives, abuse of trust and the degree of discouraging the donor, the learned Justices of Appeal found no reason to alter the decision of the learned trial Judge.

Ground eight.

Counsel for the respondent submitted that the learned Justices of Appeal evaluated the evidence in relation to the forgery of the 2nd appellant's signature and rightly found that his signature (2nd appellant) was forged.

Counsel argued that a witness can be found to be a liar on one aspect and truthful on another aspect (**Gabula Bright Africa Vs. Uganda, Supreme Court Criminal Appeal No. 19 of 1993**). He submitted further that since the 2nd appellant admitted that his signature on the MEMARTS was forged, the same needed not be proved as provided for under Section 57 of the Evidence Act, Cap. 6.

Counsel concluded his submissions and stated that all the grounds of the appeal lack merit and should be dismissed and that the judgment and orders of the Court of Appeal be upheld.

Appellant's submissions in rejoinder.

On ground one, counsel for the appellant submitted that the appellants pleaded in both courts that the purchase of land comprised in Plot 3 Rubaga Road was illegal because the respondent purchased it from a wrong party and that both courts ignored the same. He relied on **Tropical**

Africa bank Ltd Vs. Grace Were Muhwana, SCCA No. 04 of 2011, where Dr. Kisaakye, JSC held that;-***"I am aware that this issue was never raised by either party at the trial stage as well as in the Court of Appeal. I am however of the view that this is immaterial because this is an error of law which this court cannot overlook."*** and submitted that courts have a duty to uphold the law and should not give judgments contrary to the law.

On the second ground, counsel submitted that PW1's evidence did not prove fraud on the part of the 1st appellant that he knew of the registration certificate of the NGO as found by the learned trial Judge and confirmed by the learned Justices of Appeal.

On the third ground, counsel submitted that the appellants proved that there were other donors apart from the respondent as listed on page 194 line 37 and page 195 lines 1 to 4 of the record of appeal. He submitted that this evidence was not challenged in cross examination and no reasons were given by the Court of Appeal Justices as to why this evidence was not found credible.

On ground four, counsel submitted that the issue of limitation is a matter of law and can be raised at any time before a decision is reached by court. Counsel argued that even if a matter of law is not pleaded, it does not bar either party to raise it at any stage of pleadings and in this case the appellant raised the issue of limitation in both the High Court and the Court of Appeal. He relied on **Phillips Vs. Coping, (1934) 1 KB 15,** for the proposition that court should not deliver judgments that are contrary to the law even where the parties do not raise the matter.

On grounds five, six, seven and eight counsel reiterated his earlier submissions as reproduced above.

Consideration of the appeal.

This is a second appeal. In resolution of this appeal, I will keep in mind the role of this court as a second appellate court which was stated in **Kifamunte Henry Vs. Uganda, Supreme Criminal Appeal No. 10 of 1997** as follows: -

> ***"On a second appeal, the court of appeal is precluded from questioning the findings of facts of the court provided that there was evidence to support such findings though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the findings of fact this being a question of law."***

Both counsel argued grounds one, two, five, six, eight separately and grounds four and three together. I shall therefore resolve the grounds in the order followede by counsel.

Ground one

It was argued for the appellants that the respondent acquired the land in question from one Bandali Jaffer who was not the registered owner of the land at the time of purchase. In reply counsel for the respondent argued that this issue was never raised for lower court's determination and therefore the Court of Appeal cannot be faulted for not making any finding on it.

The land in question was allegedly acquired by the respondent from Bandali Jaffer on the 15th day of September 1994 as per Exhibit PE6, the agreement on record between the two.

The appellants' memorandum of appeal at the Court of Appeal does not mention this issue amongst the grounds raised for court's determination. In **Hilda Wilson Namusoke & 3 Ors Vs. Owalla's Home Investment Trust (E.A Ltd) & Commissioner Land Registration, SCCA No. 15 of 2017,** Prof. Tibatemwa – Ekirikubinza, JSC basing on Rule 102 of the Court of Appeal Rules held: -

> ***"Court of Appeal cannot be faulted for not addressing the issue which was not raised as a ground in the memorandum of appeal."***

Rule 102 of the Judicature (Court of Appeal Rules) Directions SI 13-10 provides: -

> ***"102. Arguments at hearing.***
>
> ***At the hearing of an appeal in the court—***
>
> ***(a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;***
>
> ***(b) a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 82 of these Rules;***
>
> ***(c) the court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground; and***
>
> ***(d) the arguments contained in any statement lodged under rule 98 of these Rules shall receive the same consideration as if they had been advanced orally at the hearing."***

In that case, court exercised its inherent powers and determined the issue considering that the issue of denial of a fair hearing touches the cornerstones of natural justice.

