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**THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 62 OF 2018**

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

KIZITO JOSEPH MUBIRU}APPELLANT

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VERSUS

- 1. WAMALA DESIRE PAUL**
- 2. KABOGGOZA SIMON**
- 3. GOKYALA JUDITH**

.....**RESPONDENTS**

**(Appeal from the judgment of the High Court delivered by Hon. Mr. Justice
Bashaija K. Andrew dated 15th December 2017)**

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JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

The appellant appealed from the judgment of his Lordship Hon. Mr. Justice Bashaija K. Andrew dated 15th December, 2017 against the whole of the judgment.

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The background to the appeal is sufficiently set out in the judgment of the High Court. The respondents instituted a suit against Kizito Joseph Mubiru, the appellant for recovery of land and or compensation at market rates, restoration of title mutated out of the mother title back to the names of the respondent comprised in Block 1 Plot 130 currently described as Plots 1128 and 1127, delivery of title in respect of Rubaga Block 1 Plot 1128 to the plaintiffs, a declaration that the defendant is not entitled to Plot 1128 and that the alleged transfer of the Plot to the appellant was fraudulent and therefore null and void. The respondents also sought a declaration that the plaintiffs are entitled to special damages for unlawful eviction and destruction of property, a permanent injunction against further dealing in the land or against trespass, special and general damages as well as costs of the suit. The respondents are beneficiaries of the estate of their late father Mr Pantaleoni Kivumbi Ssonko as well as administrators of his estate. Three issues were framed for resolution of the dispute by the High Court namely:

- 1. Whether or not the plaintiff's father sold part or the whole suit land to the defendant.

- 5 2. Whether or not the defendant committed any fraud during the transfer of the
 suit land.
3. What remedies are available to the parties?

10 The learned trial Judge resolved issues 1 and 2 in favour of the respondents. With regard
 to remedies, he directed the Registrar of Titles to cancel the certificate of title and all
 instruments or any entry or memorial in the register book relating to Plot 1128 as relates
 to the defendant/appellant and to substitute therefore the names of the plaintiffs as the
 administrators of their late father's estate. He further held that the transfer of Plot 1128
 to the defendant/appellant was fraudulent and therefore null and void. The
15 defendant/appellant was required to deliver the certificate of title in respect of the same
 Plot to the plaintiffs/respondents. As far as the claim for special damages is concerned,
 it was disallowed.

 Trial Judge issued a permanent injunction against the defendant from further selling or
 trespassing on the suit property. The plaintiffs were awarded general damages of
 Uganda shillings 10,000,000/= with interest at 8% per annum from the date of judgment
20 till payment in full. Furthermore, the plaintiffs were awarded costs of the suit and the
 appellant's counterclaim was dismissed with costs as well.

 The appellant being dissatisfied with the whole decision appealed to this court on the
 following grounds:

- 25 1. The learned trial Judge erred in law and in fact in holding that the respondents
 proved that their late father only sold a part of the suit land to the appellant,
 which was inconsistent with the weight of the appellant's credible evidence on
 court record that he bought the whole of it.
2. The learned trial Judge erred in law and in fact in holding that the respondents
 demonstrated (to) the required standard that the appellant committed acts of
30 dishonesty in getting the whole land registered in his name instead of a portion
 of it.
3. The learned trial Judge erred in law and fact in failing to properly evaluate the
 entire parties' evidence on record and this made him arrive at a wrong decision
 against the appellant.
- 35 4. The learned trial Judge erred in law and fact when he dismissed the appellant's
 counterclaim on the ground that it has no merit, when it had.

5 5. The learned trial Judge erred in law and fact when he issued an injunctive order
against the appellant on the suit land, awarded general damages of Uganda
shillings 10,000,000/= for trespass, interest and costs in the head suit to the
respondents and yet they failed to have the appellant's certificate of title for Plot
1127 cancelled and the respondents are in possession of the appellant's portion
10 of land on which the appellant was given no remedy.

