

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO
EDWARD RURANGARANGA Vs MBARARA MUNICIPAL COUNCIL
& 2 ORS
SUPREME COURT CIVIL APPEAL NO. 10 OF 1996
(ARISING FROM HCCS 1065/88 AT KAMPALA)
CORAM: WAMBUZI, CJ, TSEKOOKO, JSC & KAROKORA, JSC

Land law – leases – fraud – whether appellant’s application form for acquisition of a developed plot was evidence of fraud.

Administrative law – municipal council – Controlling Authority – leases – whether there was no Controlling Authority to grant a valid lease, S.22 Public Lands Act

Land law – leases – forfeiture – development conditions – whether lease was substantially developed – whether therefore lessee should not forfeit the same.

Land law – certificate of title S.56 Registration of Titles Act – whether impeachable, S.69 Registration of Titles Act.

Land law – mesne profits – trespass – whether proved against appellant who was allocated semi-developed premises on an expired lease.

The second and third respondents were granted a two year lease by the 1st respondent Mbarara Municipal Council in 1974, with a development condition attached, i.e. that the respondent erect thereon a building within that period. The

grant was extended in 1976 for two years. By 1978, the building was semi-finished a temporary occupation permit was granted. The Uganda Commercial Bank rented the same as a store. When Mbarara was engulfed in the war to remove Amin, in 1979, the said respondents fled to Kenya. In February 1980, they returned and applied to the 1st respondent to extend their lease for 3 years from 1978 to enable them repair their building and complete it. In March 1980, the general purpose committee acting as Mbarara Municipal Council sat and resolved to withdraw the lease from the respondents.

In October 1981, the appellant claiming that there was no building on the site except sand and stones applied for the suit land and was granted a lease thereof, erected (or rather completed) the building and was granted a 49 years lease. Meaning that the appellant held a certificate of title to the suit property but the respondents held none. Nonetheless about 1986, the respondents (i.e. the 2nd and 3rd) had their possession of the building restored. In opposition thereof the appellant filed HCCS 1065/88 at High Court at Kampala, for a declaration that he validly held a lease to the suit premises. Justice Rajasingham held that the appellant had obtained the lease through fraud because him as a District Commissioner in Bushenyi, at the time he applied for the lease, knew or must have known that the committee should not have made the respondents forfeit their lease when it was substantially developed; that he knew that the building had been substantially completed; that he knew that the authority of the committees to grant leases or otherwise extend or refuse the same, had expired in 1980, inter alia. The trial judge also allowed the respondent's counter claim for mesne profits against the appellant. Hence this appeal.

HELD:

1. The appellant to have applied for the suit land stating that there was no building thereon except stones and sand, repeating the same in court, whereas there was an erected building already occupied, was evidence of guilty knowledge and fraud.
2. The Local Administrations & Urban Authorities Decree 1971 dissolved all District, Town and Municipal Councils and their functions were vested in a committee appointed by the Minister by statutory order for a period of two years. The last such statutory order appointed the committee whose existence expired on 13th September 1980, such that by May 1981 when the committee purported to grant the suit lease to the appellant it had no such power to do so. Therefore the appellant did not obtain a valid lease because the committee that purported to do so had expired.
3. It was inequitable for the 1st respondent to revoke the 2nd and 3rd respondents' lease without adequate hearing, when the two respondents had by letter explained that their failure to complete the building was due to the onset of the 1979 Nyerere-Amin war, and the subsequent failure to find building materials. And moreover, the building had been substantially completed excepting the water system, and a temporary occupation permit had been given.
4. Though S.56, Registration of Titles Act provides that a registered proprietor named in the certificate of title is conclusively the owner of the property, S.69 of the same Act provides for those instances such as the present one where the Registrar of Titles may upon proof of fraud or mistake, cancel such certificate and re-issue the same in the name of the person deprived of the land by the said

fraud or mistake. In the instant case, it was not sufficient for the appellant to wave the certificate of the title to the court as ultimate proof of ownership. Therefore, the learned trial judge was correct to go behind the certificate of registration and to find that the respondents had been deprived of their property by fraud, inspite of the existence of the certificate of title in the names of the appellant.

5. The learned trial judge erred to have awarded damages as mesne profits against the appellant because the appellant was not a trespasser at the time he occupied the suit property, it having been on a lease which had been granted him by the 1st respondent.

Appeal dismissed except as regards the decree to pay mesne profits.

Legislation considered:

- i. SS.56, 69, 184 Registration of Title Act.
- ii. S.22 Public Land Act.
- iii. Local Government & Urban Authorities (Vesting of Powers) Decree 1971.

Cases cited:

- i. Livingstone Sewanyana vs Martin Alier SCCA 4/90
- ii. Sella vs Associated Motor Boat Ltd. [1968] EA 123.
- iii. Pandya vs R (1957) EA 336.
- iv. Waimika Saw Milling Co. Ltd, vs Laione Timber Co. Ltd. [1926] AC 101.
- v. David Nalima Sejjaka vs Rebecca Musoke SCCA 12/88.

Butagira for the appellant.

Kakuru for the respondent.

Tsekooko, JSC, dissented.

JUDGMENT OF TSEKOOKO, J.S.C.

This appeal is against the judgment and decree of the High Court dismissing a suit filed by the appellant (as plaintiff) against the three respondents (as defendants). In the suit the appellant sought a declaration that he is the rightful owner of Plot No.13 Makhan Singh Street, Mbarara, among other reliefs.

The facts of the case are as follows: On 7/3/1974 the second and third respondents applied for a lease of Plots No.11 and No.13, Makhan Singh Street, Mbarara. The application was in the name of Rwampara Hides and Skins. The 1st respondent as a controlling authority granted a two year lease on 16/4/1974. A certificate of title was issued for two years in the names of the 2nd and 3rd respondents as tenants in common. These two (2nd and 3rd) respondents began construction of a building with a basement on Plot No.13. On 1/4/1976, the two respondents obtained a one year's lease extension which expired on 31/3/1977. By then the building on Plot No.13 appears not to have been completed. The two respondents obtained a further extension of the lease of one year from 1/4/1977. It appears they never got or did not process a certificate for the last lease. From 1/4/1978 the plot was without a lease. The building appears to have been in an advanced stage of completion. That is why they got temporary occupation permit.

On 27th February 1979, during the liberation war, which toppled the Government of Idi Amin, the 2nd and 3rd respondents fled Mbarara. However, the second respondent appointed Vincent Mwahura a Manager of Uganda Commercial Bank

(UCB), Mbarara Branch, as his Attorney to look after the building (on Plot 13). Mwahura and or UCB appear to have occupied this building until sometime in 1980 when they were evicted. It is not clear who carried out the eviction. During February, 1980 the second respondent returned to Mbarara. He was unable to take over the management of the building. Banyu, a Town Clerk of Mbarara Municipal Council was un co-operative. He appears to have thought the building belonged to the Custodian Board. About 24/2/80, 2nd respondent talked to Banyu about the building. On 25/2/1980, the second respondent wrote to the first respondent a letter exh. "SA3" applying for extension of lease on Plot 13 for 3 years from 1978 and proposed to surrender Plot 11 which had remained undeveloped. On 13/3/80 he wrote exh. "SA4" to re-emphasize the application. On or about 18/3/1980 a technical committee of the first respondent met as a council, considered "SA3" and revoked the lease. By then there was no full council. This technical committee consisted of civil servants. So the plots reverted to the first respondent as a local controlling authority apparently by virtue of s.22 (7) and 22(9) of the Public Lands Act, 1969.

On 18/5/1981 the appellant applied to the first respondent by his application (Exh. ER2) for grant of lease of Plot 13. A Government Valuer assessed the value of the building on Plot 13 at Ush. 3,000,000/-. On 25/5/1981 the Commissioner of Lands and Surveys recommended that the appellant pays a premium of Ush.3m/- for the Plot and structure thereon. On 26/5/1981, the Commissioner of Lands and Surveys as agent of the 1st respondent issued a lease offer (Exh. ER1) to the appellant on specified conditions. One of the conditions required the appellant to pay Ush-3m/- The appellant paid the money in 3 installments. He had plans approved for completion of the building. He carried out some construction work to complete the

building. The appellant acquired a two-year certificate of title (Exh. ERI) to the Plot.

On 9/3/1983 the lease was extended to a 49 years lease. The second respondent had in the meantime left Mbarara. He returned to Mbarara during 1986 and had the Plot and the building returned to him through RC's decisions of Mbarara Municipal Council. Consequently the appellant instituted an action against the three respondents to recover the building and damages. All the respondents filed written defences. The defences of the second and third respondents were later amalgamated into a joint amended defence. By the amended defence they also counter-claimed for general damages for trespass, claimed for general damages of Ush, 7.2/- and cancellation of appellant's certificate of title. In their amended written statement of defence the second and third respondents alleged that the appellant as Minister of State in the Prime Minister's office connived with officials of the first respondent to obtain the suit property. Three issues framed "by the trial Court were:-

- 1. Was the grant of the lease to the plaintiff by the first defendant obtained by fraud on the part of the plaintiff?*
- 2. If issue one is answered in the negative, is the plaintiff entitled to all or some of the orders prayed for in the plaint?*
- 3. If issue one is answered in the affirmative, are the 2nd and 3rd defendants entitled to all or some of the orders prayed for in the written statement of the defence?*

These issues show that the dispute before the court was whether the plaintiff obtained the lease to the suit property by fraud.

There was a full trial at the end of which the learned trial judge dismissed the suit and upheld the counterclaim by the 2nd and 3rd respondents, He ordered the appellant to pay Ushs.7.2/- to the 2nd and 3rd respondents and directed the Registrar of Titles to cancel the registration of the plaintiff as owner of Plot 13. The learned Judge further ordered the first respondent to cause the second and third respondents to be registered as owners of the plot.

The appellant has appealed against that judgment. The Memorandum of Appeal contains eight grounds. The objection in the first ground states that -

The learned Judge erred in law and fact in basing his judgment on erroneous assumptions and reaching conclusions which are not supported by evidence, in particular

(a) His finding of conspiratorial co-operation between land agent and officials of the council was mere speculation;

(b) And that meeting of 18/3/80 used the fact of Plot 11 not developed to override the fact that Plot 13 had been developed and that this was deliberate dispossession;

(c) His finding that the building on Plot 13 was completed by the time the 2nd defendant flew (sic) the country in the face of evidence by the 2nd defendant himself having applied for extension of lease on 25.2.80.

In their submissions on ground 1 (a) both counsel for the appellant and for the respondent alluded to matters relating to ground 1 (b) and 1(c) and other grounds.

Mr. Butagira, Counsel for the appellant, criticised passages in the judgment of the trial judge. He submitted that there was no council when the technical committee of Mbarara Municipal Council withdrew the Plot from the 2nd and 3rd respondents on 18/3/1980. Counsel contended that the trial judge fundamentally erred when he ignored exh. DB1 and instead held that the matter of the plot should have been referred to the council which was non-existent. That if the judge had addressed his mind to the contents of exh. DB1 and the statement of the Town Clerk, (DWI) Bashakara the judge would have no basis for the conspiracy theory and the finding of fraud or fraudulent dealings on the part of the appellant.

Mr. Kakuru for the respondent submitted that there was evidence to support the conspiracy theory. He contended in effect that this is supported by the actions and the conduct of Bainomugisha and Banyu. That the appellant knew of the conspiracy and of the actions and conduct of these two officials and therefore is affected by their conduct. Mr. Kakuru appears to suggest that the Minute of 18/3/80 is fictitious and doubts the propriety of the appellant's application for the plot.