I am persuaded by this finding and I therefore hold that the learned Justices of Appeal in the instant appeal cannot be faulted for not pronouncing themselves on an issue that was not raised by the appellants as a ground in their memorandum of appeal for court's determination. However, I exercise this court's inherent powers to determine this issue because it is a matter of law that this court cannot overlook (See: **Tropical Africa Bank Ltd Vs. Grace Were Muhwana, (supra).**

The evidence on record (Exhibit PE6) shows that one Sherali Bandali Jaffer agreed to sell Plot 3 Rubaga Road to the respondent on 15th September, 1994 at a consideration of US$ 50,000 payable through Canadian Imperial Bank of Commerce. The transfer of the said building was to take place after receipt of the agreed price.

The appellants argue that the respondent acquired the land in question from a wrong party because at the time of purchase the land was registered in the names of Abdulrasul Gulamhussein Makalai and Gulamhussein Datardina.

Exhibit PE14, the Certificate of Title shows that Abdulrasul Gulamhussein Makalai and Gulamhussein Datardina were registered on the 29th January 1996 under Instrument No. 277029.

It therefore follows that the respondent purchased the land in question before the said registered owners were actually the registered owners. The respondent acquired the land in 1994 but land was never transferred in her names.

In her statement on oath (PE1(a), the respondent stated that she wrote other letters dated 29th February, 1996 to the vendor indicating that the transfer should be in her names but this was never executed because the appellants received documents from the vendor and secretly transferred the land into the names of the 3rd appellant.

Exhibit PE14, the land title shows that Bandali Jaffer died in 1942 but appointed Pyarali Bandali, Abdul Rasul Bandali and Sherali Bandali as administrators of his land. Exhibit PE6 was signed by Sherali Bandali Jaffer and the respondent, meaning that the respondent purchased the land from the administrator of the estate of the late Bandali Jaffer and thus not a wrong party.

I therefore, do not agree with the appellant's submission that the respondent purchased the land from a wrong party. This ground fails and I therefore disallow it.

Ground two.

Under this ground, the appellants contend that Plot 3 Rubaga Road was fraudulently transferred in 3rd appellant's names. It was submitted for the appellants that the learned Justices of Appeal erred in law and fact when they found that the transfer of Plot 3 Rubaga Road into the names of the 3rd appellant was fraudulent.

In her statement on oath, the respondent stated that after purchasing the land, she donated it to the organization on 15th November 1995 but never signed transfer forms passing on the title.

The certificate of title (PE14) shows that the title was registered in the names of the 3rd appellant on 9th February 1996 under Instrument No. 277339. This was about 4 months after the donation.

It is trite law that fraud must be specifically pleaded and strictly proved (See: **Hilda Wilson Namusoke & 3 Ors Vs. Owalla's Home Investment Trust (E.A LTD) & Commissioner Land Registration SCCAA No. 15 of 2017**).

Kerr on the Law of Fraud and Mistake, 5th edition page 1, states that fraud includes *"all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or un conscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone."*

As observed by both the Court of Appeal and the High Court, the 1st and the 2nd appellants and the respondent entered into a memorandum of understanding to form a charitable organization for the construction of hostels for needy students in Kasese under a project known as Kithende Project (Kithop). However, contrary to the understanding, the 1st and 2nd appellants incorporated the 3rd appellant as a company limited by guarantee in order to create a legal entity which could own land and property. The change of the NGO into a company limited by guarantee was executed without the knowledge of the respondent.

The learned Justices of appeal found and held that Exhibit PE6, the sale agreement, executed between the respondent, as purchaser and one Sherali Bandali Jaffer, as seller, clearly shows that the respondent was the owner by purchase of Plot 3 Rubaga Road and that she therefore had all the powers as such owner, to donate the same to whomever she chose and also to set the conditions relating to that donation.

Further, the learned Justices of Appeal found on pages 15 - 17 of the Judgment as follows: -

"We thus come to the conclusion, as the learned trial Judge also found that the third appellant, a company registered by guarantee, was never given by the donor Plot 3, Rubaga Road. The donee of that property was the NGO, Kithende Hostels Project, registered as such NGO for carrying out charitable purposes.