At the hearing of the appeal learned Counsel Mr. Eric Muhwezi appeared for the
appellant while learned Counsel Mr. Joseph Luzige appeared for the respondent. With
leave of court the appellant addressed court in written submissions.

Appellant's submissions

15 Mr Eric Muhwezi submitted that the respondents as children of the deceased sued the
appellant for recovery of land namely Plot 1128 formerly comprising Kibuga Block 1 Plot
1013 and later mutated into Plots 1127 and 1128 both registered in the names of the
appellant. The contention of the respondents is that their late father (defendant) sold
to the appellant 0.45 factors to be mutated out of the original Plot 130 Block 1 and
20 handed over the duplicate certificate of title and signed transfer forms to the appellant
for purposes of accessing the part sold namely Plot 1127 but he transferred all the Plots
namely Plots 1127 1928 into his names using a forged agreement for the residue of the
land which is Plot 1128. The respondents prayed for special and general damages
among other declarations. The appellant denied commission of any fraud by him and
25 contended that he bought the Plots on duly executed transfer forms by the
respondents' late father. He counterclaimed seeking inter alia revocation of the
respondent's caveats.

The appellant's counsel argued grounds 1, 2 and 3 of the appeal together and then
grounds 4 and 5 separately.

30 Grounds 1, 2 and 3

Mr Muhwezi submitted that in arriving at the decisions on the above issues, the learned
trial Judge believed the respondent's version had more weight in its content and was
more plausible than that presented by the appellant based on the following reasons:

35 Firstly, that there were variations in the deceased signatures as demonstrated by PW 4
and PW6, the two expert witnesses for the plaintiffs/respondents and the clearly falsified
passport photograph of the deceased all being proof of the dishonesty of the appellant

5 which amounts to nothing but fraud. Secondly, that there was no concrete proof that
the money the appellant was to pay was fully paid or was paid at all. That it also cast a
doubt on the sale agreement the appellant presented to court. Thirdly, though the
plaintiffs did not present documentary evidence to prove the intention of their late
10 father leaving a portion of the suit land to them, they demonstrated to the required
standard that the appellant committed acts of dishonesty in getting the whole of the
suit land registered into his names instead of just a portion of it.

Mr. Muhwezi submitted that the learned trial Judge failed to properly evaluate the
evidence on court record and thus arrived at a wrong decision against the appellant
both in the head suit and in the counterclaim. Further, he submitted that the parties'
15 evidence in arguing issues 1 and 2 is well laid out in the applicant submissions in the
High Court. He adopted the same in this appeal with the conclusion that the
respondent's late father sold to the appellant the whole land, Plots 1127 and 1128 and
there was no fraud committed.

Mr Muhwezi contended that it was wrong in fact for the learned trial Judge to have
20 found that there was no concrete proof that the money the appellant was supposed to
pay was fully paid or was paid at all. He submitted that it casts doubt on the sale
agreement he presented to court. Furthermore, he submitted that at least some
payments made by the appellant to the respondents father for the purchase of Plot
1128 up to Uganda shillings 30,000,000/= by 17th October, 2005 and were conceded to
25 by PW1 and the balance was about Uganda shillings 8,000,000/=. The agreement which
was executed on 28th April, 2009, indicates instalment payments totalling to Uganda
shillings 10.1 million made after 17th October, 2005 in instalments number 8, 9 and 10.
When added to previous payments reflected, it totals to Uganda shillings 38,000,000/=
which was the cost price of Plot 1128. He submitted that the agreement was an agreed
30 document but the record in the diary of the deceased is not conclusive. This is because
there were erasures of some payments made on stated dates as reflected in the
proceedings. Furthermore, he contended that the dairy which was produced in court
was in respect of only one year but payments were spread over five years. That meant
that there were other records where their late father recorded receipts of other
35 payments by the appellant to him but PW1 was not disclosing them.