Paragraph 5 of the amended plaint and paragraphs 3 to 6, 14 and 16 of the amended written statement of defence for the 2nd and 3rd respondents relate to this ground. In para 5 of the amended plaint, the appellant averred-

"5 On the 26th day of May, 1981 a lease offer in respect of Plot No. 13 Makhan Singh Street was made by the first defendant to the plaintiff who accepted the offer on 29th May 1981 and paid Ushs. (old currency) 1,000,663.50 to the first defendant as part payment of the premium ... The plaintiff proceeded to erect and completed a building thereon in accordance with the terms of the lease and thereafter paid all the premium and ground rent whereupon he was granted a 49 years period of Plot No. 13 Makhan Singh Street comprised in LRVS224 Folio 12."

By paras 3 to 6, 14 and 16 of the amended written statement of defence and counter claim, the 2nd and 3rd respondents averred that:

- "3. The defendant (sic) denies paragraph 5 of the plaint and at the trial adduce (sic) evidence that the plaintiff fraudulently obtained and lease offer in respect of Plot 11/13 Makhan Singh Street whereas the defendants were the rightful owners and had already developed the said plot in accordance with the plans approved by the first defendant.*
- 4. The defendant deny (sic) that the plaintiff even put up any building on the said Plot 11/13 Makhan Singh Street in 1981/82 since there was an already existing building built by the defendants and completed in 1979 just before the war of liberation.*

5. *The land title LRV224 Folio 12 in the names of the plaintiff was therefore obtained by fraud.*
6. *The defendant deny paragraph 6 of the plaint and contend that upon presenting their original papers to the 1st defendant, the first defendant quickly realised one mistake made in 1981/82 and returned the property to the rightful owners to wit, the 1st and 2nd defendant.*

14. *That during 1981/82 the plaintiff who was a Minister of State in the Prime Minister's Office and Acting Minister of Local Government connived with the officials of the 1st defendant to allocate the Plot 11/13 Makhan Singh as if the same had not been developed.*

15.

16. Particulars of Fraud

- (a) *Applying for a plot of land well knowing that it had already been fully developed by another.*
- (b) *Pretending that he put up a building on the plot well knowing he did not.*
- (c) *Using coercion (sic) and undue influence on the first defendant to allow an already developed plot to him and coercing for the 1st defendant to grant a lease thereon."*

The appellant filed a belated reply admitting existence of the building denying fraud and putting the two respondents to strict proof of fraud.

The appellant testified as PW1. He called S.E. Mungati (PW2) a property Valuer and E. Kalubwende (PW3) a Registrar of Titles in the land office. The evidence of PW2 and of PW3 is formally really. David Bashakara (DW1) Town Clerk testified for the first defendant, Sheriff A. Abdalla, the second respondent testified as DW2 for the 2nd and 3rd respondents.

In support of his case at the trial the appellant denied fraud and explained how he applied for and acquired Plot 13 from the first respondent. He produced his application for the plot Exh. ER2 and the lease offer Exh. ER1 signed by Elly Bainomugisha, a Land Officer based in Mbarara. These two exhibits were produced without objection and the appellant was not cross-examined on the same. The appellant explained how he paid for the plots between 29/5/81 and 16/8/82. The money was paid in three installments. He claimed he had the building plans (Exh, ER6) approved. In the course of his testimony the appellant contradicted himself. At first he gave the impression that he found no building on the plot except the foundation and some building materials. But during cross examination he admitted there was a structure on Plot 13 which is supported by Exh. ER6. The appellant denied that he appointed either the Chairman or Councilors of Mbarara Municipal Council at any time. He denied influencing Bainomugisha (Land Officer) or Banyu the then Town Clerk or the councilors to allocate the plot to him.

For the first respondent DW1 explained the circumstances surrounding the revocation of the offer of the plots to respondents (2 and 3). DW1 indicated that the appellant was the proper owner of the suit property.

The second respondent in his testimony explained how he acquired the plots, developed Plot 13 and how he ran away and returned in February 1980. Because of fear, he left Mbarara and stayed in Kampala. He appears to have been operating in Kampala and Masaka till 1986 when he returned to Mbarara where RCs informally restored the building to him. There is no direct evidence of a conspiracy between appellant and Banyu and or Bainomugisha to defraud any of the respondents. Nor is there direct evidence to prove that the appellant or anyone on his behalf coerced or influenced any official to allocate the plot to the appellant.

At page 14 of his judgment, the learned trial judge dealt with conspiracy in the following words:-

"The plot having been withdrawn, the second defendant was hounded out of Mbarara. He left the UCB Bank Manager Mr. Mwahuro, his attorney in charge of the property and paid him rent."

With respect I think that here the learned judge misdirected himself on the evidence. The 2nd respondent and presumably the 3rd respondent left Mbarara, in February 1979 because of the war of liberation. Mwahuro's letter of 9/7/1979 Exh. SA1 confirms this. Exh. SA2 written by Mwahuro subsequently does not show who hounded the 2nd respondent, if at all. The second respondent appointed Mwahuro as attorney in 1979 since the 2nd respondent could not stay in Mbarara because of the consequences of the war. The plot was withdrawn much later in 1980.

The learned Judge continued in the following words:

"This put a crink in the plans of those who sought to take over the property through the Town Clerk and Council. It was at this stage that the Council, which is the-body to which the application for a plot is to be made and which having recovered the fee sends the application to the lands office for processing, received letter "DB2" from the Lands and Surveys Department, Land Agent for Mbarara purporting to forward the plaintiff's application for Plot 13. This is dated 25th May, 1981. There is no application from the plaintiff in council's records according to Mr. Bashakara and, that being so, it seems quite logical that, as Mr. Bashakara testified, there is no council Minute to show that the council considered or awarded the plot to the plaintiff. The letter "DB2" is signed by Eri Bainomugisha as Land Agent, Mbarara, for the senior surveyor of Bushenyi Mbarara District. One day later the same Eri Bainomugisha signing for the Commissioner of Lands & Surveys issued the purported Lease offer "ER1" to the plaintiff and copied it to the Town Clerk offering the plaintiff Plot 13 Makhan Singh Street for a premium of "

It seems to me and with due respect to the trial judge that the learned judge did not quite appreciate the role of Bainomugisha and the consequences of failure by the 2nd and the 3rd respondents to register the extension of the lease which expired on 31/3/1978. The Public Lands Rules (Statutory Instrument 201-1) are pertinent here.

Rule 5 thereof reads-

"Applications shall be sent to the Secretary on the form prescribed in the second schedule to these rules."

The Secretary is defined to mean the Secretary of the controlling authority. By Rule 6 the Secretary informs Mbarara Municipal Council the value of the land. The council as controlling authority decides the conditions upon which the plot is to be offered to the applicant. It is the Secretary who communicates these conditions and the value to the applicant. Rule 8 provides for conditions under which the offer lapses.

The offer lapses after one month if the applicant fails to take necessary steps to be registered.

By rule 10 *"any occupation or use by a grantee or lessee of land which the controlling authority has agreed to alienate shall until the registration of the grant or lease be on sufferance only and at the sole risk of such grantee or lessee."* This rule may be unfair to an applicant who like the two respondents had erected a building on the plot. But the rule remains valid law.

The trial judge appears to imply that the appellant caused the second respondent to flee Mbarara, that the appellant was involved in the withdrawal of the plot from 2nd respondent before the appellant was irregularly allocated the plot.

There is unchallenged evidence by the appellant that until about mid 1980, he was a District Commissioner in Bushenyi not Mbarara. On 1/6/1980 he became a Deputy Minister. In spite of allegation put to the appellant in cross examination no

evidence was called to refute the appellant's evidence that he did not know Bainomugisha, at the time material to this case and that he had no influence over Mbarara Municipal Council. The plot was withdrawn on 18/3/1980. There is no evidence that by then the appellant had applied for the plot. Exh. ER1 and Exh. DB2 show that the appellant's application for the plot was made about 18/5/1981 which is more than one year after the technical committee revoked the lease of-plot to the 2nd and 3rd respondents. There is no evidence at all to show that the appellant influenced the revocation. Nor is there evidence that between 18/3/80 and 18/5/81 the appellant harassed the 2nd respondent in connection with the suit land or at all. DW2 gave hearsay evidence that youth wingers of Rwakasisi and of the appellant wanted the building. He did not mention relevant period. DW1 in his testimony stated that by 18/3/1980 there were no councilors. He stated that Mbarara Municipal Council affairs were conducted by Technical Officers. He further stated "I have not come across anything in writing from the plaintiff directing council to do anything."

Idi Amin dissolved all the District and Municipal Councils on 2/2/1971 when he promulgated the Local Administrations and Urban Authorities Decree, 1971 (Decree No. 2 of 1971).

By the Local Administrations and Urban Authorities (Vesting of Powers) Decree, 1971 (Decree 33 of 1971) the duties and functions of the District and Municipal Councils were vested in committees whose tenure was two years. A Committee for Mbarara Municipal Council was apparently never set up until 1978: See Statutory Instrument 1978 No.92. Before then the duties and functions of Mbarara Municipal Council were performed by the District Commissioner and the Town Clerk: See

S.2 of Decree 33 of 1971. Therefore when DW1 testified (at page 32), during cross examination, that-

"In 1980 the technical committee acted as the Council"

He was right because there is no evidence that a council for Mbarara Municipality was in place. Even these committees could have ceased to exist after the Uganda National Liberation Front (UNLF) overthrew Amin on 11th April, 1979. On 8th May 1979, UNLF published Legal Notice No. 1 of 1979, which set in a new political order in Uganda and terminated services of political appointments. This was restated on 30th May 1980 by the Military Commission by Legal Notice No.2 of 1980. Although Decree No.2 of 1971 was repealed on 9th January 1980 by the Existing Law (Miscellaneous Repeal Statute) 1980, there is no evidence that Councilors were elected or appointed thereafter for Mbarara Municipal Council at that time or thereafter. Indeed Decree 33 of 1971, which provided for Committees, remained on the Statute books until 1981 when it was repealed by The Existing Law (Miscellaneous Repeal) Amendment Act, 1981. So absence of regular Councilors is not a myth.

I have gone to these lengths to show that when DW1 testified that there was no full Council for Mbarara Municipal Council at the time of the revocation of the lease of the two respondents and at the time of the allocation of the plot to the appellant, he was correct.

The plaintiff testified that his documents were damaged during the 1985/86 war. The second respondent stated the same. DW1, the Town Clerk, gave evidence about same situation (at page 70) where he stated that-

"Some documents got lost during the wars in 1979 and 1985. In 1985 the Council building was looted."

The fact that the appellant applied for the plot was not challenged. His evidence that Mbarara Town Council advertised the plot before he applied for it was not at all contradicted by any other evidence. His application (Exh . ER2) was not proved to have been forged. Indeed the irregularities in Exh, ER1, ER2 highlighted by the trial judge as evidence of impropriety were not put to the appellant in cross-examination. Mr. Kakuru casually referred to Exh. ER1 during submissions in regard to the value of the building.