We find the appellant's contention that it was necessary to create the 3rd appellant, a company limited by guarantee, so as to have ownership of the donated property, Plot 3 Rubaga Road, registered in its names un acceptable. It is not an explanation by the 1st and 2nd appellants as to why they did not notify and seek the consent of the respondent before registering the ownership of the said property into the names of the third appellant.

We further note that there were alternative ways under the law of registering ownership of Plot 3, Rubaga Road, into a corporate body while at the same time observing and fulfilling the conditions set up by the respondent as the donor. One of these, for example, would be the incorporation of a trust for charitable purposes to own Plot 3 Rubaga Road, on conditions set by the respondent and having the same incorporated and managed under the Trustees Incorporation Act, Cap. 165, laws of Uganda.

We, therefore, safely conclude the conduct of the 1st and 2nd appellants elaborated herein above was a careful calculated scheme intended to deprive the respondent of any interests, proprietary or otherwise, in the said property.

We accordingly conclude, as the trial Judge found, that the respondent was entitled to and acted rightly, in revoking the donation as the 1st and the 2nd appellants acted fraudulently in the way they handled the said donation."

In **Grace Asaba Vs. Grace Kagaiga, SCCA No. 14 of 2014,** Justice A.S Nshimye, JSC, held: -

"It is trite law that an appellate court such as this one, ought to be slow where concurring findings of fact have been made by the trial court and

concurred by the first appellate court. However, there are instances where if the second appellate court is satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of the trial court and the first appellate court are erroneous such concurrent findings may be altered by the appellate court."

In this case, both the trial court and the first appellate court concurred on the finding that the acts by the 1st and the 2nd appellants of changing the NGO into a company limited by guarantee and consequently transferring Plot 3 Rubaga Road into the names of the 3rd appellant without the knowledge of the respondent were acts of fraud. There is no evidence on record showing that these allegations were untrue other than submissions by counsel that fraud was not strictly proved by the respondent. I do not agree with this because evidence was adduced to show that the 1st and 2nd appellants incorporated the 3rd appellant and registered the property donated to the NGO into its names.

I do not have any reason to fault the Court of Appeal for upholding the findings of the trial court that Plot 3 Rubaga Road was fraudulently transferred into the names of the 3rd appellant. This ground fails too.

Grounds three and four.

Both counsel submitted on grounds three and four together. I shall also resolve the two grounds together.

The appellants argued that the respondent did not have capacity to sue them because she was not the only donor to the project and she would have sought consent from the other donors to sue on their behalf.

Further, that the suit was barred in law because the respondent knew of the existence of the company (3rd appellant) in 1999 and took action in

2007, eight years later than 6 years' limitation time provided under the law.

On the other hand, the respondent argued that the Court of Appeal evaluated all the evidence on record and came to the right conclusion that the respondent had *locus standi.* Also, that the issue of limitation was not pleaded in the lower courts and therefore court cannot be faulted for not finding on it.

Black's Law Dictionary 8th Edition defines *Locus standi* as the right to bring an action or to be heard in a given forum. A right to bring an action accrues when litigant's interest has been infringed/interfered with.

As earlier found and stated above, the respondent owns Plot 3 Rubaga Road by purchase. She therefore has interest in the land and thus has a right to sue/bring an action, if such interest is interfered with. In this case, the 1st and 2nd appellants interfered with the respondent's interest in the land when they transferred it into the names of the 3rd appellant without her consent/knowledge.

The learned Justices of Appeal found on pages 17 to 19 of their judgment as follows: -

> ***"Locus Standi is the right that one has to be heard in a court of law or other appropriate proceeding. Once one has a direct interest in a matter, then one is eligible to claim relief respecting that matter if that one's interest is being adversely affected. Such a one*** *(sic)* ***is said to have locus standi and his/her cause of action is said to be disclosed. A cause of action is created in a person once that person has a right, the said right is being violated and the alleged violator is liable.***
>
> ***At trial the evidence adduced was to the effect that the respondent as an individual acquired by purchase the property comprised in Plot 3, Rubaga Road, and donated the same, on specific conditions, to a named charitable***

organization. The 1st and 2nd appellants, contrary to the conditions of the donation set by the respondent, instead created the 3rd appellant and vested ownership of the stated property into that 3rd appellant. Those circumstances clearly, in our considered view, gave a locus standi to the respondent to sue the appellants as she did in High Court Civil Suit No. 49 of 2007 as regards the property comprised in Plot 3 Rubaga Road.