He submitted that had the learned trial Judge correctly addressed his mind to the above
facts, the appellants submissions in the High Court on payments for Plot 1128, his
decision would have been different and in favour of the appellant. In any event, if there

5 was a balance duly found and proved to be due of Uganda shillings 8,000,000/=, the respondents claim would have been for a debt owing to the deceased's estate and not nullification of the sale. That debt should first be demanded on notice before a suit which was not done.

10 With regard to the respondent's evidence contained in the opinion of a handwriting expert which the learned trial Judge believed more than that of the appellant's expert opinions, it is in detail addressed in the appellant's submissions in the High Court which are adopted. He submitted that the final decision on whether to believe the experts opinion or not depends on overall evaluation of evidence and not on the opinion in isolation of other evidence.

15 Mr Muhwezi further submitted that in this case, the impugned sale agreement was an agreed document by both parties at the scheduling conference and there was acknowledgement of payment by the appellant to their father by PW1. He submitted that there was also delivery of signed transfer forms and duplicate certificate of title to the appellant. This evidence and pleadings are sufficient enough to demonstrate and
20 confirm that the appellant bought Plots 1127 and 1128 from the deceased defendant and there was no fraud. The impugned vendor's signature is the same as on the agreement executed on 23rd March, 2006 for the land later on described as Plot 1127. The sale thereof is not disputed. The price of Uganda shillings 17,500,000/= was paid in cash and was conceded to by PW1. PW1 did not have any other agreement for the sale.

25 For the part of acknowledgement of payment on Plot 1128, the first respondent (PW1) did not have a sale agreement. Mr Eric Muhwezi submitted that the agreed documents are genuine and there was no need for expert opinions of the signatures which in any case were based on photocopies when the originals were available. There is no finding that a person with a master's degree acquired recently is more experienced than a long
30 time tested practising handwriting expert on examination of documents. He prayed that the grounds 1, 2 and 3 of the appeal are allowed.

Ground 4

Whether the learned trial Judge erred in law and fact when he dismissed the appellant's counterclaim on the ground that it had no merit, when it had? Mr Eric
35 Muhwezi submitted that the counterclaim was dismissed and the reasons given for dismissal are based on resolution of issues 1, 2 and 3 in favour of the respondents.

5 Having argued grounds 1, 2 and 3, he prayed that the counterclaim is allowed. Further,
that the learned trial Judge erred in fact in dismissing the counterclaim. The decisions
made on the above issues were wrongly arrived at for reasons already given. In any
event, he contended that the court agreed that the appellant had bought Plot 1127 but
lost on the purchase of Plot 1128 only. As for Plot 1127, the learned trial Judge should
10 have allowed the prayers in the counterclaim with costs to the appellant but he wholly
dismissed it with costs when the respondents in their submissions at High Court prayed
for nullification of both sales and cancellation of title thereof. The only succeeded in the
cancellation of one title, which is the subject of this appeal. He prayed that the ground 4
of the appeal is also allowed.

15 Lastly, the appellant's counsel submitted that the ground 5 is dependent on the
determination of the previous grounds and prayed that it is also allowed. Further that
this court, being a first appellate court, should invoke its powers to reappraise the
evidence on court record and draw inferences of fact and allow the appeal as prayed for
in the memorandum of appeal.

20 **Submissions of the Respondents**

In reply, the Respondent's counsel prayed that the court upholds the judgment of the
High court by evaluating the evidence using its mandate to subject the evidence to
fresh scrutiny. He submitted that the judgment of the High Court is supported by the
evidence and prayed for dismissal of the appeal with costs.

