THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO. 152 OF 2009

1. **REBECCA NSANGI**
2. **JUSTINE NANSUBUGA::PLAINTIFFS**
3. **BENON WASSWA NSUBUGA**

VERSUS

1. **VINCENT KIZZA**
2. **ZABEETI KANAYIWA:::DEFENDANTS**

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT.

REBECCA NSANGI, JUSTINE NANSUBUGA, and BENON WASSWA NSUBUGA *(hereinafter referred to as the "1st" , "2nd" , and "3rd" plaintiff respectively)* brought this suit against ***VINCENT KIZZA and ZABEETI KANAYIWA****(hereinafter referred to as the "1st", "2nd" defendant respectively*) jointly and severally seeking for, *inter alia*, orders and declarations that the registration of land comprised in ***Busiro Block 392 Plot 674*** land at Sekiwunga *(hereinafter referred to as the "suit land")* in the 1st defendant's names with the connivance, collusion and help of the 2nd defendant was fraudulent, general and exemplary damages, and costs of the suit.

Background.

Land comprised in ***Busiro Block 392 Plot 51*** was part of a bigger chunk of land comprised in ***Block 392 Plot 51*** that belonged to the Estate of late David Mubiru Ssalongo. The said land was occupied by tenants among whom was the 2nd defendant with a *Kibanja* interest measuring 2.5 acres. Upon the death of David

Mubiru Salongo, the 2nd and 3rd plaintiffs obtained Letters of Administration in respect of his Estate. Thereafter, the said Administrators negotiated with tenants on the land to exchange part of their bigger *Bibanja* for smaller plots of land with registerable interest on the land.

On 07/02/2006 the 1st plaintiff entered into another agreement with the 2nd and 3rd plaintiffs for the purchase of registerable interest in land measuring 1.5 acres which was formerly occupied by one Kiggundu a *Kibanja* holder, who had returned it to the 2nd and 3rd plaintiffs pursuant to the above mentioned exchange arrangement. The 1st plaintiff started utilising the 1.5 acres while she waited for the 2nd and 3rd plaintiffs to avail her with a certificate of title to enable her to effect subdivisions and have a certificate of title in her own name.

On 17/02/ 2007 the 2nd and 3rd plaintiff entered into yet another agreement, but this time with the 2nd defendant who had 2.5 acres of *Kibanja* on the suit land. The 2nd defendant agreed to relinquish 1.5 acres of her *Kibanja* in exchange for one acre with a title in her names. Owing to her very advanced age, the 2nd defendant entrusted the 1st defendant, her nephew, with a responsibility of following up the execution of the agreement and ensuring that a certificate of title for the one acre was processed in her names. The 2nd defendant gave specific instructions to the 1st and 2nd plaintiffs to give the 1st defendant transfer and mutation forms duly signed in favour of the 2nd defendant, and duplicate certificate of title to enable the 1st defendant help the 2nd defendant in the process of surveying off and creating a title for the agreed one acre.

The land was to be registered in the name of the 2nd defendant pursuant to the agreement, and was to be delineated with mark stones not stretching into the 1st plaintiff's land but just part of, and only restricted to the one acre of the land that was formerly part of the 2nd defendant's *Kibanja*. Unknown to the plaintiffs, the 1st

defendant whose mandate was only to process the one acre into the name of 2nd defendant altered the transfer and mutation forms, and processed a certificate of title in his own name exceeding one acre which had been agreed upon to be given to the 2nd defendant, with an extra portion measuring 1.5 acres that belonged to the 1st plaintiff. The 1st defendant wrote a letter to the 1st plaintiff stopping her from utilising the land. This prompted the plaintiffs to institute this suit alleging fraud against the defendants seeking for the orders stated above.

The defendants denied the allegations and averred that on 10/03/ 2004 the 2nd defendant expressly appointed the 1st defendant as a trustee to control and administer all her property. Further, that in 2007 the 2nd and 3rd plaintiffs negotiated with *Bibanja* holders on the Estate of the late David Mubiru Salongo who included the 1st defendant and that it was agreed that registerable land of 2 acres be given to the defendants. That by an agreement with the 3rdplaintiff dated 22/08/2007 the plaintiffs formally gave to the defendants the suit land comprised in ***Block 392 Plot 674*** in lieu of their *Kibanja*. That in order to fulfill the agreement the 2nd and 3rd plaintiffs handed over duly signed transfer and mutation forms relating to ***Block 392 Plots 112, 673 and 674*** to the 1st defendant, including the certificate of title to curve off ***Plot 674*** from the certificate of title, and that the 1st defendant proceeded to obtain the title. That the 1st defendant thereafter returned the mother title to the plaintiffs which they acknowledged receipt of.