Further I think that the learned judge unjustifiably denigrated Exh. DB1. This is a form of a report about the dispute on the suit plot. It is dated 8/4/86 and was written by the District Commissioner, Mbarara District to the Commissioner of Lands & Surveys Department. The document was produced as exhibit at the instance of Mr. Kakuru who was the advocate for the 2nd and 3rd respondents during the trial. The plaintiff's counsel, Mr. Elue, had reservations about the document. The District Commissioner at that early time after change of Government could not be influenced by the appellant in writing Exh, DB1. In that document (Exh. DB 1) the District Commissioner whose office had chaired the technical committee which revoked the allocation of the lease to the second and third Respondents state in part (at page 2) that -

"On 25.2.80 Sharif Ai Abdalla again applied to the Council for lease extension by Registered post. In the same letter he requested the council to

allow him to surrender plot 11 since only plot 13 had been developed and that he had been given a temporary occupation permit.

In Council's Minute DGPC.14/80 of 18.3.80, the Council Development and General Purposes Committee considered the above application for lease extension and resolved that since the would be developer did not accept the offer made, the plot be withdrawn and whatever property was on it automatically reverted to the council and that the plot be offered to any serious developer. Thereafter what followed was that:-

On 18.10.81 (sic) Mr. Edward Rurangaranga of P.O. Box 547, Mbarara, applied for plot 13 Makhan Singh Street. This was the same developed plot.

The building was later valued at shs. 3 million Uganda shillings on 21.5.81 by a Government Valuer from the department of Lands and Surveys. On 25.5.81 the Council asked Land Office to prepare lease offer for Mr. Rurangaranga based on the previous Minute of DGPC. 14/80 of 18th March, 1980 where the plot was withdrawn from M/s. Sharif Alwi & Mohamed Ahamed and that premium of Ushs. 3 million should be charged as premium as this was direct purchase." (18.10.81 must be typing error)."

The District Commissioner consulted many officials and official records before he wrote Exh. DB1. He also held meetings. The opening paragraph shows this.

In view of the above passages from Exh. DB1 which was produced on behalf of the 2nd and 3rd respondents, I do not appreciate why the learned judge ignored the

document and asserted that the council never considered the applicant's application. Further this document which was a result of meetings and consultations and in absence of appellant does not make any hint that the appellant conspired to obtain the plot nor that he coerced anybody or authority to acquire the plot.

With respect, I think that the learned judge erred in holding that Bainomugisha acted without authority and that this officer was acting in conspiracy with the council officials. The evidence of DWI during cross-examination by Mr. Kakuru, counsel for the second and third respondents, is recorded (at page 66) in the following words:-

"After second two years and if it is not finished, you can re-apply and you may be given a year or two to finish. If part of the building is completed, you can be given a temporary occupation certificate. The completed part must have minimum standards for occupation. This applies to part of the building. I have issued temporary permits for a year or two years and if not completed it will be withdrawn and council can take over the plot. Such a person is always given a hearing. If his reasons are unconvincing he may not have a hearing. I am sure conditions are not fulfilled and the time has elapsed. I could advise him or not. I am not obliged to do so..... This plot was allocated to plaintiff on 18th May, 1981. In council Minute of 18th March, 1980, the defendant's application was rejected. I can find no Minute of any of any council meeting at which any decision was taken to give this plot to the plaintiff."

The evidence of DW1 is hearsay in regard to his reports about what was done in his absence in 1980 and 1981. He refers to records. Even if the minutes at which the appellant's application was considered could not be traced (and DW1 stated that some documents got lost during 1979 and 1985 wars) it is clear that the appellant applied for the suit plot long after the 1st respondent council had revoked the lease granted to the second and third respondents. If the revocation was improperly made, the blame lies on the revoking authority not on the appellant. The copy of the Minute revoking the lease was available as evidence (exh. DB4). It is part of the record before us. It shows that the authority considered the respondent's application before the revocation. There was thus a hearing. Moreover I think that even revocation was unnecessary. By reason of s.22(7) of the Public Lands Act, 1969 once a lease expires the plot automatically reverts to the controlling authority. There is evidence of both sides showing that the lease expired in 1978. That is why the two respondents applied for a 3 year extension of the lease. It was that application for extension which was considered and rejected on 18/3/80. Exh. DB1 and exh. DB4 are quite explicit about this matter.

At different stages of his judgment the trial judge refers to a conspiracy between the Town Clerk (Banyu) and the Land Officer (Elly Bainomugisha). The learned judge suggests Banyu took personal interest in the plot. With respect I don't share this view. I should expect a diligent town clerk to know plots which are being developed in his town. His officials would regularly brief him. He can read records. The Public Land Rules (S.I. 201-1) support this view.

After referring to withdrawal of the plot, the third para at page 19 of the judgment reads

"The question that arises from that is whether Banyu was acting out of vindictiveness towards the second and third defendants or whether he was part of a greater conspiracy in favour of the then District Commissioner for Bushenyi in the new Government."

I have not found evidence on the record to explain why Banyu could have been vindictive to the 2nd and 3rd respondents. I have not been able to appreciate the connection between the appellant having been District Commissioner of Bushenyi District before mid 1980 and the allocation of the plot to him in May 1981. I have been unable to find any evidence apart from allegations in the amended statement of defence suggesting that the appellant used any of his positions to acquire the plot. Yet throughout his judgment the learned judge implies that the appellant influenced the allocation of the plot to himself. Mr. Kakuru unashamedly suggested this.

At page 20 of the judgment the learned judge stated-

"Another curious fact which points to possible collaboration by Banyu and Bainomugisha is the recitation on "ER2" the supposed application, of the minute of the General Purposes Committee of the 18th of March, 1980 by the Land Agent. This was, according to Bashakara, no more than a recommendation obtained, as I have already concluded, through the machinations of Banyu. This application for a plot dated 18th May, 1981 was not sent on by Bainomugisha to the council. He appears to have acted on it himself and issued a lease offer on the following day to the plaintiff. That offer "ER1" was copied to the Town Clerk. There is however no record

of it in the council records. This Banyu who according to "ER7" was still Town Clerk in May, 1981, appears to have kept it to himself probably because the offer was being made without consideration by the council. That Banyu was aware of the plaintiff's interest is apparent from his vouching for the legality of the grant to the plaintiff's lawyers Mugenyi & Co., by "ER7" in July 1981.

The most important link between what could have been the vindictiveness of Banyu and the machinations of Bainomugisha is brought out by Banyu's letter "ER7" to Mugenyi & Co. The time lapse between what could have been independent actions by Banyu, and Bainomugisha, I must admit, had me puzzled until I re-read "ER7". In "ER7" Banyu states that as early as on the 30th January 1980, the land Agent who was also the senior state surveyor by his letter LWM/5859.

"Advised that the council takes necessary action"

About the expired lease to a third party who according to Banyu "stubbornly refused and did not honour the offer"

This clearly establishes that Bainomugisha orchestrated the Appropriation of this suit property with the assistance of the then Town Clerk Banyu and thus defrauded the second and third defendants."

With respect to the learned trial judge, I think that the last paragraph quoted above ignored the powers given to the Town Clerk and Bainomugisha by the provisions of Rules 5,6,8 and the third schedule to the Public Lands Rules (S.I. 201- 1)(supra).

It is a fact that neither Banyu nor Bainomugisha testified as witnesses. The inferences made by the learned trial judge against Banyu and Bainomugisha without hearing from either Banyu or Bainomugisha unduly influence the decision of the judge in the case.

The learned judge quoted selected sentences from the letter (Exh. ER7) and gave erroneous interpretation thereof.

The above passage demonstrates that the learned judge did not consider the evidence of DWI that documents in Mbarara Municipal Council got lost during the 1985 war. Original of "ER1 "could be one of the lost documents. In any case "ER1" is not a forgery. There is no evidence of forgery. It was not Bainomugisha as an individual who was the land agent. He was an agent as an official for all land transactions. I understand the quotation of Minute DGPC 14/80 of 18 March, 1980 on ER2 to explain that the plot had been repossessed by the controlling authority, Mbarara Municipal Council, and therefore that it was available for leasing. I do not myself find anything strange in this. The learned judge might have made different conclusions if he read the letter of 30/1/1980. It could have helped to understand the background. The last part of the passage .1 have quoted above shows that the learned judge misinterpreted ER 7 and therefore misdirected himself on the import of "ER7". What is of interest is that Mr. Kakuru who appeared for the two

respondents here and at the trial did not cross examine the appellant on Exh, ER 1, ER2 and ER7. ER7 reads as follows-

"MTC.1/1/97

M/s Mugenyi & Co.

8th July, 1981

P.O. Box 6600

KAMPALA.

Dear Sirs,

**RE: LEASE OFFER- PLOT 13 MAKHAN SINGH STREET -
MBARARA.**

I am in receipt of your letter Ref: No. 1.775/81 dated 12th June, 1981, in respect of the above subject.

The third party mentioned in your letter was offered a two year lease of the plot on 1st April 1976 and he stubbornly refused and did not honour the offer by failing to fulfill the obligations of the offer. The lease expired and this was brought to the attention of Lands and Surveys Department by the Council. In his letter Ref. LWM/5879 dated 30th January, 1980, the Senior Staff Surveyor who is also the Land Agent of the Council advised that the council takes action (a true copy of the extracts is also attached hereby for your information). The matter was then brought to the Development and General Purpose Committee meeting held on 18th March, 1980 (true copy of the extract is also attached herewith for your information) and it was resolved that the developer of the plot-should not be offered-extension of lease and that his property be offered to another interested

developer since he had refused to accept the offer. Normally, when such cases occur the authority automatically re-enter whatever was offered in that respect. Therefore the whole matter is in order and you can advise your client to go ahead with payment of the property.

Yours faithfully,

*J. W.R. Banyu
Town Clerk."*

Apart from the language, this letter does not in my opinion show vindictiveness or any ill motive on the part of the author (Banyu). It appears that after "ER1" was given to the appellant, he sought legal advice from Mugenyi & Co., Advocates. These advocates appear to have sought clarification from the Town Clerk. This in fact is what the appellant explained in examination-in-chief when he tendered ER7 A Town Clerk of an Urban Authority is expected to know particulars of the properties being developed in his town. This is because information about application for lease or for extension of a lease must of necessity reach him. By "ER7" I understand Banyu to be explaining to Mugenyi & Co., the history and the factual position of Plot No.13 rather than conspiring to defraud the respondents.

Rule 8 of the Public Lands Rules gives this authority. Moreover it would seem that, by virtue of the Public Lands Rules the land agent should know what is happening on a property being developed in town. If he is an agent for the Municipal Council, I should imagine that one of the duties of such a land agent is to advise his principals about action to be taken in respect of a particular property. I think that in Exh. "SA4", DW2 merely pointed out that Banyu as Town Clerk was unhelpful to DW2. But the letter stated to have been written on 30/1/80 cannot be

said to be evidence of a conspiracy to defraud the two respondents. Nor can it be a basis for the statement that the lease offer had been made to the plaintiff in early 1980 as stated by the learned judge. There is no evidence to support that conclusion.

By Exh. "ER6" (the drawings) the appellant showed the existence of the Respondents' structures. The appellant was required to draw ER6, the plans, by Rule 4(d), 4(g) and Rule 6 (1) (a) (dl) (c) (i), 6 (2) and 6 (4) of the Building Rules (S.1. 269-13). He signed them (R.8). Mbarara Municipal Council officials approved them and signed them (Rule 9).

He did not hide the existence of the structures. I do not think much can be made out of them. In the light of the evidence available, my opinion is that the learned judge erred-

- a) In holding that there was a conspiracy between the land agent and the officials of Mbarara Municipal Council.
- b) In holding that the meeting of 18.3.80 used the fact of Plot 11 not developed to override the fact that Plot 13 had been developed and that this was deliberate dispossession.