25 **Resolution of appeal:**

I have carefully considered the facts of this appeal, the evidence in the printed
proceedings of the High Court, the submissions of counsel in the lower court and this
court as well as the law generally. As a first appeal from a decision of the High Court in
the exercise of its original decision we have discretionary jurisdiction under Rule 30 (1)
30 of the Rules of this court) to subject the printed evidence on record to fresh scrutiny and
to reach to our own conclusions on all issues of fact and law. In the exercise of this
jurisdiction we are required to caution ourselves that we have neither heard nor seen
the witnesses testify. The need for caution was discussed in **Peters v Sunday Post Ltd**
[1958] 1 EA 424, by the then East African Court of Appeal at page **429** that:

35 "An appellate court has, indeed, jurisdiction to review the evidence in order to
determine whether the conclusion originally reached upon that evidence should

5 stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

This principle is supported by the decision of the Supreme Court of Uganda in **Kifamunte Henry v Uganda; S.C.C.A No. 10 of 1997.**

10 Having evaluated the facts and circumstances of this appeal, the main question in controversy is whether the appellant lawfully acquired and was registered in respect of Kibuga Block 1, Plot 1128 at Rubaga measuring approximately 0.311 ha. The main controversy does not include the purchase by the appellant of Plot 1127.

I will therefore embark on the resolution of the appeal by considering grounds 4 and 5 relating to the counterclaim of the appellant. **Grounds 4 and 5** are that:

15 **"4. The learned trial Judge erred in law and fact when he dismissed the appellant's counterclaim on the ground that it had no merit, when it had.**

20 **5. The trial Judge erred in law and fact when he issued an injunctive order against the appellant on the suit land, awarded general damages of shillings 10,000,000/= for trespass, interests and costs in the head suit to the respondents and yet they failed to have the appellant's certificate of title for Plot 1127 cancelled and the respondents are in possession of the appellant's portion of land on which the appellant was given no remedy."**

The plaint clearly indicates in paragraph 3 that:

25 "The plaintiffs' cause of action against the defendants jointly and/or severally is for:- recovery of the suit land and/or compensation at the market value of the suit land, restoration of the title carved out of the suit land back to the plaintiffs that is Plot 1030 Block 1 currently reading Plots 1128 and 1127, delivery of title in respect of Plot 1128 of the plaintiffs, a declaration that the defendant is not entitled to Plot 1128, a declaration that the alleged transfer of Plot 1128 to the defendant in respect to the land is null and void, a permanent injunction against
30 further sale or trespass on the suit land."

It is clearly averred in paragraph 4 that the late Pantaleon Kivumbi Ssonko sold to the defendant/appellant 0.45 ha carved out of the original Plot referred to in paragraph 3 of the plaint. In paragraph 4 (e) of the plaint, it is averred that:

5 "The defendant without any colour of right designed a scheme to instead steal the whole land and while the plaintiff's father was on his death bed at Mengo hospital, the defendant transferred the residue land that is Plot 1128 Block 1 which comprises the late Pantaleon Kivumbi Ssonko's home where the plaintiffs reside to date."

10 The particulars of fraud in paragraph 7 relate only to Plot 1128 and not 1127. In total there was no claim for cancellation of title in respect of Plot 1127 registered in the names of the appellant.

15 The defendant had filed a written statement of defence and counterclaim for vacant possession, mesne profits, general damages, permanent injunction and an order directing the Registrar of Titles to lift the caveat lodged on the suit land by the plaintiffs as well as costs of the counterclaim. In reply to the counterclaim, the respondents clearly averred that the plaintiff illegally transferred Plot 1128 into his names. Furthermore, they averred that they were not trespassers on the suit land which is family property where
20 they have resided with their father and mother since childhood. Thereafter the appellant filed an amended defence and counterclaim. The counterclaim includes an additional facts that the defendant denies buying 0.45 ha to be mutated out of the original Plot 130 of Block 1 and contends that he bought from the deceased proprietor 0.045 ha on Plot 1127 mutated out of the original Plot 1030 and 1031. The purchase agreement
25 thereof is dated 23rd of March 2006. The appellant further admitted that he subdivided the land and got his title for Plot 1127 which was registered on 13 November 2006 and he returned the residue on Plot 1128 to its original owner (the deceased) who later on sold it to him. In the amended counterclaim, the defendant contended that he purchased the suit land and the plaintiffs trespassed on it after the deceased died and
30 therefore occasioned him loss for which he claimed mesne profits, general damages, interest at commercial rate since the death of the deceased to payment in full on the mesne profits, a permanent injunction, vacation of plaintiff's caveat on the suit land, and costs of the counterclaim.