We have found no credible evidence on record that any other donors contributed to the projects in issue. The respondent on the other hand, adduced such evidence in respect of each particular project. But even if it were to be proved that another donor, in addition to the respondent, donated towards any of the said projects, which is not the case here, this per se, would not deprive the respondent of locus standi to question the appellants, through a law suit, as to whether or not the donations she made to the projects complied with the conditions that were attached to those donations and, if not, then seek appropriate reliefs through court action."

I find that the land in question was purchased by the respondent alone as evidenced by Exhibit PE6 and even if there were other donors to the project, she would not need consent from them to bring an action in relation to the land in which she has interest, which interest was interfered with by the appellants.

On ground four, the appellants' learned counsel faulted the Court of Appeal for failure to find that the respondent's suit was time barred because matters of fraud cannot be brought after the expiration of 6 years. He pointed out that the respondent discovered fraud in 1999 when she received a complaint from the 2nd appellant.

Learned counsel for the respondent argued that this issue was not pleaded under the appellants' memorandum of appeal at the Court of Appeal and thus the learned Justices of Appeal cannot be faulted.

I agree with the learned counsel for the respondent that the learned Justices of Appeal cannot be faulted on an issue that was not raised as a ground in the memorandum of appeal. (See: Rule 102 of the Judicature (Court of Appeal Rules) Directions SI 13-10). However, this being a matter of law, I shall proceed to address it.

The provisions of the Limitation Act Cap. 80 applicable to this issue of the appeal are clear. Section 3(1) of the Act provides that actions founded on contract or tort shall not be brought after the expiration of 6 years from the date on which the cause of action arose. Section 25 provides for postponement of the limitation of time prescribed by the Act where:-

> ***"(a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;***
>
> ***(b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or***
>
> ***(c) .....***
>
> ***(d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed;"***

In the instant case, the cause of action was based on both contract and tort. However, fraud was also pleaded in the plaint as well as recovery of land.

The learned trial Judge found as follows: -

> ***"The defendants counsel argued that the matter was limited by time. This was lamely argued probably because it did not hold water. Court was not told when the cause of action arose, and therefore when time began to run, in order for the suit to be barred by time. The suit was filed in June 2007.***

Monies were allegedly sent to the defendants from 1990's for putting up students' hostels and other activities. It was not shown when, if at all, these hostels and other activities were completed, or the money misapplied as alleged by the plaintiff.

The suit was for recovery of land and buildings, where limitation is 12 years. It was for a permanent injunction, which is exempted from the period of 6 years by subsection (6) of section 3 of the Limitation Act."

The Court of Appeal did not make any finding on this issue because it was not raised under the grounds brought for court's consideration.

In the circumstances, I agree with the findings of the learned trial Judge. I am unable to fault his findings on this issue because the respondent filed the suit against the appellants for recovery of Plot 3 Rubaga Road. Further, she pleaded fraud on the part of the appellants because the 1st and 2nd appellants concealed to the respondent the transfer of the property to the 3rd appellant. The limitation period of fraud in contract and tort matters is postponed by Section 25 of Cap. 80 as reproduced above. The time starts to run from the moment the fraud is discovered, in this case, by the respondent. It is not clear when the respondent discovered the transfer of Plot 3 Rubaga Road into the names of the 3rd appellant.

Therefore, grounds three and four fail and are dismissed.

Ground five.

On this ground, counsel for the appellants argued that the respondent being a foreigner cannot be an employee in this case a coordinator in the NGO before fulfilling the conditions provided under Regulation 13 (c) of the Non-Governmental Organizations Registration Regulations, SI 113-1.

Further, counsel argued that the right constitution of the NGO as accepted by the learned trial Judge is Exhibit PE1 (b) which mentioned the 1st and 2nd appellants' mother, Mantilda Kanyere Mutokambali as the coordinator, not the respondent.

For the respondent, it was submitted that the learned Justices of Appeal properly evaluated the evidence and came to the right conclusion that the respondent is a member of the NGO.

The learned trial Judge found that the appellants did not adduce evidence in court to show that the respondent ceased to be the Coordinator and Advisor of the NGO at the time of filing the suit and therefore, she was a member of the Executive Committee of the NGO under Article 7(c) of the Constitution.

The learned trial Judge further observed that it could not be said that the members of the Executive Committee are not members of the NGO. That the respondent having been appointed a Coordinator and Advisor of the NGO, in terms of Article 7 (c) of the Constitution, she became part of the Executive Committee and consequently a member of the NGO.