The learned judge did not appear to appreciate that Plot 11 and 13 were initially applied for as a package. In the same way the lease was granted.

The evidence of DW1 and Exh. "DB4" shows the council had authority to lease Plot 13 to any interested new developer. The evidence of DW2 shows that Plot No.

13 had not been quite completed and that Plot 11 had not been developed. "Exh. SA3" produced by DW2 shows the last extension authority was given in March, 1977. The extended lease expired on 31/3/78. That is why on 25/2/80 he applied for extension of three years to continue construction. DW2 wanted 3 year extension to include the period from 1/4/78. DW2's evidence shows quite clearly that the lease had expired in March, 1978. If he left Mbarara in March 1979 because of the war why had he not applied for the extension of the lease between 31/3/1978 and March 1979.

When he was cross-examined about this by Mr. Elue, DW2 claimed that because he had temporary occupation permit he assumed that that was an extension. The temporary permit did not say so or suggest that.

Mr. Butagira criticised the learned judge when he held that the building on Plot 13 was completed by the time 2nd defendant fled the country. This is ground 1 (c) of the memo of appeal. On 25.2.1980 the 2nd defendant wrote Exh. "SA3" asking to be granted extension for 3 years to enable him "to do the small renovation requested to get an occupation permit."

During examination-in-chief the appellant initially stated that only the foundations had been dug and that there were building materials, sand and stones on the site, thereby suggesting absence of a building. However, during cross examination (at page 16) he admitted that:

"There was a structure above the ground. There was the structure of the building, a structure on blocks. There was a structure up to 10 or 8 feet.

There was a basement and a single ground floor with a flat roof at the time I visited the premises for the first time."

These two positions are difficult to reconcile. But the appellant produced the plans of the building (Exh. ER6). These plans show a building on the site. DW2 testified that he had obtained a temporary occupation permit in respect of the same building. He further testified that he had occupied only the go-downs of the building.

UCB through Mwachura would occupy the building while UCB move to its own building. There is evidence that drainage systems and water piping had not been done. The appellant had to do this. The appellant had to break and rebuild some walls. Hence ER6. In fact Form D 1 annexed to the drawing was for drainage plans. DW1 testified that (page 66)-

"I have issued a temporary permit for a year or two years and if not completed it will be withdrawn and council can take over the plot."

In his last reply to the counter claim of the two respondents, the appellant admitted existence of a building on the plot.

On the evidence, there was a building on plot 13 by the time the 2nd respondent left. Does the presence of the building mean that the appellant acted fraudulently when he applied for the plot as pleaded in the joint written statement of defence? Exh, ER2, the application for the plot is the Statutory Form, Land Form 1, in the Second Schedule to the Public Lands Rules (S.I. 201-1) authorised by Rule 5 thereof. The

lease offer Form Exh. ER1 is also the standard form. I have seen the application Form D1 dated 7th September 1982 referred to by the learned judge. The application was annexed to Exh. ER6. ER6 and the Form related to an application for approval of Drainage as required by Rules 4 and 6 of (S.I. 269-13). The date that formed the basis of its criticism by the learned judge was not put to the appellant to enable him explain the anomaly. It can be argued that whoever wrote the years 1982 might have originally written two 9s. This is normal. Moreover without expert evidence and explanation of the appellant it is difficult to say that 1982 was written recently and not on 7/9/1982.

I say this because of the accompanying application (Form A) bears the same date namely 7th September 1982. In my view the conclusions of the learned judge were based on his own theory unsupported by credible evidence. This is particularly so since the appellant applied for the plot long after the two respondents' lease of the plot had expired and after Mbarara Municipal Council had acquired its reversionary interest in the plot. In fact the Council sold the plot to the appellant more than a year after the plot reverted to the Council. Again I cannot appreciate how issuing by Banyu of Exh. ER8, the occupation permit, can be evidence of fraud. In my opinion grounds l(a), l(b) and l(c) ought to succeed.

The complaint in the second ground is that the learned judge erred in law and fact when he held that the withdrawal of the lease offer made to the second and third respondents was void and of no effect when it was legally withdrawn by Technical Committee which then acted as Council as there was no Council.

Mr. Butagira contended that the withdrawal was validly done. Mr. Kakuru contended that there was no reason why extension was not granted.

As already stated, the lease granted in 1976 or 1977 expired on 31/3/1978. There is no doubt that after expiration of the initial lease, the plot reverted to council: see s.22 (7) of Public Lands Act 1969.

That is precisely the reason why the 2nd respondent made the applications "SA3" of 25/2/1980 and "SA4" dated 13/3/80 for extension. Unfortunately no copies of the leases granted in 1974 and 1976 or 1977 were produced in evidence. Mr. Kakuru relied on clause 4 of the lease granted to the appellant. Mr. Kakuru's reliance on that clause 4 has problems. There is no evidence on the record to prove that the terms and conditions in lease granted to 2nd and 3rd respondents in 1976/77 are identical to the ones given to appellant. There is no evidence that the leases of the 2nd and 3rd respondents could be extended automatically. Further the temporary permit given to the respondents was not produced. True DW I testified that normally the two respondents should have been granted extension but he also testified that Council had power to withhold or refuse extension.

He stated, and is support by Exh. DBI, that the technical committee of the Development and General Purpose Committee validly withdrew the plot. DWI testified that this committee was competent to do this. We were not given any authority to show that this committee could not do this. The learned judge held that the respondents should have been given a hearing. This is not entirely correct. But DWI said that sometimes this is not necessary. He gave reasons. One can say that the hearing may not have been sufficient because of the developments on the plot.

If the committee considered Exh. "SA3" and "SA4", this in my view constituted some hearing. We were not given authority requiring a hearing to be more than what was done here. The judge held that these exhibits were not before the committee. At page 16 of his judgment the judge dealt with this issue in the following words:

"The withdrawal of the lease offer without the council considering it, and made by a committee of the council without the requisite authority to act for the council was void and of no effect. In the absence of evidence that the council as a whole had authorised the General Purposes Committee to make such decision, the committee cannot make them. The making of a lease offer without any evidence that it was considered and authorised by the council is equally void and of no effect."

I have referred to Decree No.2 of 1971 by which councils were dissolved. I have already shown that council affairs were managed by a committee and in its absence by the District Commissioner and the Town Clerk: see s.2 of Decree 33 of 1971.

The competence of the committee to revoke, grant or withhold leases was never pleaded in the defence. Again with respect I think that the judge misdirected himself on the evidence. DW1 who is himself a Town Clerk and therefore an authority on this issue was categorical. He stated that the committee had authority to revoke. He testified (page 32)

"The committee sitting in 1980 was a technical committee of civil servants. This committee would now act as an advisory committee. In 1980 the

committee acted as the council ... An application for extension is not automatically granted."

Furthermore, Exh. DB4 tendered by DW1 contains council's minute, which shows that the council somehow considered the application for extension before rejecting the application. In view of this and in the absence of authority for the holding of the judge, I think with respect that the judge erred in declaring that the committee had no authority to refuse extension or to revoke the lease. I think that the only question is whether on the peculiar facts of this case the two respondents were given a reasonable hearing before the revocation of their lease. There was evidence by DW2 that lack of building materials contributed to the delay in completion of the building. This was compounded by the onset of the liberation war of 1979, which forced the two respondents to flee Mbarara. These are circumstances peculiar to this case. The building was in an advanced stage of construction before the plot reverted to the first respondent. Even if the first respondent had reversionary interest, the first respondent should have interviewed the second respondent before rejecting the application for the extension of the lease or before withdrawing the lease.

Consequently, ground two ought to fail.

Because of the conclusions I have just reached on ground two, I find no need to discuss ground three.

Ground 4 complains that the learned trial judge erred by holding that Exh. "ER6" was a fabrication to maintain a fraud.

Mr Butagira criticised the judge for this view that the building plans (ER6) were fabricated. Learned counsel submitted that there is no evidence of fabrication because-the appellant testified that there was a structure on the plot. I understand Mr. Kakuru to contend that by submitting building plans, the appellant indicated that he was to erect a new building.

At page 24 of the judgment, the judge dealt with this matter in the following words:

"He then went on to produce building plans as his plans which are clearly plans of a building already in existence. Another curious factor which I unfortunately only noticed now, is that the so called application for approval of plans he says he submitted is a carbon copy of an application with nothing to show who the applicant is except a signature dated 7th September, 1982, again in ink. If that did not raise a doubt, the accompanying application for approval of plans for drainage certainly must. It not only appears to be a recent fabrication from the face of it but the plaintiff having signed it has at first dated it "1992" and then written "1982" over it. I know that one can, especially at the turn of a year, accidentally put down the earlier year but I find it impossible to believe one can accidentally post date a document by ten years! I am convinced, therefore that "ER6" is wholly fabricated for this case. Once again I must conclude that he did that to cover up a guilty knowledge."

With respect I think that these findings by the learned judge are based on his own theory. I have already considered this matter. The so-called fabrications were not put to the appellant when he testified. The appellant admitted the existence of the building. At page 54 of the record, the appellant testified during cross-examination by Mr. Kakuru that:

*"My plans show what was there. The plan notes say that a building is in existence with a flat roof. There was a structure above the ground
The plans my surveyor made were for alteration and completion of an existing building. The alterations included rooms at the back to be added. The rooms inside the building were poorly built so we demolished them and rebuilt them."*

When the 2nd respondent testified, he was shown Exh. "ER6" he stated-

"This is exactly what we had done up to completion."

I have seen two copies of the drawings. On each one there are official stamps of Mbarara Municipal Council officials and of land office showing dates 9/9/82, 8/9/82, 13/9/82, 16/9/82. There has been no suggestion that the signatures of officials near those dates were forgeries. Nor is there evidence that the official stamps appearing on the face of each of the two -drawings is not genuine. There are notes on the two drawings reading:

"Plan of the original basement and ground plan. Then side elevation of existing building plus Det. Of St. Case Loc. Plan and layout plan for Major Edward Rurangaranga which is on Plot No. 13 Makhan Street..."

I don't know if the appellant was required to show who the previous owner of the existing building was. In any case this was not put to him. I think that picking some error in the covering letter to justify a view that all the plans were a fabrication is not supported by evidence. I think that the judge erred in holding that "the plans were wholly a fabrication for this case" and that the appellant committed perjury. I think that the drawings were required by and conformed to the Building Rules (S.I. 269-13). Rule 4(d) and 4(g) and Rules 6(1)(a), 6(1)(c)(i), 6(2) and 6(4) which are relevant read as follows:

"4. Every person who erects a building shall comply with the requirements of these Rules, and for the purposes of these Rules any of the following operations shall be deemed to be the erection of a building -

(d) the re-erection or alteration of any part of an existing building;

(g) the carrying out of any drainage work;

6. (1) Every person who intends to erect or make any alterations or additions to a building to which these Rules relate shall give to the local authority notice in writing of his intention and -

(a) send or deliver the notice to the local authority together with a sufficient description in writing on the printed application form of-

(i) The class or nature of the building and whether it is to be used as a dwelling-house or not and shall furnish any further particulars that the local authority may deem necessary;

(ii) The materials with which the building is to be constructed;

- (iii) *The sanitary fittings, the mode of drainage and sewerage disposal;*
- (iv) *The water fittings and the means of water supply;*
- (e) *send or deliver to the local authority such drainage plans as may be prescribed by the Drainage and Sanitations Rules or any rules amending or replacing the same to a scale approved by the local authority."*

In the light of these provisions, I cannot see how the appellant could be faltered because of producing the drawings. The law obliges him to produce the drawings.