35 The first issue agreed clearly followed the pleadings and is; **whether or not the plaintiff's father sold part or the whole suit land to the defendant.** At page 14 of the judgment at page 665 of the record, the learned trial Judge held that the plaintiffs have recovered Plot 1128 through court order and directed the Registrar of Titles to cancel the registration of his name in the certificate of title and all instruments or any entry or

5 memorial in the register book relating to Plot 1128. The learned trial Judge did not make any order in relation to the counterclaim but dismissed it with costs in the following words:

10 "... and that by transferring the whole land into his name instead of the portion that was sold to him, the defendant fraudulently transferred the other portion of the suit land.

Having found as above, it would therefore follow that the defendant's counterclaim in respect of the same suit land has no merit and it fails. It is dismissed with costs."

15 While the learned trial Judge cannot be faulted for finding that there was no merit in the counterclaim in respect of the contested portion of the suit property, he never made any finding in respect of the uncontested portion of the suit property. Having read the pleadings in counterclaim of the defendant carefully, the defence in paragraph 5 of the appellant denied that he bought only 0.45 ha of the suit land and contended that he had purchased the whole land and registered it into his names. In the counterclaim, he does not claim specifically for Plot 1127 which was not in dispute. In the context of the pleadings, the property that is in dispute is Plot 1128. The learned trial Judge cannot be faulted for having dismissed the counterclaim which could only relate entirely to Plot 1128. There was no specific averment about encroachment on the plaintiff's Plot 1127 which was not contested at all by the respondents/plaintiffs in the lower court. In the context of the entire pleadings, the suit property concerns only to Plot 1128 and because Plot 1127 was not specifically referred to, it was not in controversy in the plaint or in the counterclaim. The learned trial Judge could not consider it as part of the land in issue in relation to the counterclaim. We find no merit in ground 4 of the appeal which is hereby dismissed.

30 Secondly, in relation to ground 5 of the appeal, the issue of injunctive order in the relation to Plot 1127 does not arise. The learned trial Judge restricted his orders to Plot 1128. In holding at page 15 of the judgment that a permanent injunction issues against the defendant from further selling or trespassing on the suit land, he also restricted himself to Plot 1128. He could not make an award which the respondents have not claimed in the plaint and therefore the general damages awarded of Uganda shillings 10,000,000/= together with the interests related only to the suit contested transfer of Plot 1128 and has nothing to do with Plot 1127. To the extent that ground 5 of the

5 appeal also incorporates a grievance about the holding in respect of Plot 1127, it has no merit. We shall only considered ground 5 in relation to its affecting only and being in respect of Plot 1128 which is what the learned trial Judge had considered.

10 The rest of the grounds namely ground 1, 2 and 3 directly relate to whether the appellant fraudulently acquired and was registered in respect of Plot 1128, referred to as the suit property. We shall accordingly evaluate the evidence relating to the fraud of the appellant.

15 The appellant faults the learned trial Judge for having found that he had fraudulently acquired Plot 1128. I have carefully considered the judgment of the learned trial Judge to establish what he relied on to reach his conclusion. The learned trial Judge held that issue 1 and 2 as to whether the plaintiffs' father sold part or the whole of the suit property as well as the issue of whether or not the defendant committed any fraud during the transfer of the suit land were interrelated and considered them together. Having set out the standard to be proved under the law with regard to allegation of fraud, the learned trial Judge considered the evidence and evaluated the evidence of all the witnesses as well as the documentary evidence relating to the forensic examination of the signatures and photos used in the transaction.

25 The trial Judge held that having evaluated all the evidence, it was evident that the plaintiff's version bears more weight and is more plausible than that presented by the defendant. Variations in the signatures as demonstrated by PW4 and PW6 the two expert witnesses for the plaintiffs showing clearly falsified passport photograph of the deceased are proof of the dishonesty of the defendant amounting to fraud. He further held that the defendant seemed inclined to conceding that he bought only a portion of the suit land. There was no concrete proof that the money he was supposed to pay was fully paid-up in respect of the suit property. Finally, the plaintiffs had proved that the deceased had only sold a portion of his land.