The learned Justices of Appeal upheld the findings of the learned trial Judge and added that the 1st and 2nd appellants who were signatories to Exhibits PE1(b), PE16 and PE17, offered no explanation as to why, when it came to registering the constitution of Kithende Hostels Project, the respondent, as first coordinator with the NGO, was substituted with the biological mother of the 1st and 2nd appellants Mantilda Kanyere Mutokambali.

This is a finding of fact and this court may not alter such findings if there is no evidence to support such alterations (See: **Grace Asaba Vs. Grace Kagaiga, (supra)**. The appellants did not at any one point in the

proceedings assert that the respondent ceased to be a member of the project upon registration of PE 1(b). The substitution of the respondent with Mantilda Kanyere Mutokambali was not communicated to the respondent. The 1st and 2nd appellants kept it a secret and made it appear that she was the Coordinator and Advisor of the project.

I do not find reason to alter the findings of the learned trial Judge and the learned Justices of Appeal. This ground also fails.

Ground six.

It was submitted for the appellants that the respondent being a foreigner could not own land at Rwentutu, it being customary land.

For the respondent, counsel argued that the respondent is not the owner of the land but purchased it and donated it to the project. He further pointed out that the appointment of the trustees was intended to save the NGO that was operating illegally because the appellants failed to renew its license but rather used the donated land for commercial purposes.

I agree with the submissions of counsel for the respondent. Mr. Aaron Muhindo and Rev. Fr. Laurent Bwambale were appointed as trustees of the land at Rwentutu to hold it trust for the benefit of Kithende Hostels Project as an NGO. The 1st and 2nd appellants departed from the sole purpose and objectives of the NGO and instead used the land for their personal benefit.

I do not find merit in this ground and I dismiss it.

Ground seven.

Counsel for the appellants faulted the learned Justices of appeal for upholding the findings of the learned trial Judge who put the evidential

burden on the appellants to account for the funds. Counsel also argued that the appellants only admitted receiving the money but denied embezzling it.

Further, counsel argued that there was no evidence to prove both special and general damages.

In reply, counsel for the respondent argued that facts admitted need not be proved.

The respondent pleaded special damages under paragraph 6 and 11 of the plaint. She adduced (Exhibit PE1 (a) evidence to prove this. The respondent asserted that all the money dispatched and received by the 1st and 2nd appellants was misappropriated and used for their personal gains and that they never accounted for it. On the other hand, the appellants admitted under paragraph 8 of the written statement of defence having received that money mentioned by the respondent but denied embezzling it.

I do not find any evidence on record by the appellants rebutting the respondent's assertion that the appellants misappropriated moneys received from the respondent. I therefore find no basis to fault the learned Justices of appeal for upholding the learned trial Judge's findings on this issue.

It is trite law that an appellate court should not interfere with an award of damages by a trial court unless the award is based on an incorrect principle or is manifestly too low or too high. (See: **Administrator General Vs. Bwanika James & Ors, SCCS No. 7 of 2003**).

I do not find merit in this ground and I therefore dismiss it.

Ground eight.

On this ground, the appellants contend that the learned Justices of appeal erred in law and fact when they found that the 1st appellant forged the 2nd appellant's signature on the memorandum and articles of association of the 3rd appellant. Counsel argued that since the learned trial Judge found DW1 a prolific liar, his evidence should not have been relied on to find that his signature was forged to register the 3rd appellant.

In opposition, counsel for the respondent pointed out that a witness can be found a prolific liar but his/her evidence may be relied on.

The learned Justices of appeal evaluated the evidence on record in relation to this issue and found that the conduct of the 2nd appellant whereby he allowed the forgery of his signature by the 1st appellant to remain on the Memorandum and Articles of Association of the 3rd appellant **"because the reasons for which it was done was for the good, safety, and development of the organization"** amounted to debasing justice and that it was proof of how far both the 1st and the 2nd appellants went with their schemes, in total disrespect of the law, to defraud the respondent.

I have read and re-evaluated all the evidence on record, and I find that indeed the 2nd appellant's signature was forged by the 1st appellant on the Memorandum and Articles of Association in order to register the 3rd appellant. I am satisfied with the Court of Appeal findings on this issue. This ground of appeal also fails.

In conclusion, I find no merit in this appeal and I accordingly dismiss it. I award costs in this court and the courts below to the respondent.

Dated at Kampala this.....7th..... day of.....Dec.....2020.