Ground 4 must therefore succeed.

Ground 5 complains that the learned trial judge erred in holding that the plaintiff's registration of title was vitiated by some fraudulent act of which the plaintiff was aware of and participated in its execution, when there was no evidence to this effect except the fertile imagination of the learned judge.

The words "fertile imagination" as used here is inapt. However, this ground is an aspect of the first ground, which I have considered. I agree with Mr. Butagira that there is no evidence, which connects the appellant with any fraudulent act. As I have said earlier, fraud must be strictly proved. Here it was not proved. I don't think that **Musisi vs Grindlays Bank [1983) HCB 39** supports the two respondents. Ground 5 ought to succeed.

In ground 6, the complaint is that the learned judge erred in law in relying heavily on Mr. Banyu and Mr. Bainomugisha and Mr. Mwachura when they never gave evidence in court and his conclusion was accordingly hearsay.

Mr Butagira criticised the learned judge because of the latter's reliance on actions or omissions of Banyu, Bainomugisha and Mwachura. These never testified. If there was fraud, there was no evidence that the appellant was a party or privy to it.

Mr. Kakuru contended that the judge referred to Bainomugisha, Banyu and Mwachura because of documentary exhibits. Learned counsel, therefore supported the judge. Letters signed by Mwachura, Banyu and Bainomugisha were admitted. But I don't think that was licence to rely on hearsay evidence.

I agree that at page 12 of his judgment the learned judge relied on hearsay about what Mwachura and certain lawyers informed the second respondent. The problem which the admission of the documentary exhibits created is that anomalies which the judge appears to have found were not explained by the authors. This applies to Bainomugisha, in respect of Exh. ER1, ER2; Banyu, in respect of Exh. "DB4", Exh. DFI, ER7; and Mwachura in respect of Exh. "SA1" "SA2".

At page 18 of his judgment, the learned trial judge stated:

"It therefore behoves me to examine whether the fraud was in fact perpetrated, if there was fraud perpetrated, with the co-operation of the persons acting for the council. This is in effect what the second defendant

said he was told by the Bank Manager Mwachura, that the Town Clerk and the plaintiff were "after the building."

The Town Clerk at the time of the second defendant's letter "SA3" dated 25th February 1980, was one Mr. Banyu.....

The same Banyu was the one who according to the second defendant, advised him not to pursue his claim to the building on Plot 13..... At this time the plaintiff was, according to him, District Commissioner in Bushenyi. According to the plaintiff it was in "early 1980" that this plot was advertised, if indeed it was advertised, which I do not believe it was, in the Uganda Times."

Later at page 19 of his judgment the learned judge stated:

".....the same Town Clerk Banyu produced the second defendant's letter without any report of the development or a valuation of the property and informed the committee that he was not a resident of Uganda but of Kenya That committee on that information or lack of information decided to withdraw the offer to the second and third defendants ... this purported withdrawal, engineered by Banyu did not have the effect of withdrawing the plot from the second and third defendants ... What it does show is that the Town Clerk Banyu did take a personal interest in depriving the second and third defendants of this property.

The question that arises from that is whether Banyu was acting out of vindictiveness towards the second and third defendants or whether he was part of a greater conspiracy in favour of the then District Commissioner for Bushenyi in the new Government."

The whole of the above quoted passage illustrates that the learned judge did not properly evaluate the evidence before him. First until February 1980, the two defendants had not met Banyu who appears to have been under the mistaken view that the suit property belonged to the Custodian Board. So when the plot was withdrawn on 18/3/1980, Banyu could not act out of vindictiveness. Nor could he act for the plaintiff who was still working as District Commissioner of Bushenyi and not Mbarara. Even then there is no evidence to show that by 18/3/1980 the appellant was interested in the plot.

Further DB4 shows that Banyu read to the committee "SA4" dated 25/2/80 from the second respondent.

The trial judge does not give reasons why he expected Banyu to produce to the technical committee a valuation report and other report other than reading "SA4" as the Minute "DB4" shows. The judge drew wrong inferences about Banyu and finally used those wrong inferences to find conspiracy to defraud. I think that the criticism of the judge is valid and ground six ought to succeed.

In the 7th ground the complaint is that the manner and style of writing judgment revealed the learned trial judge's bias as evidenced by accepting defendants' evidence, and making findings on it, without first also considering the plaintiff's

evidence, which was in fact alluded to as an afterthought. As this Court's **Civil Appeal No.9/85 Libyan Arab Uganda Bank & Haji Bagalaliwo vs Adam Visialidas** shows misinterpreting evidence or a document is not evidence of bias. Bias is much more than that.

Mr. Butagira contended that before the trial judge evaluated the entire evidence the judge made adverse findings and inferences and innuendos about the appellant's case, learned counsel contended that the judge gave scanty attention to evidence in favour of the appellant. Mr. Kakuru submitted that in his testimony the appellant departed from his pleadings and that the judge did not condemn the appellant before evaluating his evidence.

Mr. Butagira's complaint refers to the following passages from the judgment. At pages the judge stated-

"At this stage the first defendant filed an amended answer, which in effect was a complete reversal of its position in 1991 and stated that the Chief Executive of the first defendant had never deprived the plaintiff of the suit property and it was therefore not liable. Thus, from saying it had never legally granted a lease to the plaintiff, it came round to saying it had never deprived him of the property implying thereby that' the property was legally the property of the plaintiff."

This passage appears early in the judgment when the trial judge was making a summary of the case. The plaint was amended with the consent of counsel for the defendants. The two counsels for the defendants signified their consents by

appending signatures to the amended plaint. Amended written statements of defences were filed. The amended defences did not plead any objections to the amendment plaint. Neither did defence counsel raise any objection to the form of the amended plaint. Furthermore the appellant filed two successive replies to the amended defence and counterclaim of the two respondents. In paragraph 2 of the latest reply the appellant admitted the existence of the building but pleaded that it was not yet completed and not ready for occupation.

In paragraph 4 he denied particulars of fraud and put the respondents to strict proof.

Interestingly, the latest reply was consented to apparently by Mr. Kakuru, Counsel for the 2nd and third respondents and was, in-fact filed on Court record before the second respondent testified. The remarks of the learned judge were therefore uncalled for and undesirable.

The following passage at pages 3 and 4 of the judgment was criticised by Mr. Butagira:

"Plaintiff then produced a "building plan" which he said he submitted to the first defendant. It was marked "ER6". This is a most revealing document. The plaintiff stated that there were the plans for a building he was to construct on the plot. The plan is accompanied by his application and the application clearly states that it is an application for permission to construct drainage and not to construct any building. Furthermore the two plans

which make up "ER6" clearly talk of "existing promises" and original basement and ground plan."

When discussing ground 4 I made observations in regard to the views of the learned judge about these plans. All I can say now is that because of the provisions of Rule 4(d), 4(g) and Rule 6 of the Building Rules (S.I. 269-13) the appellant was required to produce plans as he did. With respect I think that the criticism of the appellant by the learned judge was therefore unjustified.

The last of the passages about which Mr. Butagira complained is at the top of the judgment. It reads;-

" .. There had been a completed building on the suit property when he got it. He denied using his influence as a Minister. And in re-examination denied the obvious that he' had never given anybody written instructions to offer the plot to him."

I am unable to appreciate what the learned judge meant by "denied the obvious". If he meant that it was obvious that the appellant had not given written instructions, that was factual because DWI said so. Indeed no evidence was adduced to the contrary. If that be the position, was it necessary for the learned judge to make the remark? Mr. Butagira complained that this passage bears innuendos suggesting that the appellant gave instructions. That is one-possible interpretation. Perhaps it is a matter of style. Overall I think that the remarks were uncalled for and suggest that the judge held the view that the appellant influenced allocation of the plot to himself.

Ground 7 ought to succeed.

Ground eight complains that the learned trial judge erred in law in awarding special damages when no evidence was adduced by the plaintiff to prove them. Here the plaintiff must mean plaintiff by counter claim. Mr. Butagira submitted that since the judge held that the second respondent had not adduced evidence to prove his claim, it was wrong for the judge to rely on the appellant's evidence as proof of the counter claim. Mr. Kakuru for the respondents supported the findings of the learned judge.

The trial judge dealt with this matter at page 26 of his judgment in the following words:

"The second defendant's evidence is that after he left the country in 1979, the building and premises were vacant until they were occupied for a few months at most by the UCB. He says the UCB paid rent but although the letter "SA2" talks of "sorting out" the matter of rent, and he spoke of being paid Ushs. 300,000/- a month he made no effort to prove it.

The plaintiff however had a rental assessment made in 1983 and according to those figures, the sum claimed by the second and third defendants is quite modest. I award the second and third defendants the sum of Ushs. 7,200,000/- as special damages."

A significant factor which the learned judge did not consider is that the appellant's figures were in old currency. The judge did not consider the effect of the Currency Reform Statute, 1987 on figures. PW2's valuation covers a long period and was a lump sum.

By 1979 the building was incomplete. UCB might have occupied it as an emergency after the war. The claim by the respondents for Ushs. 7.2m/- had not been particularised in para 18 of their amended written statement of defence and counter claim. The counter claim for the claim covers the period 1981/87 which includes periods when the appellant was carrying out construction. There is no evidence that the appellant was responsible for the eviction of the respondents. The appellant occupied the building before 1986 after its sale to him by the first respondent. He was not a trespasser. There is no basis for the award of damages. Even the appellant's evidence on the rental would have to be properly evaluated. Special damages must be strictly proved. The award of Ushs 7.2m/- was just arbitrary. I accordingly think that ground eight ought to succeed.

In view of the conclusions I have reached on ground eight, I would allow this appeal.

For the reasons which I have endeavored to give, I would allow this appeal. I would set aside the judgment and decree of the trial court. I would award costs to the appellant both here and below.

Delivered at Mengo this 8th day of August 1997

J.W.N TSEKOOKO

JUSTICE OF THE SUPREME COURT

JUDEGEMENT OF WAMBUZI, CJ;

I have read in draft the judgment prepared by my learned brother Tsekooko. J.S.C. and also read the pleadings in this case and a number of points cause me concern.

On the pleadings the appellant brought an action in the High Court for a declaration that he is the rightful owner of the premises on Plot 13 Makhan Singh Street, Mbarara by virtue of a lease granted to him by the first respondent, Mbarara Municipal Council, for breach of contract and for damages and an eviction order against the second and third respondents for trespass, among other reliefs sought.

The first respondent denied that it legally offered or granted any lease of the land in question to the appellant.

The second and third respondents claimed to have been granted a lease in respect of the plot in question which they developed to some extent. They alleged that the appellant obtained the lease of the property in question through fraud and counter-claimed for damages for trespass.

In these circumstances, I am a little puzzled that in effect the only issue at the trial was whether or not the lease to the appellant was obtained by fraud. The record indicates that there was some discussion on the issue but there is no indication that the pleadings were amended. In my view and with respect, one of the issues was surely whether or not the second and the third respondents were granted a lease to develop the plot in question and if so what happened to that lease. Needless to say it is important to frame issues properly in any case because the production of evidence depends on the issue to be resolved.