35 I have carefully considered the testimonies. The first agreement is exhibit P4 dated 23rd of March 2006. It is written in the matter of Kibuga Block 1 Plot 1031 at Rubaga. In that agreement the seller one Mr. Kivumbi Ssonko Pantaleon (The deceased) sold 150' x 34' to the buyer, the appellant, for a consideration of Uganda shillings 17,500,000/=. It is written that the buyer paid the total consideration at the execution of the agreement and the seller acknowledged receipt thereof. In paragraph 3 it is also written that the

5 seller shall hand over vacant possession of the land to the buyer on execution of the agreement. Paragraph 4 of that agreement is pertinent and provides as follows:

"4. The seller shall sever off the buyer's portion of the land and handover the certificate of title to him together with duly signed transfer forms within two months from the execution of this agreement."

10 The seller guaranteed that the land is free of encumbrances and that it is not family property and section 39 of the Land Act did not apply to it. The sale agreement that is in controversy relates to Kibuga Block 1 Plot 1128 at Rubaga measuring 0.311 ha. It relates to an agreement made on 28th of April, 2009. Subsequently, the appellant's case is that the seller also sold Plot 1128 (also referred to as the suit property). The decision of the
15 learned trial Judge is that the evidence of the respondents who were the plaintiffs was more credible than that of the appellant. Evidently, it was a close matter in which there are two conflicting expert evidence reports and testimonies indicating that the deceased it did not execute certain documents so as to transfer Plot 1128 to the appellant. He was persuaded by the plaintiff's side and concluded after considering all the testimonies that
20 the purported purchase and transfer of the suit property was fraudulent.

Exhibit P3 deals with signatures of the deceased father on the transfer documents and concludes that based on the number of fundamental differences; there is strong evidence to show that the author of the sampled signatures did not sign the questioned signatures. The questioned signatures on the sale agreement dated 23rd of March 2006
25 exhibit A and sale agreement dated 28th of April, 2009 exhibit B. The document challenges both sale agreements and was written by Sebuwufu Erisa of the Scientific Aids Laboratory, Police Headquarters. The same expert also examined a second document namely photocopy of the land transfer for Plot 1128 inquiring whether the figure 1128 was altered and also the questioned photo attached was that of the
30 deceased. He found that the Plot number could have been altered. His opinion was that there was a high likelihood that it could have been altered from a previous figure. Secondly, he found that the sample photograph and the questioned photograph were not of the same person.

The third forensic report is that of Namuwoya Catherine, a Government Analyst of the
35 Directorate of Government Analytical Laboratory, Ministry of Internal Affairs. He also examined the photocopy of the sale agreement dated 23rd March, 2006 and that of 28th of April, 2009. Secondly, he examined the questioned passport size photograph on the

5 transfer documents of the suit property. Having compared it with the samples, he noted
that there were photocopies of the questioned documents which give some limitations
in assessing evidence. She found that the differences between the questioned
documents and sample signatures were of more significance than the similarities. As far
10 as the photographs are concerned, she observed that is not likely that the photographs
belong to the same individual. Based on the above observation she was of the opinion
that they had sufficient evidence to indicate that Kivumbi Ssonko whose sample
signatures were provided is not the same person who authored the questioned
signatures in the two sale agreements for Plots 1128 and 1127. Secondly, the photo of
15 the person appearing in the transfer document was not the same as that in the sample
photos of the deceased.

On the other hand Mr Ezati Samuel of the Forensic Services Directorate, Department of
Questioned Documents examined the same documents namely the original sale
agreement dated 23rd March, 2006 and 28th April, 2009 relating to Plots 1127 and 1128
20 respectively. These were the questioned documents which were compared with the
sampled specimens of the deceased as far as signatures are concerned. He found the
variations between the questioned signatures with that of the samples signatures were
natural variations in a person signatures. He was the opinion that the person who wrote
the questioned signatures was also the one who wrote the sample signatures. In relation
to the photograph evidence, he found that it was that of the same person taken at
25 different times and age which explain the differences in the features.