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EZEKIEL MUHANGUZI

785 **JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CIVIL APPEAL NO. 03 OF 2019

(1) KITHENDE APPOLONARIS KALIBOGHA
(2) PETER KALIBOGHA ..... APPELLANTS
(3) KITHENDE HOSTELS PROJECT (KITHOP)

VERSUS

ELEANORA WILSMER (Suing Through her lawful ..... **RESPONDENT**
Attorneys Mr. Aaron Muhindo and Fr Laurent Bwambale)

(An appeal rising from the judgment of the Court of Appeal in Civil Appeal No 34 of 2010 before Kavuma DCJ, Nshimye, Kasule JJA dated 23rd October, 2010 at Kampala)

JUDGMENT OF MWONDHA JSC

I had the benefit of reading in draft the judgment of my learned brother Muhanguzi JSC and I concur with the decision that there's no merit in this appeal. I also agree with the orders he has proposed.

As the other members of the Court agree, this appeal is accordingly dismissed with costs in favour of the respondent in this Court and the Courts below.

Dated at Kampala this ..... day of 2020

Mwondha
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: MWONDHA, MUGAMBA, BUTEERA, MUHANGUZI, TUHAISE JJ.S.C.]

CIVIL APPEAL NO. 03 OF 2019

BETWEEN

1. **KITHENDE APPOLONARIS KALIBOGHA**
2. **PETER KALIBOGHA**
3. **KITHENDE HOSTELS PROJECT (KITHOP)::::::::::::::APPELLANTS**

AND

ELEANORA WILSMER (Suing through her lawful Attorneys: Mr. Aaron Muhindo AND Fr. Laurent Bwambale ::::::::::::::::::::::::::::::::::::RESPONDENT

[An Appeal from the judgment of the Court of Appeal in Civil Appeal No.34 of 2010 dated 28th October, 2015 (Kavuma DCJ (as he then was), Nshimye and Kasule, JJ. A)

JUDGMENT OF JUSTICE MUGAMBA, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother Hon. Justice Ezekiel Muhanguzi, JSC. I agree with his decision and the orders he proposes.

Dated at Kampala this.....7th.....day of.....Dec.....2020

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HON. JUSTICE PAUL MUGAMBA

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CIVIL APPEAL NO.03 OF 2019

BETWEEN

1. **KITHENDE APPOLONARIS KALIBOGHA**
2. **PETER KALIBOGHA**
3. **KITHENDE HOSTELS PROJECT (KITHOP) ::::::::APPELLANTS**

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ELEANORA WILSMER (Suing through her lawful Attorneys: Mr. Aaron Muhindo and Fr. Laurent Bwambale::::::::::::::::::::::::::::RESPONDENT

(An Appeal arising from the judgment of the Court of Appeal in Civil Appeal No. 34 of 2010 before Kavuma, DCJ (as he then was), Nshimye, Kasule, JJA, dated 23rd October, 2015 delivered in Kampala on the 28th day of October, 2015)

JUDGMENT OF BUTEERA, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Ezekiel Muhanguzi, JSC.

I concur with his judgment and the reasoning therein. I also agree with the orders he has proposed.

Dated at Kampala this.....7th.....day of.....Dec.....2020.

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Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

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

(CORAM: Mwondha, Mugamba, Buteera, Muhanguzi, Tuhaise, JJ.SC)

CIVIL APPEAL NO.03 OF 2019

1. **KITHENDE APOLONARIS KALIBOGHA**
2. **PETER KALIBOGHA)** } ::::::::::::::::::::::::**APPELLANTS**
3. **KITHENDE HOSTELS PROJECT (KITHOP)**

VERSUS

ELEANORA WILSMER (suing through her lawful Attorneys: Mr. Aaron **Muhindo and Fr Laurent Bwmbale** ::::::::::::::::::::::::::::::::::::**RESPONDENT**

[An Appeal arising from the judgment of the Court of Appeal in Civil Appeal No. 34 of 2010 before Kavuma, DCJ (as he then was), Nshimye, Kasule, JJA dated 23rd October 2015, delivered on the 28th day of October, 2015]

JUDGMENT OF TUHAISE JSC.

I have had the benefit of reading in draft the judgment of my learned brother Justice Ezekiel Muhanguzi JSC.

I agree with his analysis of evidence, discussions and conclusion that this appeal has no merit and should consequently be dismissed with costs

Dated at Kampala, this ---------7th--------- day of---Dec---------- 2020.

PNTuhaise

Percy Night Tuhaise

JUSTICE OF THE SUPREME COURT