Be that as it may, the appellant testified in the court below that he applied to and was granted a lease of plot 13 Makahn Singh Street, by the first respondent. The application was dated 25th May 1981 and is Exh ER 2. It shows that the building to be erected was commercial with a residence at the top and the value was to be Ushs. 3.5m/-. The appellant inspected the plot and, in his own words;

“I inspected the property after I got the offer. There were foundations dug and some building materials – stone and sand on the site. I came to my lawyers and told them of it... the Town Clerk told them the plot had reverted to the Town Council. I produced a photocopy of that letter – marked ER7.”

Exh ER 7 reads as follows in so far as is relevant,

“RE: LEASE OFFER – PLOT 13

MAKHAN SINGH STREET – MBARARA.

...The third party mentioned in your letter was offered a two year lease of the plot on 1st April, 1976 and he stubbornly refused and did not honour the offer by failing to fulfil the obligations of the offer. The lease expired and this was brought to the attention of the Lands and Surveys Department of the Council. In his letter Ref. No. LWM/5879 dated 30th January 1980, a Senior Staff Surveyor who is also the Land Agent of the Council advised that the Council takes the necessary action, (a true copy of the Land Agent’s letter is attached hereby for your information). The matter was then brought before the Development and General Purpose Committee meeting held on 18th March, 1980 (a true copy of the extracts is also attached herewith for your

information) and it was resolved that the developer of the plot should not be offered extension of lease and that his property be offered to another interested developer since he had refused to accept the offer. Normally, when such cases occur, the authority automatically re-enters whatever was offered in that respect.

Therefore the whole matter is in order and you can advise your client to go ahead with payment of the property.

Yours faithfully,

J.W.R. Banyu

TOWN CLEARK

c.c. The Hon. Major E. Rurangaranga,
Minister of State, Office of the Prime Minister,
Kampala.

c.c. The Land Agent,
P.O. Box 220, Mbarara

The appellant erected the building and was subsequently granted a lease for 49 years. It was indicated during the course of the hearing that it was not disputed by the second and third respondents that a lease of 49 years was granted to the appellant.

Apparently, the first respondent was not represented at the beginning of the trial and its Counsel was given leave to appear for it at the close of the case for the appellant. Only one witness, the appellant, was recalled for cross-examination and that was the appellant himself.

For the first respondent David Bashakara, the Town Clerk, since 1990 testified to the effect that the first respondent recognized the appellant as the legal owner of the plot in question and the first respondent did not deprive the appellant of the plot in question. He wondered why the appellant had sued the first respondent and prayed that the case against the first respondent should be dismissed. This evidence is the exact opposite of the first respondent's pleadings. There is no indication that the pleadings were amended to reflect this turn around.

Be that as it may, Shariff Abdulla, the second respondent testified to having obtained a lease together with the third respondent to develop the plot 11 in 1974. However, only Plot 13 was developed. The building was completed and a Temporary Occupation Permit was granted by the first respondent in 1978. Because of the war in 1979 the witness left the building in occupation of Vincent Mwahura, Bank Manager of UCB. He returned to Mbarara in 1980 and was not allowed to occupy the building. He raised the issue with the first respondent through letters Exhs. SA 3 and SA 4. He claimed he was harassed by the authorities and had again to leave Mbarara until 1986. He learnt that the first respondent had sold the building to the appellant but could do nothing about it. The building was returned to him in 1986 by the first respondent.

The main issue in the court below was whether the grant of the lease was obtained by fraud on the part of the appellant.

The learned trial judge found as a fact that:

“The second and third defendants obtained a lease offer in respect of Plot 11 and 13, Makhan Singh Street, Mbarara, in 1974 and an extension of the offer to the 1st April, 1978 by an application dated 22nd of April, 1976 in which they indicated that the building on Plot 13 was almost completed vide page 2 of DB1. They were granted a year at a time to complete the building on Plot 13.

The evidence of the second defendant and the plan “ER 6”, to my mind, establishes that the building on Plot 13 was completed by the time the second defendant fled the country in 1979, except perhaps for the construction of water and sewerage facilities, and that the defendants had in fact been granted a Temporary Occupation Permit.”

The learned trial judge accepted evidence to the effect that the second and the third respondents in their letter of 25th February 1980 requested for an extension of the lease for three years, commencing 1st April 1978, to carry out repairs on the building.

The learned trial judge accepted the evidence of Bashakara, the Town Clerk, that in his experience any developer who had reached the stage reached by the second and third respondents would be granted an extension to complete the development.

Exh. DB4 purports to be a minute of the Council Meeting held on 14th March 1980, it read as follows:

“Plot No. 11/13 Makhan Singh Street

The Town Clerk read out an application letter received from Mr. Alwi Abdulla, Ahmad Ahmed of P.O. Box 160, Mbarara, in which he was applying for 3 (three) years lease extension to enable him complete the above plot which he had not been able to accomplish due to lack of building materials. After lengthy discussion, it was resolved:

That since the would-be developer did not accept the offers made the plot be withdrawn and whatever the property was on it automatically reverted to the Council.

That the Council Technical Officers inspect the building and assess the value of the building so as to enable the Council offer the plot to another interested developer. Also the Town (sic) reported that he was in possession of a copy of a letter written by the above person authorizing someone else to take-over the property as the former was denying being a resident of Uganda but of Kenya.”

On the effect of this so-called minute, the learned trial judge remarked:

“I am convinced that the ‘appropriation’ of this developed plot was executed by the Land Agent of Mbarara with almost conspiratorial cooperation of officials of the first defendant Council after the General Purpose Committee purporting, without the necessary powers to act for the

Council, purported to withdraw the lease offer made to the second and third defendants.”

There was evidence considered by the trial judge that at the relevant time, there was no council and that the work of the Council was done by some officials. There was no evidence of any authority under which these officials were empowered to carry on the functions of the Council.

According to the letter on the lease offer from the Town Clerk Exh E.R. 7, it was the Development and General Purposes Committee which handled the withdrawal of the lease offer from the respondents. Most probably, the same Committee granted the lease to the appellant and this may be the Committee of officials referred to in the evidence.

Under the Local Administrations and Urban Authorities Decree, 1971 all district Councils, Municipal Councils and Town Councils were dissolved with effect from 31st January 1971 and the offices of Secretary General, Assistant Secretary General, Mayor and Deputy Mayor were terminated.

Under section 1 of the Local Administration and Urban Authorities (Vesting of Powers) Decree, 1971, the administration of the affairs of every district, Kampala City Council, Municipal and Town Council and the duties and functions of the said councils were vested in a committee appointed by the Minister by Statutory Order for a period not exceeding two years.

It appears that by the Local Administrations and Urban Authorities (Appointment of Committees) Order 1978, committees were appointed for a number of

authorities including Mbarara Municipality. The Chairman and Deputy Chairman of each Committee were to be known as Mayor and Deputy Mayor respectively. The Order was to be deemed to have come into force on the 14th September, 1978.

As already pointed out these Committees were appointed for a period not exceeding two years. It follows that the Committee appointed for the Municipality of Mbarara was to last for two years from the 14th September 1978. There was no evidence that this is the Committee, which handled the lease in the case before us, but even if it was, the jurisdiction of the Committee to carry out the functions of Mbarara Municipal Council expired on 13th September 1980, two years from the date of its creation. I have not found any authority extending the life of the Committee or appointing a new Committee for Mbarara Municipality with the result that on the 26th May 1981 when the lease was granted to the appellant there was no authority to grant such a lease.

The learned trial judge quite correctly in my view concluded:

“The withdrawal of the lease offer without the Council considering it, and made by a Committee of the Council without the requisite authority to act for the Council was void and of no effect. In the absence of evidence that the Council as whole had authorized the General Purpose Committee to make such decisions, the Committee cannot make them. The making of a lease offer without any evidence that it was considered and authorized by the Council is equally void and of no effect. Land grants within what is referred to as a “designated urban area” may only be made by the “designated authority” which under the Public Lands Act 1969 (13 of 1969) is defined as including Municipal Councils. Since there is nowhere in the

minutes of the Mbarara Municipal Council any minute showing that the Council considered the plaintiff's application let alone that it decided to grant the plaintiff a lease of No. 13 Makhan Singh Street, the grant to the plaintiff is void and of no effect."

What is the effect if a title to land is issued without authority as in this case? The matter was not argued nor did the learned trial judge allude to it. He appears to have assumed that nothing could be done unless fraud was proved. In his own words:

"This does not, however, dispose of this case because the plaintiff is the registered title holder of plot 13 Makhan Singh Street, and the registration can only be challenged – S. (1) (c) (sic) in case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud"

I am not sure that this is entirely correct. In so far as is relevant S.69 of the Registration of Titles Act provides:

"In case it appears to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error..... or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate of title, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that any certificate of title or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained to deliver up the same for the purpose of

being cancelled or corrected or given to the proper party, as the case requires...”

On the face of it, it would appear that the Registrar of Titles has power to cancel a certificate fraudulently or wrongfully obtained or retained. In my view it was open to the court in the case before us to declare that the certificate of title was wrongfully obtained. This would open the way for the second and third respondents to pursue their rights before the first respondent and the Registrar of Titles. I am aware of the provisions of Sections 56 and 184 of the Registration of Titles Act but in this case the action was brought by the appellant and not by the respondents and I see no valid reason in law to prevent the second and the third respondents who were in possession of the property in question from pursuing any rights they may have had under S.69 of Registration of Titles Act.

I am also aware that these matters were not pleaded but the case appears to have been conducted and evidence adduced around the general theme as to whether or not the lease to the appellant was properly granted. On the pleadings, the first respondent denied it legally granted any lease to the appellant.

Be that as it may, the court went on to consider whether fraud had been established.

On the evidence before him, the learned trial judge found that Bainomugisha, “the land agent” orchestrated the appropriation of the suit property with the assistance of the then Town Clerk, Banyu and thus defrauded the second and third defendants.

Quite rightly in my view the learned trial judge posed the question,

“Whether the plaintiff was part of the fraud himself or was aware of the fraud on the part of somebody else, in this case on the part of Bainomugisha and Banyu”.

He then made the curious finding that,

“The plaintiff obtained registration of his title under the Registration of Titles Act by applying to the Registrar of Titles and producing those supporting documents that he was required to produce. Hence the act of registration was not in itself fraudulent”.

But presumably tainted with fraud.

The question to ask is what were the supporting documents that were required to be produced? If those documents included or were based on the grant of the lease by the Council, the learned trial Judge found the relevant minute was false as the Council did not grant nor authorize the granting of the said lease. The purported offer of the lease to the appellant the learned trial Judge found on the evidence to have been the work of Bainomugisha purporting to be authorized by the Council. What evidence did the appellant put before the Registrar of Titles that he had been granted the lease by the Council for the issuance of the certificate of Title?

It would appear to me that an application for registration which to the knowledge of the applicant is based on an unauthorised grant is in itself fraudulent in so far as it is a false presentation to the Registrar of Titles that the lease had been granted by the Council.

In the case of **Livingstone Sewanyana vs Martin Alier - Civil Appeal No.4 of 1990 (unreported)** the land Registry issued two certificates of title to different parties in respect of the same piece of land. The High Court agreed that the second certificate of title had been wrongly issued and that it should be cancelled because there was a subsisting title in respect of the same piece of land. On appeal it was necessary to decide when the second lease was granted. Oder JSC dealt with the matter in this way,

"I think that it is adequate to consider the issue of what act on the part of the Commission should be regarded as having been the grant of the appellant's lease; that is to say whether it was the decision contained in minute 8/2/82 (a) (204) of August, 1982, the offer of 11/8/1986 or the Registration of the appellant as the lessee on 8/9/1986.... The Commission's grant was in response to the applicant's application on a standard for (Exh D.1) as he did not make any other application.