I further assessed the testimony of the witnesses and subjected the documents to
scrutiny for any consistencies or inconsistencies. The first document is dated 23rd March,
2006 by which the deceased sold 150' x 34' and is described as Kibuga Block 1 Plot 1031
Rubaga. It is also provided that the buyer who is the appellant paid the total
30 consideration in paragraph 2 thereof. The seller acknowledged the price and indicated
that he would sever that portion of the land and hand the title over to the appellant. In
the alleged earlier agreement, there was no Plot 1127. Plot 1127 was carved out of the
original Plot. The testimony of the appellant is that he had agreed to purchase 0.311 ha
and subsequently the deceased sold to him the residue and it is embodied in the
35 agreement dated 23rd March, 2006. If this testimonies to be taken as the truth, the
appellant started and continued to pay for Plot 1128 since 2004 before it had ever been
demarcated and marked as Plot 1128. In the course of doing so, he bought the residue

5 of the property and had it demarcated and transferred to him. The transfer was made in November 2006. The residue of the property is Plot 1127.

The hard evidence contained in the agreements is that Plot 1128 has a later written agreement dated 28th April, 2009 for 0.311 ha. The logical question is why the demarcation of the property had not been done earlier? Why was it done immediately
10 upon the transaction for Plot 1127 in which it was expressly agreed that the severance of the property through mutation would be undertaken by the seller? The sale agreement dated 28th April, 2009 clearly indicates that by the 7th instalment contained in paragraph 2 of the agreement, the seventh instalment being dated 25th July, 2005, the appellant had paid Uganda shillings 27,900,000/= . The next instalment is dated 20th August, 2007
15 after the first agreement of 23rd March, 2006. It is therefore significant to consider the illogical sequence of events in which the appellant paid Uganda shillings 17,500,000/= for the residue of the property when the balance he had for the alleged Plot 1128 was about Uganda shillings 10,100,000/= and still outstanding. This is because the purchase agreement of 28th April, 2009 has a total consideration of Uganda shillings
20 38,000,000/=. It was after the appellant had paid starting from 10th April, 2004 Uganda shillings 27,900,000 by 17th October, 2005 that he entered into another transaction to buy the residue of the property for Uganda shillings 17,500,000 in an agreement dated 23rd March, 2006 in which the demarcation of the property was expressly agreed upon. I find that illogical and agree with PW1 that the logical course was for the appellant to
25 complete the payment of the Uganda shillings 10,100,000/= to make 38,000,000/= Uganda shillings before venturing into another transaction and paying for it in full. He would have been left with Uganda shillings 6,400,000 to pay for the residue of the property. The conclusion of the learned trial Judge that the evidence of the plaintiffs/respondents was more probable is supported by an analysis of the two
30 agreements as above.

Additionally, the testimony of the appellant is clouded by the attestation of the witness Mr Karigyenda Joe Robert who testified as PW5. We have carefully considered this testimony. He is the lawyer who drafted both agreements. In the agreement, he witnessed the signature of the deceased Mr Pantaleon Kivumbi Ssonko. His signature
35 indicates that the deceased signed in his presence. He witnessed the signature of the deceased vendor and that of the purchaser. His witness statement indicates clearly that he prepared the sale agreement dated 23rd March, 2006 which was brought to him by the appellant. In paragraph 4 he states as follows:

5 "That I never saw the vendor and upon insistence by myself to see him, the said Kizito Joseph informed me they had already agreed on the terms."

In paragraph 5 of his witness statement he states that the appellant returned the agreement to him and informed him that the vendor had signed it. Paragraph 6 – 9 of the witness statement is pertinent. This is the written testimony of the lawyer who prepared the agreement and is stated to have appended his signature in the absence of the deceased. He stated as follows:

15 "6. That I interviewed him and he told me that the vendor was one Kivumbi Ssonko Pantaleon who had already received some money from him the proof of which he showed me acknowledgements of receipt of money by the said vendor in an exercise book.