The defendants also set up a counterclaim in which they alleged fraud on part of the plaintiffs, and seeking, *inter alia*, for orders of removal of the caveat that was lodged by the 1st plaintiff on the land, general and exemplary damages, and costs of the suit.

The plaintiffs were represented by *M/s/ Kigozi Ssempala Mukasa Obonyo (KSMO) Advocates a*nd the defendants by *M/s. Owinyi – Dollo Legal Services*. In the joint

Scheduling Memorandum the parties agreed on the fact that the 2nd and 3rd plaintiffs were at all material times the registered proprietors of the suit land comprised in ***Busiro Block 392 Plot 51.***They also agreed on the following issues;

1. ***Whether the 1st defendant acted fraudulently in registering the suit land into his name without consideration or authority from the plaintiffs.***
2. ***Whether the transfer of the suit land into the name of the 1st defendant was lawful.***
3. ***Whether the plaintiffs are entitled to the remedies prayed for in the plaint.***
4. ***Whether the defendants/counterclaimants are entitled to the remedies prayed for in the counterclaim.***

Before delving into the substance of the issues, it is called for to consider and dispose of the preliminary point raised by Counsel for the defendants. The said Counsel faults the pleadings of the plaintiffs on ground that it is difficult to comprehend the nature of their case against the defendants because the plaint and reply to the counterclaim seem to be at variance and contradictory. Counsel contended that the contradictions appear in paragraphs; 4 (p), 5(b) of the amended plaint read together with paragraphs; 4(L) (ii), 4(k) (vii) of the reply to the counterclaim; paragraph 4(h) read with paragraphs 4(i) (i) (ii) & (iii), 4(k) (iii), 4 (k) (vi), paragraphs 4(i) read with 4(k) both from the reply to the counterclaim, paragraph 4(k) (iv) read with 4(k) (v). Counsel argued that it is difficult to tell which particular pleadings the plaintiffs seek to rely on to prove their claim.

Counsel for the defendants cited the case of ***Uganda Breweries Ltd vs. Uganda Railway Corporation SCCA No. 6 of 2001*** to the effect that pleadings should state with clarity the real matters in controversy between the parties upon which they can prepare to present their respective cases, and upon which court will be called

upon to adjudicate between them. Counsel argued that the plaintiffs' pleadings are irregular and amount to grave injustice to the defendants.

In reply Counsel for the plaintiffs submitted that if the defendants were confused by the pleadings, they should have raised the issue at the scheduling conference stage so that the same is rectified. That the defendants are now estopped raising the issue at late stage of submissions. Secondly, that the plaintiffs' pleadings are clear and consistent and can easily be understood. Counsel prayed that the prelimianary point be dismissed.

I have had occasion to read and appreciate the particular pleadings referred to as being contradictory and/or confusing. For ease of following I have reproduced the same below. Paragraph 4 (p) of the amended plaint states that;

> ***"Unknown to the plaintiffs the 1st defendant whose mandate (as brought to the attention of the 2nd and 3rd plaintiffs) was to only process one acre of the land in the names of Zabeti Kanayiwa, the 2nd defendant herein, went ahead to alter the transfer and mutation forms and fraudulently processed a certificate of title in his personal names exceeding the one acre agreed to be given to the 2nd defendant with an extra portion thereof measuring 1.5 acres that belong to the 1st plaintiff."***

Paragraph 5 (b) also states that;

> ***"Creating a title for a bigger portion of land than the one acre of land intended for the 2nd defendant after receiving a transfer and mutation form whose mandate was to mutate one acre off and filling in details and particulars different from those agreed upon between the 2nd and 3rd plaintiffs and the 2nd defendant."***

In comparison, paragraph 4 (l) (ii) of the reply to the Written Statement of Defence states that;

"The transfer form attached as Annexure E to the Defendants' Written Statement of Defence and counterclaim was never signed by the 2nd Plaintiff as the signature thereon is forged and further that the 1st Defendant only presented it to the 3rd plaintiff who signed it when it was blank on the understanding that the 1st Defendant was to avail it to the 2nd Defendant, the transferee thereof to sign it."

Paragraph 4 (k) (vii) states that*;*

"Forging the 2nd Plaintiff's signature on the transfer form and filling in the 1st defendants' names as the transferee yet the agreed transferee was the 2nd defendant."

Further, paragraph 4(h) of the reply to the Written Statement of Defence states that*;*

"In further reply to paragraph 17 of the defendants WSD, the plaintiffs shall aver and contend that Annexture D to the defendants WSD is not a sales agreement but an understanding premised on an earlier agreement wherein the beneficiary (transferee) who is named to be Zabeeti Kanayiwa (and not any other person) was taking portion from Plot 674 not the whole of it."

The content above is compared with paragraphs 4(i) (i), (ii) & (iii) (supra) in which it is averred that;

"Annexture D was never made between the plaintiffs and the 2nd defendant but was a creature of the 2nd defendant designed to rob the plaintiffs of their land and it further presupposes an already existing contract between the parties."

Further, under paragraph 4 (k) (iii), (iv), (v) and (vi) (supra) it is stated that;

"The 1st defendant backdated Annexture D to appear as if it was made in 2007 whereas Plot 674 was not in existence prior to February 2009, 1st defendant purporting to be clothed with authority to sign documents on behalf of the 2nd defendant yet the same was untenable in law, 1st defendant acted in breach of the strict letter of the Power of Attorney purportedly donated to him by the 2nd defendant even if the same were to be taken as genuine and forcing and misleading the 3rd plaintiff to sign and append his thumb print on Annexture D while the 1st defendant misrepresented to him on 13th April 2009 that he needed the same to pick the title from Land Office on the allegation that the officers at Land Office had declined to hand over the same to the 1st defendant without a signature from the registered proprietor."

It is clear by their pleadings that the plaintiffs basically seek to show that the 1st defendant through forging the 2nd and 3rd plaintiffs' signatures on the transfer forms fraudulently registered himself on the suit land instead of the 2nd defendant. Further, that he got registered for a bigger portion of land contrary to what had been agreed upon between the 3rd plaintiff and 1st defendant. Thus I do not find the pleadings of the plaintiffs inconsistent or at variance in any way.

I also wish to observe that the objection should have been raised at the earliest at the scheduling stage and the parties addressed then. It would be in the case of failure to resolve it that the parties would make it issue for trial by court. ***Order 12 r2 Civil Procedure Rules*** which introduced scheduling conference as a permanent feature in our civil procedure was not made in vain. In the case of ***Stanbic Bank (U) Ltd. v Uganda Cros Ltd, SCCA No.04 of 2004;*** and also in ***Tororo Cement Co. Ltd. v Frokina International Ltd, SCCA No.02 0f 2001***, the overriding objective of the scheduling conference was stated, *inter alia,* to be the

identification the issues of agreement and disagreement between the parties at an early stage, and assessing the possibility of alternative settlement of the suit. Therefore, raising the objection so late at submission stage not only flouts the principles that govern pleadings, but it also amount to taking the opposite party by surprise. I find the objection to technically wrong in addition to being substantively devoid of merits. It is accordingly dismissed.

Resolution of Issues.

Issue No.1and 2 were handled concurrently by both Counsel. I will adopt the same approach.

1. ***Whether the 1st defendant acted fraudulently in registering the suit land into his names without consideration or authority from the plaintiffs.***
2. ***Whether the transfer of the suit land into the names of the 1st defendant was lawful.***

Counsel for the plaintiffs submitted that ***Section 176(c) of the Registration of Titles Act (Cap 230)*** protects a registered proprietor's interest in land and a registered proprietor's title is indefeasible unless it is shown that such a person got registered through fraud and/ or is not a *bona fide* purchaser. Counsel cited a plethora of authorities on what constitutes fraud that include; ***Osborn's Conscise Dictionary 8th Edition Sweet &Maxwell, 1995 at page 152; Kampala Bottlers Ltd vs. Damanico (U) Ltd, S.C.C.A. No. 22 of 1992, Katarikawe vs. Katwiremu (1977) HCB 187, Fredrick Zaabwe vs. Orient Bank Ltd & 5 O'rs, S.C.C.A. No. 4 of 2006.***

Counsel submitted that the 1st defendant moved to create a title in respect of land which the 1st plaintiff was in possession of albeit with an unregistered interest. That even if the 2nd and 3rd plaintiffs had failed to prove fraud against the defendants, which is not the case, the 1st defendant's registration on ***Plot 674*** that was inclusive

of the 1st plaintiff's land measuring 1.5 acres is sufficient proof that the registration of the suit land into the 1st defendant's name was fraudulent.

In reply Counsel for the defendants submitted that the plaintiffs failed to prove fraud to the required standard, and that the plaintiffs' witnesses gave contradictory and irrational evidence. Counsel cited the case of ***Aziz Kalungi Kasujja vs. Nauni Tebekanya Nakakande, SCCA No. 63 of 1995*** to the effect that inconsistencies in material evidence of a party are major and go to the root of the evidence leading to rejection of such evidence as worthless.

Counsel for the defendants also attacked the agreement, *Exhibit P1,* as invalid and unenforceable as it was not made with the free consent of the parties. Further, that the onus remained on the plaintiffs who sought to rely on *Exhibit P1* to prove its execution and validity. To back this proposition Counsel cited the case of ***Musisi Dirisa and others vs. SIETCO (U) Ltd S.C.C.A. No. 24 of 1993*** to the effect that the evidential burden does not shift to the defendant. Counsel opined that the plaintiffs failed to prove that *Exhibit P1* was executed by DW2 or that there was an enforceable contract between the parties as pleaded.

Counsel also faulted the plaintiffs for attempting to prove particulars of fraud that were not pleaded; and that it is contrary to the law regarding pleadings and proving of fraud. Counsel invited court to follow the principle in ***Shenoi & Anor vs. Maximov [2005] EA 280 at 291,*** and ***A.W Biteremo vs. Damascus Munyanda SCCA No 15 of 1991,*** where it was held that departure by a party's evidence from his pleadings is a good ground from rejecting the evidence.

The two issues above are, in my view, primarily premised on three documents, i.e.; *Exhibit P1 (The agreement), Exhibit D2 or P2 (The transfer form)* and *Exhibit P4 (The consent to transfer form).* Regarding *Exhibit P1,* the plaintiffs adduced evidence that the 3rd plaintiff and 2nd defendant entered into that agreement

whereby the 3rd plaintiff accepted to give one acre of registered land to the 2nd defendant in lieu of her *Kibanja* interest measuring 2.5 acres. The agreement was made on 17/02/2007 in the absence of the 2nd defendant but in the presence of the 1st defendant who wrote the 2nd defendant's name on the agreement and it was taken to the 2nd defendant to be thumb-marked. This evidence was corroborated by that of PW4 Dennis Kagimu, the LC1 Chairman, who stated that he attended the negotiations between the 3rd plaintiff and the defendants whereby the 2nd defendant accepted to surrender the rest of her *Kibanja* interest in exchange of one acre of registered land. PW4 further stated that it was the 1st defendant who wrote the 2nd defendant's name on the agreement, and that the 2nd defendant thumb-marked the agreement.

PW7 Erisa Sebuwuffu, the handwriting expert, testified that the handwriting of the person who wrote the 2nd defendant's name on the agreement was the same as the person who wrote on *Exhibit P1*. The writer, according to evidence of PW4, was the 1st defendant. This evidence corroborates that of the plaintiffs that it was indeed the 1st defendant who wrote the 2nd defendant's name on, *Exhibit P1*, the agreement dated 17/02/ 2007.

PW3 Ssalongo Sebulime Samuel, who at first claimed to be a qualified surveyor, but later admitted being a linesman, also corroborated the plaintiffs' evidence. He stated that he was the one who drafted *Exhibit P1*, and that the 2nd defendant thumb marked it thereafter. He however conceded that there was no endorsement showing that the thumb-mark belonged to the 2nd defendant.

PW8 Dan Oundo Malingu, also testified that among the documents the 1st defendant submitted to support the transfer was *Exhibit P1*. PW9 Namatovu Anna corroborated this evidence that after the agreement *(Exhibit P1)* was executed they

relocated from the *Kibanja* where they lived and built on the one acre that the 3rd plaintiff had given them.

It is noted that the plaintiffs' evidence in the above regard was not specifically rebutted by the defendants. In addition, the absence of writing on *Exhibit P1* showing that the thumb mark belonged to the 2nd defendant can be easily understood as she neither denied it nor denied ever having negotiated with the 3rd plaintiff. It would follow that the defendants, particularly the 1st defendant, is estopped casting in doubt *Exhibit P1*, the agreement, when he used the same document himself to have the suit land registered in his name. Overall, there are no inconsistencies in the plaintiffs' evidence which were satisfactorily explained. I find that the plaintiffs' evidence proved that *Exhibit P1* was executed by the 3rd plaintiff and the 2nd defendant.

The second document, *Exhibit D2 (P2)* is a transfer form signed on 20/11/2008 in respect of ***Block 392-393 Plot 674*** between Nansubuga Justine, Nsubuga Benon Wasswa, and Kizza Vincent at no consideration. The 3rd plaintiff contended that he signed the transfer form on 17/2/2007 for the one acre in the presence of PW3 and PW4, but in the absence of the 2nd plaintiff; a fact which was corroborated by PW3 and PW4 in their testimonies. The 3rd plaintiff admitted that the signature on *Exhibit D2* belonged to him and that the contents in the document are the ones the 1st defendant was called upon him to sign, and that indeed he signed the documents. The 3rd plaintiff, while admitting that he signed transfer form, denied the signatures attributed to him on *Exhibit D2* and the mutation forms.

The third document, *Exhibit P4*, the consent to transfer form shows that it was in respect of an area measuring 0.813 hectares (approximately 2 acres) for a consideration of Shs.14,000,000/=. The 3rd plaintiff denied ever selling or receiving Shs.14, 000,000/= from the 1st defendant for the suit land. The 3rd plaintiff also

denied the signature on *Exhibit P4* as belonging to him. The 2nd plaintiff also denied having ever signed *Exhibit D2 and P4*. The denial was corroborated by evidence of PW7 Erisa Sebuwuffu, the handwriting expert, who testified on his report that the signatures on both documents were forged.

The defendants argued that the plaintiffs should have produced in court copy of the alternative transfer forms that they had signed which were not forged. Further, that the figure of Shs.14, 000,000/= was simply stated in the consent to transfer form for valuation purposes not as evidence of how much was paid as consideration, and that in any case this was not pleaded and particularized. Furthermore, that handwriting expert's report has no probative value since the witness who tendered it was not the author, and that it was a photocopy, and that the examination itself was based on photocopy of a transfer.

I will start with the last point concerning evidence of the handwriting expert. This court is guided by the principles enunciated in the case of ***Kimani vs. Republic [2000] EA 417 (CAK)*** where their Lordships quoted the case of ***Ndolo vs. Ndolo [1995] LLR 399 (CAK)*** that;

> ***"…It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence, and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so…"***

Taking the above principles into account on basis of facts of this case, it is evident that the signatures of the 2nd and 3rd plaintiffs were forged, and most likely by the 1st defendant. There is cogent evidence of PW7 suggesting that the signature of the 2nd plaintiff in *Exhibit D2* was differed from the sample she supplied and from all

other documents where she signed. It is again evident that the 2nd and 3rd plaintiffs could not have signed or written their names on *Exhibit P2 (D2)* and as such did not transfer the suit land to the 1st defendant. There is also glaring other evidence of forgery as can be seen in the writing in name of the 3rd plaintiff *"WASSWA"* which was written as *"WASWA"* in the transfer form. It is certain that a person who attempts to write another's name would most likely easily misspell it as opposed to the owner who would most unlikely easily misspell his or her name.

Again the 2nd and 3rd plaintiffs' evidence that they never signed on the transfer form was not rebutted. The burden thus shifted on the defendants who maintained that the 2nd and 3rd plaintiffs signed the transfer forms to prove that indeed the plaintiffs did sign them. This principle is encapsulated under ***Section 102 of the Evidence Act (Cap. 6)*** which states that

> ***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

In short; he who alleges must prove. The defendants in this case failed to discharge that burden. They did not even procure evidence of the lawyer who purportedly signed as witnessing on the transfer forms. Even then, it is doubtful that his evidence would change anything since he never witnessed the 2nd or 3rd plaintiffs and 1st defendant sign the transfer form.

As regards *Exhibit PE3*, which is another report dated 09/04/2010 by Mr. Apollo Ntarirwa the handwriting expert; I would consider it of diminished evidential value. Though admitted on court record, the author of the report did not testify on it to support the findings or to explain the reasons as to why and how he arrived at the conclusions he made.

On the issue of Shs. 14,000,000/= as consideration paid for the suit land in the consent form, I find that there was could be no legitimate reason for the 1st

defendant to have filled it in well knowing that the 2nd defendant did not actually pay money to the plaintiffs for the land. In fact, in his evidence the 1st defendant conceded that he never paid any money at all for the land, and that he never gave anything as consideration to Wasswa in order to get the land. This only goes a long way to reinforce the finding that the 1st defendant actually fraudulently acquired the transfer and consent forms. Certainly, the plaintiffs could not produce in court the original transfer forms which they had signed for the simple reason that the forms were no longer in their possession. They had already been handed over to the 1st defendant who opted not to use them, but instead forged the 2nd and 3rd plaintiffs' signatures on *Exhibit D2 (P2).*

Forgery denotes the making of a document with intent to deceive and /or to defraud. ***Osborn's Concise Dictionary (8th Edition) Sweet &Maxwell (supra)*** defines "fraud" to involve the making of a false representation knowingly, or without belief in its truth or recklessly. Given this authoritative definition, the arguments by Counsel for the defendant that the forgery of the consent form was not pleaded have no basis. The fraud in that specific regard is pleaded and particularized in paragraph 5 (g) of the amended plaint where it is stated that;

> ***"The 1st defendant falsifying documents consequent to which he caused the land to be registered into his names and not in the names of the 2nd defendant, the person the 2nd and 3rd plaintiffs knew and had dealt with."***

Since a consent form is one of the documents used in transferring land, its falsification by the 1st defendant amounted to actual fraud, and the totality of the actions of the 1st defendant amounted to nothing short of fraud.

The size of the suit land is also another point in contention. Having found that *Exhibit P1* was duly executed by the parties, it follows that the suit land measured 2.5 acres, and that the 2nd defendant was entitled to only one acre of that land.

There is ample evidence which corroborates that fact. For instance, PW3 Ssalongo Sebulime, a chainman or linesman, gave cogent evidence on that point. As a linesman he is a surveyor's assistant who measured distances of the suit land with a tape measure. He also testified that after one week of making the agreement (*Exhibit P1)*, he went with a surveyor, one Kasirye Ssalongo, to the suit land and measured off the 2nd defendant's one acre and placed mark stones; which is clearly in line with his duties chainman. I find that his evidence is cogent and relevant to the fact in issue. I am fortified in this finding by the case of ***Mohammed Ahmed vs. R [1957]1 EA 523,*** where the Court of Appeal for Eastern Africa held that;

> ***"It is true that in Gatheru S/o Njagwara vs. Reginam (1) [1954] 21 EACA 384 this court said that the competency of an expert witness should be shown before his evidence is admitted. That, however, is a rule of practice and the omission to observe it will not in all cases render the evidence inadmissible; particularly when, as in the instant case, the witness's occupation imports a primafacie qualification and his capacity to give expert opinion is not challenged. The rule will obviously be applied more strictly in criminal proceedings than in civil ones…"***

In the instant case, the evidence of PW3 in relation to the size of the land is admissible given that it is within his line of work to measure land which is not limited to academic knowledge but practical experience. In ***Gatheru S/o Njagwara vs. Reginam (supra)*** their Lordships cited the case of ***Vander Donckt vs. Thellusson (1849) 8 C.B 812*** where Maule.J held that;

> ***"All persons, I think, who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required."***

In my opinion the experience and position of PW3 as a chainman/linesman in light of the issue as regards the measurement of the land cannot be ignored. His evidence that he measured the land which was hitherto a *Kibanja,* and that it measure 2.5 acres ought to be admitted as the truth. This is particularly so in absence of contrary evidence by the defendants of any other alternative measurements of the 2nd defendant's *Kibanja.*

Counsel for the defendant insinuated that the defendants were entitled to 2 acres in ***Plot 674*** based on the evidence of PW5, Musoke Andrew, and *Exhibit D4* the agreement between PW5 and the 1st defendant dated 27/10/2008 under which the mother title was surrendered. It stetes that;

> ***"I Andrew Musoke. On behalf of the family of late David Mubiru Salongo...I have handed over the title of land situate on Block No.1392 to Mr. Kizza Vincent in order for him to process a land title or to cut off his part. He is going to do it on behalf of the family of Ms. Zabetti Kanayiwa ….he plot number to be transferred or curved off is plot 674…"***

On returning the mother title to PW5 a similar agreement was made on 16/4/2009 *Exhibit D5* which stated that;

> ***"I Andrew Musoke, on behalf of the family of late David Mubiru Salongo, have received the land title which had been taken in order for Ms. Zabeeti Kananyiwa's Plotb674…They have returned it to me today on 16.04.09.***

PW5 testified that he did not know the size of ***Plot 674.*** Further, that there was an earlier agreement, *Exhibit DE2*, which had been made between the 3rd plaintiff and the 1st defendant on 22/08/2007, which stated that;

> ***"I Wasswa Nsubuga Benon the proprietor of land situated at Ssekiwunga Kiryamuli Kirumba Block 392-393 Plots 674-672 situate at Sekiwunga Kiryamuli Kirumba to curve off/ transfer his Plot 674 from my land title as***

we agreed** **that I take Plot 672 and for him he takes Plot 674 belonging to Zabett Kanayiwa, he is free to process his title…" [Underlined for emphasis]

Clearly, *Exhibit DE2* dated 22/08/2007, which is a later agreement, was made in line with *Exhibit P1* dated 17 02/2007, which was an earlier agreement between the parties. Therefore, the agreements made between the 1st defendant and PW5; and the 1st defendant and the 3rd plaintiff in respect to the 1st defendant transferring the entire ***Plot 674*** into the 2nd defendant's names did not do away with the earlier agreement under which 2nd defendant was clearly entitled to only one acre of the land, whereas *Exhibit DE2* is silent on the size of the land.

It should be noted that the defendants did not adduced evidence of any other earlier agreement other than *Exhibits DE2, DE4 and DE5.* The reading of all the above documents easily reveals that they are not conclusive on their own, but flow out of the earlier agreement, *Exhibit P1.* Though *Exhibit P1* is vehemently denied by the defendants, they produced no other agreement contradicting it. *Exhibit DE4 and DE5* are documents simply made in acknowledgement of taking and returning of the land title, but they are not agreements of sale in themselves.

Overall I have found ample evidence that the 1st plaintiff first purchased a *Kibanja* interest from Kiggundu, and thereafter purchased a registerable interest in the same portion measuring 1.5 acres from the 2nd and 3rd plaintiffs. This was corroborated by the 2nd and 3rd plaintiff s evidence that they had indeed sold the 1.5 acres to the 1st plaintiff which previously belonged to Muggala Benon Kiggundu. Furthermore, PW9, Namatovu Anna also confirmed that the 1st plaintiff was in occupation of the land which belonged to their neighbor Kiggundu. PW10 Muggala Benon Kiggundu himself, stated that the 1.5 acres was part of the 5 acres he sold to Rebecca Nsangi,

and that the ½ acre did not belong to Zabetti, and that he had sold it to Rebecca Nsangi to whom he had sold land in three phases.

PW10 also stated that he sold the last portion to the 1st plaintiff before he had entered into negotiations with the landlords; which buttress the 1st plaintiff's pleadings that she entered into an agreement with the 2nd and 3rd plaintiffs for the purchase of a registerable interest of 1.5 acres. Even without documentary proof, this is sufficient evidence to prove that the 1st plaintiff purchased 1.5 acres of *Kibanja* from PW10, and registerable interest of the same from the 2nd and 3rd plaintiffs. The 2nd defendant's evidence in a way supports this finding when she stated that;

> ***"I know Kiggundu Mugala. He had a kibanja. Kiggundu's kibanja is not mine. I found it with him. I have no claim on what was Kiggundu's kibanja…I do not want to take my neighbor's land. I do no't want Kiggundu's kibanja. I have no claim on that part which was for Kiggundu…"***

It is without doubt that the 1st plaintiff purchased 1.5 acres of land from the 2nd and 3rd plaintiff which was previously a *Kibanja* that belonged to Kiggundu from whom she had earlier purchased a *Kibanja* interest. The net effect is that the 1st defendant fraudulently got himself registered on the whole of ***Plot 674*** which partly belonged to the 1st plaintiff and without consideration and authority from the 2nd and 3rd plaintiff. *Issue No.1 and 2* are answered in the affirmative.

Issue No.3: Whether the defendants/counterclaimants are entitled to the remedies prayed for in the counterclaim.

The counterclaimants sought for orders that the caveat lodged on the defendant's title, in ***Block 392 -393 Plot 674*** be removed, general and exemplary damages, and a permanent injunction against the counterclaim defendants from trespassing on

the suit land and costs of the suit. However, having answered *Issue 1 and 2* above in the affirmative, it follows logically that the counterclaim seeking the above prayers would naturally fail. It is therefore dismissed with costs to the plaintiffs. I also find that it would be academic to pursue the issues raised in the counterclaim as relates to whether there was a trust created between the parties, or whether the trust was breached. I will only consider the point of law as regards the failure to cite parties in the heading to the counterclaim. ***Order 8 r. 8*** of the ***Civil Procedure Rules (supra)*** provides that;

> "***Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting further the names of all the persons who, if the counter claim were to be enforced by cross section, would be defendants to the cross action…"***

In the case of ***Nile Breweries Ltd vs. Bruno Ozunga T/a Nebbi Boss Stores HCCS No. 580 of 2006*** Justice Lameck N. Mukasa differed from the position in the case of ***Sekiranda Musoke Yakobo vs. China Jie Fang (U) Ltd HCCS No. 33 of 1996;*** and ***Nampera Trading Co. vs. Yusufu Ssemanye & A'nor (1973) ULR 171*** and held that ***rule 8*** must be read in light of the other rules under ***Order 8*** which concern a counterclaim, and include ***rule 2,7, 9,11 and 12(supra).***

The provision ***Order 8 r. 8 (supra)*** show that it is a mandatory requirement to make a title to the counterclaim where the claim is against the plaintiff together with another person as co-respondents to the counterclaim. In the instant case, however, the defendants' claim was against the plaintiffs and no other person, and as such, it was not mandatory to put a title on the counterclaim. I would concur

with the position taken in ***Nile Breweries Ltd (supra)*** and dismiss the contention by Counsel for the plaintiffs in that regard.

Issue No. 4: Whether the plaintiffs are entitled to the remedies prayed for in the plaint.

The plaintiffs prayed for Shs.150,000,000/= as general damages and Shs.180,000,000/= as exemplary damages. Counsel for the plaintiffs tried to justify these figures by arguing that the 1st defendant's actions are criminal, and that the 1st defendant was charged and convicted of uttering false documents and procuring registration by fraud, and that the defendants disturbed the plaintiffs, and owing to their criminal conduct, and high handedness, and showing no remorse they should be ordered to pay. For their part, Counsel for the defendants submitted that the plaintiffs failed to prove any of their claims, and that the judgments of criminal matters referred to have no bearing in civil cases.

The position of the law on general damages is it is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant's act or omission. ***See: James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993***. The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong**.** See: ***Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999*** that ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.***

In assessing the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party, and the nature and extent of the breach. See:

Uganda Commercial Band v. Kigozi [2002] 1 EA. 305. The party claiming general damages is expected to lead evidence to give an indication of what damages should be awarded on inquiry as the quantum. ***See: Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.***

In the instant case, the plaintiffs have satisfactorily demonstrated that they suffered great inconvenience at the instance of the defendants. I find that the plaintiffs are entitled to general damages.

I find that figure of Shs 150 million suggested by the plaintiffs to be too high and unjustifiable in the circumstances of this case. Taking all factors together and the particular circumstances of this case, I would consider the Shs. 50 millions to be adequate recompense, and I award the same as general damages to the plaintiffs. I however decline to award exemplary damages against the defendants. The 1st defendant has already suffered punitive measures emanating from the conviction in the criminal case. It would also be unjust and unreasonable to order punitive damages against the 2nd defendant since she was more of a victim of the 1st defendant's the machinations rather than the actual perpetuator of the fraud. This is in addition to her being of very advanced age; the reason of which the 1st defendant took advantage of the entire situation to commit the fraud in her name.

On costs of the suit, ***Section 27(2) Civil Procedure Act (Cap 71)*** provides that costs follow the event unless for good reason court directs otherwise. ***See: Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999(UR).*** The plaintiffs have succeeded in their claim, and I award them costs of the suit. In summary, it is ordered and declared as follows;

1. ***The registration of land comprised in Busiro Block 392, Plot 674 into the 1st Defendant's name was fraudulent.***

2. ***By registration of the above land in his names instead of the 2nd Defendant the Defendants committed fraud against the Plaintiffs.***
3. ***By transferring 1½ acres of land into the 1st Defendant's name instead of one acre given to the 2nd Defendant, the Defendants defrauded the Plaintiffs.***
4. ***Part of the land that was registered in the 1st Defendant's name (1 ½ acres) belong to the 1st Plaintiff.***
5. ***The Defendants are trespassers on the 1st, 2nd and 3rd Plaintiffs' laid that is in excess of one acre and which hitherto was not the 2nd Defendant's kibanja.***
6. ***A consequential order doth issue for the rectification of the title and cancellation of the 1st Defendant's title for being procured fraudulently, with misrepresentation and where there was total failure of consideration.***
7. ***A further consequential order doth issue directing that the 2nd Defendant be given a Certificate of Title for only one acre of land as agreed between the 2nd Defendant and the 2nd and 3rd Plaintiffs.***
8. ***An order of a permanent injunction doth issue against the Defendants, their agents, transferees, assignees or any other person claiming from or having an interest similar to that of the Defendants from doing any further acts of trespass or in any way interfering with the Plaintiffs' use of their respective parcels of land.***
9. ***The counterclaim is dismissed with costs to the plaintiffs.***
10. ***The defendants pay general of Shs 50 million to the plaintiffs at court rate per annum from the date of judgment till payment in full.***
11. ***The plaintiffs are awarded costs of the suit.***

BASHAIJA K. ANDREW
JUDGE
28/11/2014.