The application form was subsequently endorsed as approved by a minute of the Commission. Therefore, the offer issued to the appellant also referred to the minute of the decision approving the application. According to the evidence of Maria (DW 1), the grant was made by the Commission's minute 8/2/82 (a) (204) of August 1982. That is also what the Secretary apparently intended to communicate to the appellant by his letter of 28/2/1987.

To my mind, the Secretary and Maria (DW1) were correct. The grant to the appellant should be regarded as having been, and in my opinion it was made in August 1982 by the decision under the minute already referred as testified

to by Maria (DW I). The decision granting the lease having been made in response to the appellant's application, it was not an internal matter not binding on the Commission in relationship to the appellant.

This would in my view, appear to explain the reference to the minute of the decision on the approved application form and the lease offer. The grant made under that minute was the root from which the offer and the appellant's certificate of title derived their validity. The grant having been made in August 1982 when the suit property was not available for leasing owing to the respondent's leasehold which was still subsisting at that time, the Commission, in my view, was justified in wanting to cancel it as communicated to the appellant's lawyers by Exh.P.3."

In the instant case the grant, the root of the title, was not made by the proper authority.

The learned trial judge considered the evidence before him and concluded:

"The plaintiff was a District Commissioner and then Deputy Minister of Local Government in 1980, and must, at least in the latter office, have been aware that an application for a town plot had to be made to the designated authority, the Municipal Council. Yet in early 1981, he appears to have given his application to the Land Agent, if indeed he had made a formal application at all. Then, without anything to show that the Council met to consider his application, it is endorsed by Bainomugisha, the Land Agent on the 25th May 1981, and a lease offer made to him on 26th May, 1981. Even if

this was the result of awe or fear or even respect for his position, the plaintiff knew that the requisite approval of the Council had not been obtained. The plot had not been withdrawn at the time Bainomugisha wrote to the Council on 30th January, 1980, to draw its attention to the expiry of the second and third defendants lease offer. Although it is possible that Bainomugisha, who had not yet received the plaintiff's application at that time, may have been acting on his own; it seems unlikely in view of subsequent actions of Bainomugisha and Banyu. Be that as it may, the plaintiff in his evidence stated that there was only a pile of sand and stone and some excavation of a foundation on the plot when he examined after he received the lease offer. This we know as a certainty was totally untrue. Why then did he lie in court?

Admittedly this is post facto but to my mind it is evidence of guilty knowledge."

For my own part I am satisfied on the evidence that:-

- 1) The appellant knew that the property he had applied for had been developed or substantially developed by another person and he lied about it in his evidence.

- 2) Through his lawyers the appellant was assured that the property had been withdrawn from the first developer. Exh. ER 7 is a detailed letter by the Town Clerk giving details of the lease offer to the third party, the expiry of the lease, a copy of the letter of the Land Agent suggesting appropriate action, a copy of the minute of the General Purpose Committee and resolution not to extend the lease of the third party. One would have expected the same letter which gave such

details regarding withdrawal of the first offer to provide similar details regarding the grant of the lease to the appellant, such as date of the meeting of the Council, the minute regarding the decision of the Council, etc. On the contrary this important issue is dealt with in one sentence:

"The whole matter is in order and you can advise your client to go ahead with payment for the property."

This lends support to the inference that those details were not there. In other words, that there was no meeting of the Council and no decision to grant the lease to the appellant by the Council.

3) It is admitted by the appellant that there was no Council at the material time but there was no indication in the Court below or before us of under what authority the officials acted for the Council.

On the evidence I am unable to fault the learned trial Judge's conclusion that the appellant was aware that his application had not been considered or granted by the Council and he knew of the fraud on the land office by the Council officials and he took advantage of it by applying and obtaining a lease in respect of the property in question.

I would dismiss the appeal against the decision of the lower court on the issue of fraud and the related orders.

On the issue of damages the learned trial Judge awarded Ushs 7,200,000/- as special damages to the second and third respondents.

In their amended written statement of defence, the second and third respondents counter-claimed against the appellant and alleged in effect that the appellant fraudulently connived with officials of the first respondent to allocate Plot 13 Makhan Street, as if the same had not been developed and as a result the second and third respondents incurred loss of rent from 1981-1987 to the tune of 7.2 million shillings.

I must confess, I am unable to find any evidence that the appellant took part or that he influenced the withdrawal of the offer of the lease from the second and third respondents. In any case on the respondents' own evidence, their lease expired on the 1st April 1978 and they had in fact applied for an extension of three years. The extension was not granted. Whatever their claim may be against the first respondent, I am unable to see any basis for their claim against the appellant for trespass to the property in question or for loss of rent as the respondents had no interest in the property.

To that extent, I would allow the appeal relating to damages and alter the judgment and the Decree of the court below by dismissing the part of the counterclaim of the second and third respondents relating to trespass and loss of rent. I would accordingly set aside the award of special damages in the sum of 7.2 million shillings. I would give the appellant half the costs of the Appeal.

As Karokora JSC agrees with my proposed orders in those terms.

Dated at Mengo this 8th day of August 1997

S.W.W WAMBUZI

CHIEF JUSTICE

JUDGMENT OF KAROKORA, JSC:

The facts of the case are fully set out in the Judgment of Tsekooko, JSC; which I have had advantage to read in draft. It is therefore not necessary to repeat them here.

There is, however, uneasiness in my mind as to the circumstances of how this Plot 13 Makhan Singh Street was removed from 2nd and 3rd Respondents who had developed it to the level of securing Temporary Occupation Permit (TOP) for use as a storage of their merchandise and to the level of being used by the Uganda Commercial Bank, Mbarara Branch, after their bank had been destroyed in the Liberation War of 1979: and how it was, after the withdrawal, offered to the appellant in Leasehold.

There was no dispute that in 1974 Plot 11/13 on Makhan Singh Street were offered in leasehold to the 2nd and 3rd respondents by the 1st respondent. The two respondents (2nd 3rd) constructed a storied commercial building in Mbarara. In 1976, the two respondents applied for lease extension for 2 years in order to complete the building. The lease expired in 1978. The 2nd respondent got (TOP) for storage purposes in 1979. However, when the war broke out in 1979, the two respondents fled Mbarara in March. When the 2nd respondent wanted to return to Mbarara in 1980, he was advised by Mr. Mwahuro of UCB to keep away for quite some time.

The 2nd respondent then gave power of Attorney to Mr. Mwashuro to take care of the building when at the same time UCB was renting it. In February 1980, he managed to travel to Mbarara and saw Banyu, the Town Clerk, about his Plot 13 Makhan Singh Street. The Town Clerk was not receptive, for he told him that, he too, had been in exile and so told him (2nd respondent) not to bother him. He stated that the Town Clerk thought it was a Custodian Board property. However, the 2nd respondent still wrote to him asking for his building and a copy was exhibited as Exh. SA3. In March 1980, he wrote to him again Exh SA4 but got no reply. He then got threatened and therefore left Mbarara. In 1982 he learnt that the Council had sold his building: He could not do anything. When he returned in 1986, his building was returned to him by the District Administrator and the Town Clerk, but by then the appellant had obtained Certificate of Title.

The appellant filed a suit in the High Court and the respondent filed a counterclaim, claiming that the appellant had obtained Certificate of Title by fraud and in addition, they claimed damages for trespass. The appellant was unsuccessful on the main Suit and the counterclaim was allowed. The appellant was dissatisfied and hence this appeal.

It is settled that, as a first appellate Court, we are duty bound to re-evaluate 'the whole evidence and make our own conclusion, but bearing in mind the fact of not having seen and observed the demeanour of the witness. **See Sella vs.**

Associated Motor Boat Ltd. [1968] EA 123 and Pandya vs. R [1957] EA 336 and therefore in dealing with this appeal, we must bear in mind the above principle.

In his evidence the appellant reiterated what he had claimed in his plaint and stated that at the site he had found there piles of sand, stones and excavation for the foundation in Plot 11 Makhan Singh Street. According to his evidence, he constructed the building and was after construction granted a lease for 49 years.

In his amended written statement of defence (WSD) the 1st respondent had denied it had legally offered any lease to the appellant in respect of the above Plot.

In dismissing the suit and upholding the counterclaim, the Learned Trial Judge directed the Registrar of Titles to cancel the appellant's Certificate of Title and directed the 1st respondent to cause the 2nd and 3rd respondents to be registered as the proprietor of the Plot in question.

The appellant filed 8 grounds of appeal:

1. The Learned Judge erred in law and fact in basing his judgment on erroneous assumptions and reaching conclusions which are not supported by evidence, in particular;
 - (a) his finding of conspiratorial co-operation between land agent and officials of the Council was mere speculation;
 - (b) and that meeting of 18-3-80 used the fact of Plot 11 not developed to override the fact that Plot 13 had been developed, and that this was deliberate dispossession;

(c) his finding that the building on Plot 13 was completed by the time 2nd defendant fled the country in the face of evidence by 2nd defendant himself having applied for extension of lease on 25-2-80.

2. The Learned Judge erred in law and fact by holding that the withdrawal of the lease offer made to the second and third defendants was void and of no effect when it was legally withdrawn by Technical Committee which then acted as Council as there was no Council.

3. The Learned Judge erred in law by holding that the lease offer to the plaintiff was void and of no effect, contrary to the evidence on record, and in particular in failing to note that Bainomugisha was agent of Council by virtue of his position as land agent.

4. The Learned Trial Judge erred by holding that Exh. "ER6" was a fabrication to maintain fraud.

5. The Learned Trial Judge erred in holding that the plaintiff's registration of Title was vitiated by some fraudulent act of which the plaintiff was aware of and participated in its execution, when there was no evidence to this effect except the fertile imagination of the Learned Judge.

6. The Learned Judge erred in relying heavily on Mr. Banyu and Mr. Bainomugisha, and Mr. Mwahura when they never gave evidence in Court and his conclusion was accordingly based on hearsay.

7. The manner and style of writing judgment revealed the Learned Trial Judge's bias as evidenced by accepting defendant's evidence, and making findings on it, without first also considering the plaintiff's evidence, which was in fact alluded to as an afterthought.

8. The Learned Trial Judge erred in law in awarding special damages when no evidence was adduced by plaintiff to prove them.

I shall deal with all the grounds together. I must observe that as I stated at first that the manner in which the Plot in question was withdrawn from the 2nd and 3rd respondents and offered to appellant causes uneasiness in my mind and this uneasiness is even reflected in Mr. Bushakara's evidence in cross-examination when he stated as follows:

"It is not normal to withdraw a Plot on which the development has reached this stage. To me in my seventeen years of service, this is the first time I have seen this happen."

Now the question that remains unanswered is, what was this Technical Committee which revoked the respondents' Lease in respect of Plot 13 Makhan Singh Street and offered it to the appellant? Who created it and under what provisions of the Law was it established? In other words, where did it derive its legal authority to remove the lease from respondents and offer it to the appellant?

I must confess that, if there was any law under which it was established, no evidence of such law was adduced. In fact, Mr. Bashakara the Town Clerk of

Mbarara Municipal Council, DW1, stated in his evidence, when testifying on how the extension of lease to respondents was refused:

"At this time the Council had not been formed and it was the DC who chaired the meetings and the members were from the Land Office, Town Clerk, Medical Officer, or Chief Health Inspector, the Municipal Engineer and Land Officer."

After the above evidence, DW1 tendered in Exhibit DB4 where the Technical Committee on 14th /3/80 withdrew the Plot from the 2 respondents. The exhibit reads as follows:

"Plot No.11/13 Makhan Singh Street

The Town Clerk read out an application letter received from Mr. Alwi Abdulla, and Ahamad Ahmed of P.O. Box 160, Mbarara in which he was applying for 3 (three) years lease extension to enable him complete the above Plot which he had not been able to accomplish due to lack of building materials. After lengthy discussion it was resolved that since the would-be developer did not accept the offer made, the Plot/withdrawn and whatever the property was on it automatically reverted to the Council.

The Council Technical Officers inspect the building and assess the value of the building so as to enable the Council offer the Plot to another interested developer. Also the Town Clerk reported that he was in possession of a copy of a letter written by the above person authorising someone else to take over

the property as the owner was denying being a resident of Uganda but of Kenya."

With respect, the Learned Trial Judge accepted the evidence of Bashakara, the Town Clerk, that in his experience any developer who had reached the stage of development reached by the 2nd and 3rd respondents would be granted extension in order to complete the development.

The Learned Trial Judge further remarked, rightly so, in my view, as follows about the minute of 13th/3/1980:

"I am convinced that the appropriation of this developed Plot was executed by the Land Agent of Mbarara with almost conspiratorial co-operation of officials of the first defendant council after the General Purposes Committee purporting, without the necessary powers to act for the Council purported to withdraw the lease offer made to 2nd and 3rd defendants."

The Learned Trial Judge considered and rightly so, in my view, that at the time of the withdrawal of the Plot in question from 2nd and 3rd respondents, there was no Council and that the work of the Council was done by some officials. There was no evidence that the committee was seized with legal authority under the law to perform the function of the Municipal Council.

The Learned Judge was, quite correct in my view, when he concluded as follows:

"The withdrawal of the lease offer without the Council considering it, and made by a committee of the Council without the requisite authority to act for the Council was void and of no effect. In the absence of evidence that the Council as a whole had authorised the General Purposes Committee to make such decision, the Committee cannot make them. The making of a lease offer without any evidence that it was considered and authorised by the Council is equally void and of no effect. Land grants within what is referred to as a "designated urban area" may only be made by the "designated authority" which under the Public Lands Act 13/1969 is defined as including Municipal Councils. Since there is nowhere in the Minutes of the Mbarara Municipal Council any minute showing that the Council considered the Plaintiff's application let alone that it decided the Plaintiff a lease of Plot 13 Makhan Singh Street, the grant to the Plaintiff's void and of no effect."

Therefore, in view of the above, which I have no reason to fault, it is clear that the withdrawal of the lease from the 2nd and 3rd respondents and the subsequent offer of the same to the appellant by the so-called Technical Committee when there was no evidence adduced to prove that it was seized with legal authority to make such fundamental decision affecting individual's property was null and void. Therefore the withdrawal of Plot 13 Makhan Singh Street from the respondents and the offer of the same to the appellant were unlawful.

Then the question that remains would be what is the effect of the above finding when the appellant had already obtained Certificate of Title in respect of the same

Plot 13 in view of Sections 56 and 184 of Registration of Titles Act (RTA)?
Section 56 of RTA provides:

"No Certificate of Title issued upon-an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality ... and every Certificate of Title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars herein set forth and of the entry thereof in the Register Book, and shall be conclusive evidence that the person named in such 'Certificate as the proprietor... "

Then Section 184 of RTA provides:

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under the provisions of this Act except in any of the following cases:

- (a)*
- (b)*
- (c) The case of a person defined of any land by fraud as against the person registered as proprietor of such land through fraud-or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.*
- (d)*
- (e)*

and in any case other than as aforesaid the production of the registered Certificate of Title or lease shall be held in every Court to be absolute bar and estoppel to any such action against the person named in such document..... "

However, it appears that despite the above provisions of the law, the Registrar of Titles seems to have discretion to require delivery of the Certificate of Title to him/her in certain cases, where it becomes apparent that the Certificate was issued in error or by fraud or wrongfully. Section 69 of RTA provides as follows:

"In case it appears to the Satisfaction of the Registrar that any Certificate of Title..... has been issued in erroror endorsement has been fraudulently or wrongfully obtained....., he may by writing require the person to whom such document has been so issuedto deliver up the same for the purpose of being cancelled or corrected or given to the proper party"

In my view, considering the circumstances under which the lease was withdrawn from the 2nd and 3rd respondents and thereafter offered to the appellant, this would be a proper and fit case whereby the Registrar would intervene and cancel the Certificate pursuant to provisions of Section 69 of RTA in the interest of justice, if the 2nd and 3rd respondents, who are now in occupation, presented application requesting for intervention.

However, be that as it may, another question that has to be considered is whether the appellant was part of the fraud himself or was aware of the fraud on the part of somebody else, in this case on the part of Bainomugisha and Banyu.

It must be observed here that though the appellant did produce relevant documents before he was registered as the proprietor of Plot 13 Makhan Singh Street, those documents which purported to act as Municipal Council when there was no evidence to prove that that body was seized with legal authority to withdraw the Lease from the 2nd and 3rd respondents and grant the same to appellant.

Moreover, there was no evidence adduced by appellant before the Trial Judge to prove that the Council had made the offer of lease to appellant. The Learned Trial Judge found no evidence that purported lease offer to the appellant had been Bainomugisha's work purportedly authorised by the 1st Respondent. There was no Minute of the Council where the withdrawal and Lease offer of the Plot were made. It is not spelt out what evidence the appellant presented to the Registrar before he was issued Certificate of Title. On close scrutiny of the entire evidence it is evident that that withdrawal of the Plot in question from the 2nd and 3rd respondents and offer of the same to the appellant were by a body which did not seem to have legal authority to do so as no evidence was adduced to prove that that body existed under the law and that it had powers vested with it to perform the functions of the Council. This, coupled with the appellants' evidence that there was only a pile of sand and stones and some excavation of foundation on Plot 13 Makhan Singh Street when he examined and received the lease offer go to show that the appellant was untruthful in his evidence.

The Learned Trial Judge after considering the evidence held, and rightly so, in my view, as follows:

"The Plaintiff was a District Commissioner and then Deputy Minister of Local Government in 1980, and must, at least in the latter office have been aware that an application for a town Plot had to be made to the "designated authority", the Municipal Council. Yet in early 1981, he appears to have given his application to the Land Agent. If indeed he had made a formal application at all. Then without anything to show that the Council had met to consider his application, it is endorsed by Bainomugisha, the land agent on 25/5/81 and a lease offer made to him on 26/5/81. Even if this was the result of awe or fear or even respect for his position, the Plaintiff knew that the requisite approval of the Council had to be obtained. The Plot had not been withdrawn at 'the time Bainomugisha wrote to the Council on 30/11/80 to draw its attention to the expiry of the 2nd and 3rd defendants' lease offer. Although it is possible that Bainomugisha, who had not yet received the Plaintiff's application at that time, may have been acting on his own, it seems unlikely in view of subsequent actions of Bainomugisha and Banyu. Be that as it may, the Plaintiff in his own evidence stated that there was only a pile of sand and stones and some excavation of a foundation on the Plot when he examined after he had received the lease offer. This we know as certainty was totally untrue. Why then did he lie in Court?

Admittedly this is post facto but to my mind it is evidence of guilty knowledge. He then went on to produce building plans of a building already in existence." -

I would with respect not fault the above conclusion of the Learned Trial Judge.

The appellant knew that there was an existing building on Plot 13 Makhan Singh Street developed to near completion, but told a lie in pleadings in Paragraph 5 of the Plaintiff and in his evidence that there were only a pile of sand and stones and excavation of the foundation on the Plot in question when there was already existing building.

Further more, appellant's plaint in Paragraph 5 clearly shows he was dishonest in applying for Plot No.13 Makhan Singh Street, because he averred as follows:

"On 26/5/81 a lease offer in respect of Plot 11/13 Makhan Singh Street was made by 1st respondent to the Plaintiff who accepted the offer on 29/5/81 and Ushs. 1,000,663/50 to 1st respondent The Plaintiff proceeded to erect and completed a building there on in accordance with the terms of the lease thereafter paid all the premium and ground rent where upon he was granted a 49 years period on Plot 11/13 Makhan Singh Street."

Clearly the above pleading coupled with his evidence where he stated that on the site there were only piles of sand and stones and excavation of foundation of the building when there was already existing building which had for quite sometime been used for storage and as a UCB Mbarara Branch proves dishonesty on the part of the appellant, which would be tantamount to fraud. Lord Buchmaster stated in **Waimika Saw Milling Co. Ltd. vs Laione Timber Co. Ltd. [1926]AC 101 at page 106 as follows:**

*"Now fraud clearly implies some act of dishonesty. Lord Lindley stated in **Assets Co. vs Mere Roiki [1905] AC 176** fraud in these actions i.e. (actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive fraud, an unfortunate expression and one very apt to mislead, but often used for want of a better term to denote transaction having consequences in equity similar to those which flow from fraud."*

I would, all in all, bearing in mind the above authorities which have been cited with approval in several cases e.g. **David Sejjaka Nalima vs Rebecca Musoke, Civil Appeal No. 12/1988 SC** (unreported) and the evidence on record as reviewed, stated the appellant was not all that innocent in the acquisition of 2nd and 3rd respondents plot. He knew that the plot in question had been developed to near completion but told lies when he was applying for it and even when he was in Court that on Plot No. 13 Makhan Singh Street, he found only pile of stones, sand and excavation of foundation which clearly shows dishonesty and fraud on his part when there was already existing building on the plot. I think the Learned Trial Judge was quite correct when he held that the appellant was not only aware of the fraud perpetrated against the respondents but did himself participate in the execution of the fraud. Therefore, I would find no merit in the appeal against the decision of the Lower Court on 1st, 2nd, 3rd, 4th, 5th, 6th, 7th grounds and would therefore dismiss the appeal in respect of the above grounds.

On the issue of damages of Ushs. 7,200,000/- awarded to 2nd and 3rd respondents as special damages, it must be observed that there was no evidence apart from that of

DW2 to prove that they were renting the building and getting the rent claimed. If Mwashuro was dead one would have expected an official of the UCB to testify that the bank was renting the building and that it was paying a specified figure per month. And in any case, there was no evidence adduced to prove that the appellant withdrew the Plot from 2nd and 3rd respondents or that he participated in the decision to withdraw Plot 11/13 from 2nd and 3rd respondent.

In the circumstances, I think it wasn't enough for the respondents to say they lost so much without going further to prove that they were entitled to receive what they were claiming and this is especially so, when the building was not yet completed and had purportedly reverted to 1st respondent.

In view of the above, I think this ground of appeal must succeed.

I would to that extent allow the appeal relating to the counter-claim of special damages arising out of the rent totaling to Ushs. 7,200,000/-. I would to that extent alter the judgment and decree of the lower court by dismissing part of that counter-claim in the suit, set aside the award of Ushs. 7,200,000/- special damages. I would award ½ the costs of the appeal.

Dated this 8th day of August 1997

A.N KAROKORA

JUSTICE OF THE SUPREME COURT