7. That later on in 2009, he came back and told me he wanted me to draft for him an agreement in respect to the suit land for purpose of paying taxes in land office.

8. That I drafted for him the sale Agreement dated the 28th day of April 2009.

20 9. That I never saw Pantaleon Kivumbi Ssonko signing the said Agreement".

PW5 was cross examined on the aspect of not having witnessed the deceased signing the two agreements. The cross examination appears at page 312 up to 322 of the record. He confirmed that he never witnessed the deceased signing the two agreements. He was cross examined about the statement he made to the police indicating that the two agreements were endorsed in his presence and testified that it was procured from him by the appellant. He never appeared before the police.

30 Finally I have considered the testimony of the appellant himself on the issue. The appellant testified as DW1 and filed a written testimony on the court record. At page 106 of the record, he testified that he executed an agreement at the seller's lawyers Chambers and it was witnessed by the lawyer himself. After the first purchase, he resumed payment on the first purchase on 20th of September 2006 and completed on 28th April, 2009 when again executed another purchase agreement before the same lawyer and was witnessed by his friend Mr Wasswa Peter, the broker Mr Baguma Kenneth and Mr Kimera Umaru. The first agreement has the signature of one Wasswa Peter as a witness and the advocate as a witness too. It is the second agreement which is more contentious. The signature of the deceased is witnessed by the advocate PW5. It

5 also has the signatures of other witnesses as indicated in the testimony of the appellant
below the signature of the advocate. Whose signature were the three witnesses
witnessing? The agreement itself does not indicate that the deceased signed in the
presence of those witnesses. It is only the advocate PW5 who signed indicating that the
10 deceased signed in his presence and yet he subsequently testified that it was not in his
presence. Most importantly DW1 who is the appellant contradicts this in the witness
statement.

It is in view of the overall weight of the evidence that the finding of the learned trial
Judge that the evidence of the plaintiffs was more plausible than that of the defence has
weight. The finding supports and is consistent with the forensic evidence of two expert
15 witnesses who doubted that the sale agreement had the signature of the deceased. An
advocate is an officer of the court. Why would he concoct a statement which revealed
unethical conduct on his part and that incriminated him to the effect that the deceased
did not sign in his presence when the document indicates that it was signed in his
presence? It is an exception to the best evidence rule allowing the calling of oral
20 evidence to prove fraud under sections 91 and 92 of the Evidence Act that his oral
testimony is admissible to contradict the written contract and to show that he was not
present when the deceased allegedly signed the sale agreement.

The overall result is that I agree with the learned trial Judge that the evidence adduced
by the appellant was insufficient to sustain the claim. Further the evidence adduced by
25 the respondent was plausible and sufficient to sustain the counterclaim. I find no fault in
the decision of the learned trial Judge which I would uphold. Grounds 1, 2 and 3 of the
appeal therefore fail. In addition, ground 5 of the appeal which depends on the
resolution of grounds 1, 2 and 3 of the appeal has no merit and I would make an order
that it also fails. I would in the premises, issue an order that the appellant's appeal has
30 no merit and is dismissed with costs.

Dated at Kampala the 11th day of June 2019


Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 62 OF 2018

KIZITO JOSEPH MUBIRU APPELLANT
VERSUS

- 1. WAMALA DESIRE PAUL**
- 2. KABOGGOZA SIMON**
- 3. GOKYALA JUDITH RESPONDENTS**

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Christopher Madrama, JA

I agree with him that this appeal has no merit and ought to be dismissed with costs for the reasons he has set out in his Judgment.

As Kiryabwire, JA also agrees, it is so ordered.

Dated at Kampala this^{11th}.....day of ^{June}..... 2019.



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Kenneth Kakuru
JUSTICE OF APPEAL

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CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Christopher Madrama, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....^{11th}..... day of ^{June}.....2019.


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HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL