

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0016 OF 2013

DRAZA MOSES **PLAINTIFF**

VERSUS

1. ABDUL SALAM }
2. SARON KAMDAD } **DEFENDANTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendants jointly and severally for trespass to land, an order of vacant possession, a permanent injunction, general damages, interest and costs. The defendants are husband and wife. Sometime in January 2008, the first defendant offered to sell to the plaintiff, a residential house comprised in LRV 3254 Folio 20 Plot 4A Mango Road in Arua Municipality, measuring approximately 0.57 Hectares, at the price of shs. 150,000,000/=. The plaintiff agreed to purchase the property but at the time, the first defendant had mortgaged the title deed to the land, to the Housing Finance Bank in Arua, where he had an outstanding balance of shs. 10,100,000/=. The plaintiff paid to the first defendant a sum of shs. 11,000,000/= being part payment of the agreed purchase price for the house of shs. 150,000,000/=. to enable the first defendant retrieve the title deed from the bank.

Upon retrieval of the title deed, the first defendant introduced the plaintiff to a one Robert Felix Cwinya-Ai in whose name the title was registered and it was agreed that the plaintiff would pay the balance to the first defendant in instalments. Robert Felix Cwinya-Ai signed the necessary transfer instrument which he handed over to the first defendant together with the title deed. The plaintiff paid the balance of the agreed purchase price of shs. 39,000,000/= to the first defendant whereupon the first defendant handed over the title deed and the signed transfer forms to the

plaintiff. When the plaintiff attempted to take possession of the property, he found the second defendant in occupation. The plaintiff reported this to the first defendant who either failed or did not take any action to hand over vacant possession as a result of which the plaintiff filed the suit.

In his written statement of defence, the first defendant stated that he had agreed to purchase the property now in dispute, from the then registered proprietor, Robert Felix Cwinya-Ai. However, the first defendant failed to pay the purchase price in full. He requested Robert Felix Cwinya-Ai to give him a powers of attorney on basis of which he secured a loan from Housing Finance Bank in Arua, using the title deed as security. The first defendant still failed to service the loan prompting him to sell the property to the plaintiff. Unfortunately, his wife, the second defendant stubbornly took possession of the property and prevented the plaintiff from taking over the property. He contended that the property did not constitute family land and therefore he did not require the second defendant's consent before disposing it off.

In her written statement of defence, the second defendant stated that the property in dispute constitutes her matrimonial home as the wife of the first defendant and thus family land. At the time of purchase, the plaintiff was aware of this fact. She assailed the transaction of sale between the plaintiff and the first defendant as being null and void since her consent was never sought. In her counterclaim, she sought cancellation of the plaintiff's name from the certificate of title, general damages and costs. In his reply to both written statements of defence, and defence to the second defendant's counterclaim, the plaintiff stated that at the time he purchased the property, it was vacant. Further, that it was not matrimonial property since the first defendant only had a beneficial interest in it considering that it remained registered in the names of Robert Felix Cwinya-Ai. He accused the two defendants of colluding to commit a fraud on him.

At the scheduling conference, the following issues were adopted;

1. Whether the suit land was family land at the time of sale?
2. Whether the transfer of the suit land was fraudulent?
3. Whether the second defendant trespassed onto the suit land?
4. What remedies are available to the parties?

In his testimony, the plaintiff stated that he knew both the first and second defendants as husband and wife and the first defendant as a business colleague. He had known the two defendants since 1992. The two defendants lived together in a house located along Godown Road in Arua Town. In the year 2008, the first defendant called him on phone, informing him of a building he had mortgaged to Housing Finance Bank and which the bank was about to sell off, because of defaulting in his loan payments. The first defendant asked the plaintiff to deposit shs. 10,100,000/= being the amount he owed the bank, which he did and also paid directly to the first defendant an additional sum of shs. 900,000/= in cash on 3rd February 2008, to make a total of shs. 11,000,000/=. Upon the first defendant's retrieval of the title deed from the bank, he decided to sell the house off to the plaintiff at the price of shs. 150,000,000/=. The first defendant introduced the plaintiff to Mr. Robert Felix Cwinya-Ai, in whose name the title deed was registered at the time, and together they inspected the house which is located along Mango Road in Arua Town. A watchman was called to open the door and the house was empty, devoid of any furniture. The plaintiff subsequently on 18th July 2008 paid shs. 100,000,000/= to the first defendant. The plaintiff then asked Mr. Robert Felix Cwinya-Ai to transfer the title deed into the plaintiff's name which was done on 23rd February 2009, whereupon the plaintiff paid the balance of the purchase price, being shs. 39,000,000/=. None of the L.C. officials or neighbours was involved in the transaction. The second defendant too was not involved in it. The plaintiff then in turn subsequently mortgaged the house to Diamond Trust Bank for a loan.

After that final payment, the plaintiff attempted to take possession of the house only to find the second defendant occupying it. The second defendant refused to vacate the house claiming it as her home. The plaintiff later served her with an official eviction notice from his lawyers but the second defendant still refused to vacate, hence the current suit. That was the close of the plaintiff's case.

In his defence, the first defendant testified that he came to know a one Mr. Robert Felix Cwinya-Ai around the year 2001 or 2002 when Mr. Robert Felix Cwinya-Ai was an Immigration Officer in Arua. At that time, Mr. Robert Felix Cwinya-Ai had been allocated a pool house and had entered into an arrangement with Housing Finance Bank, to purchase it by way of a mortgage financed by that bank. Mr. Robert Felix Cwinya-Ai executed powers of attorney in favour of the

first defendant authorising him to service the loan, maintain the house, collect rent from tenants therein and with power to sell it off, all on his behalf. The first defendant serviced the loan from 2001 until 2008 when Mr. Robert Felix Cwinya-Ai was transferred to Kampala, whereupon he asked the first defendant to pay him for the goodwill agreed at shs. 30,000,000/=, and he would have the house as his own. The balance outstanding on the mortgage at the time was shs. 11,000,000/=. During the year 2008, the first defendant paid the agreed shs. 30,000,000/= in two instalments, by which time he had already taken possession of the house since he was in occupation with his family by the 2002 population census. The first defendant however failed to service the bank loan whereupon he approached the plaintiff offering to sell the house to him if he could pay off the loan. The plaintiff paid the agreed price of shs. 150,000,000/= in instalments and the title was transferred into his names. The first defendant vacated the house in 2008 after he had sold it to the plaintiff. The first defendant having failed to persuade the second defendant to vacate the house after the sale, the plaintiff offered to pay her shs. 50,000,000/= to enable her settle elsewhere which she rejected. The first and second defendants had undergone an Islamic marriage solemnised around 1983 – 1984 in Bunia, Congo while they were refugees there. At the time the first defendant sold the house to the plaintiff on 30th November 2008, the second defendant had travelled to Arusha, Tanzania and the first defendant was not in touch with her and therefore could not obtain her consent yet the bank was threatening to sell off the house.

In her defence, the second defendant testified that she married the first defendant in August 1983 in Bunia, Congo and they have three children together. She occupies the house situated at Plot 4A Mango Road in Arua Municipality as her matrimonial home. She began living in that house around June or July 2002, at which time her last born was two and a half years old and she has never abandoned the house. Before moving into the house, they had lived in a house at plot 8 Go-down Road owned by her husband's family company in which he had shares. When misunderstandings developed between him and the rest of his brothers, he abandoned that family property and moved to Plot 4A Mango Road with his own family.

Her husband, the first defendant, had told her he was paying off the mortgage and eventually he bought the house from Mr. Robert Felix Cwinya-Ai, whom she knew as a family friend. During the course of that transaction, the first defendant had entrusted to her custody, the powers of

attorney granted to him by Mr. Robert Felix Cwinya-Ai. When he eventually purchased the house, he entrusted to her custody the confirmation of purchase executed on 6th February 2009 between him and Mr. Robert Felix Cwinya-Ai. She only got to know that the first defendant had subsequently sold off the house when she was tipped off by the first defendant's brother, Dr. Othman Gulam, but otherwise had not been consulted nor her consent sought during the transaction. She knew the plaintiff as a family friend who used to visit her family frequently and share meals with them. She remembered that on 30th November 2008 the first defendant left for work but never returned. He abandoned her and the children in the house and switched off his mobile phone as a result of which she could not reach him. When she learnt that her husband had sold off the house she met the plaintiff who told her she should sort out the problem with her husband and offered her shs. 50,000,000/= to help her re-locate, which she rejected. When she received court process and notices of eviction, she filed her defence in court. She has been so stressed by these developments that she seeks cancellation of the plaintiff's title and recovery of damages and costs.

In his final submissions, counsel for the plaintiff Mr. Ben Ikilai argued that the first defendant had departed from his pleadings when he testified that he had been in occupation of the house in dispute by 2002, which averment should be rejected in preference of the plaintiff's version that it was vacant at the time he bought it. The first defendant was not an owner of the property but a holder of powers of attorney and therefore the house was not family land. The document he presented as confirmation of sale is dated 6th February 2009 yet the sale to the plaintiff took place on 30th November 2008 from the registered proprietor was Mr. Robert Felix Cwinya-Ai, not the first defendant. The first defendant had simply expressed interest in purchasing the house but had never purchased it, and therefore did not have any interest in the property. There was no evidence of fraud adduced attributable to the plaintiff in the transaction between him and Mr. Robert Felix Cwinya-Ai. The second defendant having entered into possession with knowledge of the fact that the property had been bought by the plaintiff, she is a trespasser on the land. The plaintiff is therefore entitled to the remedies sought and the counterclaim should be dismissed.

In his final submissions, counsel for the first defendant Mr. Samuel Ondoma argued that the first defendant did not depart from his pleadings that the land did not constitute family land. As a

result, he did not require the consent of the second defendant when he sold it to the plaintiff. The powers of attorney which were given to him by Mr. Robert Felix Cwinya-Ai did not vest any interest in that property in him. He was acting as an agent of the donor of the powers of attorney. Even when he paid for the goodwill, he simply acquired an equitable interest yet the concept of family land does not apply to equitable interests in land. In any case, the second defendant was in Arusha and out of contact. It was not possible for the first defendant to obtain her consent. The particulars of fraud pleaded were not proved against the first defendant. The first defendant did not commit any trespass. He asked the second defendant to vacate but she refused to. The remedies sought by the plaintiff are only recoverable against the second defendant.

In her final submissions, counsel for the second defendant, Ms. Daisy Patience Bandaru argued that the agreement of sale between the plaintiff and the first defendant expressly acknowledges that the first defendant had an equitable interest in the property. The first defendant acquired that interest when he paid shs. 30,000,000/= as goodwill. At the time of sale, both the first and second defendants were in occupation of the house. The plaintiff knew both defendants as husband and wife but did not seek to ensure that the second defendant's consent had been given. He neither involved the L.C. officials nor the neighbours. The payments were made in instalments over a period of nearly a year yet the second defendant's consent was not sought at any stage during the transaction. This being her matrimonial home, she is not a trespasser on the land. This is family land and therefore the plaintiff is not entitled to the remedies sought but rather judgment should be entered in favour of the second defendant in respect of her counterclaim.

The first issue raises the question as to whether the suit land was family land at the time of sale. Family land is defined by section 39A (4) of *The Land Act* as; land (a) on which is situated the ordinary residence of a family; (b) on which is situated the ordinary residence of the family and from which the family derives sustenance; (c) which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b); or (d) which is treated as family land according to the norms, culture, customs, traditions or religion of the family. Although the Act does not define what constitutes a "family" for purposes of this section, this court takes it to mean a householder and one or more other persons living in the same household who are related to the householder by birth, marriage, or adoption; or a situation of two or more persons related

by birth, marriage, or adoption including where such people who do not live together, but are related biologically or through legal contracts but excludes spouses who are legally separated (see section 38A (5) thereof). Being spouses living together at the material time, the first and second defendants were family, within the meaning of that provision.

The concept of family land, which is a fusion between law and equity, creates special tenure relations between the householder and the other spouse. In respect of registered land, the proprietary rights to the parcel of land are vested in the householder (the registered spouse) with rights of occupancy guaranteed and protected by the law, for the unregistered spouse, for their joint occupancy, use and enjoyment. With regard to unregistered land, it creates an undivided and inalienable right in the land for the other spouse which is enjoyed in common with the householder. The concept applies to land that is owned or leased by one spouse and occupied by the spouses as their family home; or occupied by the spouses as their family home while at the same time serving as their source of sustenance; or agreed to be used in either of the two prior modes; or according to the norms, culture, customs, traditions or religion of the family, is was treated as family land.

The concept effectively creates two divisions in ownership of land to which it applies; the registered owner or owner of unregistered land has legal ownership, but the spouse has a beneficiary or equitable interest of occupancy and user in the same property, such that one piece of land forms the subject of two proprietary rights separately vested in both spouses, guaranteeing a mutual occupation and enjoyment of the land. The concept in effect creates and elevates to the status of a legal right, what would otherwise have been an equitable interest of an unregistered spouse. The hitherto equitable interest is now enforceable as a right, and once the existence of the right is established it is not open to the court to consider the merits of the situation before giving a remedy.

The system is designed to keep the family together as a production as well as a consumption unit by guaranteeing spousal rights to occupy, plough, farm, tether livestock, etc, thereby providing security of occupancy for the unregistered spouse (in respect of registered land) and preventing unregistered spouses from becoming landless. For both registered and unregistered land, the

concept is important for maintenance of the social benefits of access to land by the poor and disadvantaged spouses as well as the preservation of the cultural heritage of possession and occupation. For this reason, section 38A (3) protects the right of the spouse to use the family land and give or withhold his or her consent to any transaction of giving away *inter vivos*, sale, exchange, transfer, pledge, mortgage, lease or any other transaction in respect of the land. Although the concept renders the status of all proprietary interests in land owned by married proprietors to some degree uncertain, it is an acceptable compromise between the rigidity of (and occasional unfairness perpetrated by) indefeasibility of title and the injustices of general proprietary law on the one hand and the unconscionable enforcement of legal rights of ownership of land on the other. Section 38A of *The Land Act* seeks to create and protect an equitable interest where it would be against conscience to rely on a formal title, and as such with regard to family land, reliance on legal ownership will be restrained by equity.

When a question of fact arises during a trial, the onus lies is on a party who has to prove a positive assertion and not a negative assertion of the issue. In *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993*, it was decided that he who asserts must affirm. Therefore the burden of proof of this issue lay upon the second defendant being the party asserting the affirmative of this issue, and not upon the plaintiff and the first defendant who denied, since from the nature of things he or she who denies a fact can hardly produce any proof. The second defendant had the onus of proving, on the balance of probabilities, that the land in question is “*family land*” within the definition of *The Land Act*, as amended. This required evidence to the effect either that; the house constituted the ordinary residence of the family; or (b) that it as a matter of fact constituted the family’s ordinary residence as well as the one from which the family derived its sustenance at the time of sale; or (c) that the family freely and voluntarily agreed that house would constitute the ordinary residence of the family or both their ordinary residence and one from which the family would derive its sustenance; or (d) that according to the norms, culture, customs, traditions or religion of the family, is was treated as family land.

There is no evidence from any of the parties to suggest that the house in dispute is one from which the defendants derived sustenance at any of the material time and therefore the only way it would qualify as family property would be under (a), (c) or (d) above. To constitute family land,

the court must be satisfied that the second defendant adduced evidence to prove on the balance of probabilities, either that the house constituted the ordinary residence of the family or that according to the norms, culture, customs, traditions or religion of the family, it was treated as family land or that the family freely and voluntarily agreed that house would constitute its ordinary residence. Either way, there are three elements which must be proved; (i) that the householder (the first defendant) and another person (the second defendant) are parties to a subsisting marriage and were not judicially separated at the material time (hence spouses), (ii) that at the time of the impugned transaction, the householder (the first defendant) had a proprietary legal or equitable interest in the disputed property, and finally (iii) that the disputed house constituted the ordinary residence of the family or that according to the norms, culture, customs, traditions or religion of the family, it was treated as family land at the time of the transaction or that the family freely and voluntarily agreed that house would constitute its ordinary residence.

Regarding the first element, it is common ground between all the parties to this suit that the defendants are husband and wife. The plaintiff testified that he knew them as such as far back as since 1992. The first defendant testified that he and the second defendant underwent an Islamic marriage around 1982 – 1983, when they lived in exile in Bunia, in the Democratic Republic of Congo. The second defendant was more specific when she testified that the marriage took place in August 1983. There is no evidence to contradict or refute the respective parts of each of the parties' testimony in this regard or to suggest that the defendants have ever been divorced or judicially separated since then. For that reason, I am satisfied that it has been proved on the balance of probabilities that for all intents and purposes, the first and second defendants are “family” or “spouses” within the meaning of section 38A (3) of *The Land Act*.

In respect of the second element, proof of a proprietary legal or equitable interest in the disputed property vested in the householder requires evidence of an interest in the property that is enforceable *in rem*, or at least against the current registered owner *in personam*, which existed at the time of the impugned transaction. Legal rights are rights *in rem*, that is, rights in the land itself and hence generally enforceable against any person who acquires an estate or interest in the land. By contrast, equitable rights are only rights *in personam*, that is, rights which are

enforceable against certain categories of persons, because it is considered to be fair or equitable that they should take subject to them. The Privy Council in the case of *Williams v. Papworth (1900) A.C., 563, at p. 568*, Per Lord Macnaghten held that;

It could not, of course, be disputed that the expression interest in land, unless there was something to restrict the meaning, must include equitable as well as legal interests.

For that reasons, their Lordships, held in that case, affirming the Supreme Court of New South Wales, that beneficiaries under a settlement, if deprived of their equitable interests, could validly claim under the Act for damages for loss of an interest in land. Equitable interests in land though do not bind one who takes the legal estate as a bona fide purchaser for value of that legal estate without notice of the equitable interest, save persons who buy the property either knowing about the equitable rights or deliberately closing their eyes to them, in fraudulent circumstances.

The plaintiff in the instant case contends that since the land was registered in the names of Mr. Robert Felix Cwinya-Ai and was never registered at any one time in the names of the first defendant, the first defendant did not acquire any proprietary interest in the land and therefore there was no basis for it to be constituted as family land. The plaintiff claims to have taken free from any interests the first defendant may have had in the property. The second defendant refutes this and argues that when the first defendant paid Mr. Robert Felix Cwinya-Ai, shs. 30,000,000/= as goodwill, the first defendant became owner of an equitable proprietary interest in the land. Furthermore, that at the time he secured transfer of the property into his names. The plaintiff knew of the first defendant's equitable interest in the land but proceeded to secure registration in a manner that constituted a fraud on the second defendant's spousal consequential interest therein, pegged to the first defendant's interest as unregistered purchaser of the land.

As a matter of settled legal principle, a purchaser, upon concluding a sale agreement with the owner and making part-payment of the purchase price, immediately becomes the owner in equity of the land, subject only to the legal estate being still vested in the vendor which is to pass upon registration by satisfaction of the formal requirement of conveyance, and the vendor thereby becomes his or her trustee in title. In *H.M. Kadingidi v. Essence Alphonse H. C. Civil Suit No. 269 of 1986*, it was held that;

A purchaser, who has concluded a sale agreement with the owner, immediately becomes the owner of the land and the vendor becomes his trustee in title. This is because the purchaser is potentially entitled to the equitable remedy of specific performance. He obtains an immediate equitable interest in the property contracted to be sold, for he is, or as soon will be, in position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay his money and take possession, has not yet arrived. Equity looks upon that as done with ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity (*Lysaght v. Edward* (1876) 2 Ch.D 499 at pp.506-510). The purchaser cannot of course become owner at law until the land is conveyed to him by deed

That principle has been applied in several other cases including; *Ismail Jaffer Alibhai and 20 others v. Nandlal Harjivan Karira and another*, S. C. Civil Appeal No.53 of 1995; *Adman Khan v Stanbic Bank (U) Ltd*, H. C. Civil Suit No. 435 of 2013; and *Issaka Semakula and another v William Setimba*, H. C. Civil Appeal No. 05 of 2013.

Similarly, in the Australian case of *Barry v Heider* (1914) 19 CLR 197, Mr Barry was the registered proprietor of land. Barry was defrauded by Schmidt who tricked him into signing a transfer form, saying that he would sell the property for much less than it was worth. Schmidt then used the transfer form to raise a couple of loans with Mrs Heider, using the property as security. Nothing had been registered. So, the transfer form has not been registered and neither have the mortgages, creating a group of unregistered interests. Barry tried to argue that as all the mortgagees had were unregistered mortgage instruments; those instruments could not create any interests in the land itself because instruments are not effective until registered. He in effect argued that they were *in personam* as contractual rights against Schmidt but the latter could not have any proprietary equitable rights in the land because under the law, you can't have such rights without registration. The Justices reviewed the provisions of the legislation and noted that parts of the legislation clearly envisage the operation of unregistered interests and concluded that the Torrens legislation does recognise unregistered interests in land. Although they found that no legal interest can be created because no legal interest can arise in land without registration but if equity would enforce the agreement then an equitable interest can arise before registration. Isaacs J at 216 stated that;

A proprietor may contract as he pleases, and his obligations to fulfil the contract will depend on ordinary principles and rules of law and equity ... consequently, section

41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right according to accepted rules of equity, is an estate or interest in the land.... I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest. It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest.

Furthermore, in *Chan v Cresdon* (1989) 168 CLR 242, per Mason, Brennan, Deane and McHugh JJ at 257:

Though the unregistered instrument is itself ineffective to create a legal or equitable estate or interest in the land, before registration, the section does not avoid contracts or render them inoperative. So ...an agreement will be effective, in accordance with the principles of equity, to bring into existence an equitable estate or interest in the land. But it is that agreement, evidenced by the unregistered instrument, not the instrument itself, which creates the equitable estate or interest. In this way no violence is done to the statutory command [in s 41].

While registration is necessary to pass the legal interest and is proof of the facts stated on the Certificate of Title, the law does not totally undermine unregistered instruments. In law, unregistered rights, interests and instruments are now almost universally regarded as being proprietary in nature and creating equitable estates and interests (see *Barry v Heider* [1914] 19 CLR 197 (High Court of Australia); *Great Western Permanent Loan Co. v Friesen* [1925] AC 208 (Privy Council)). Since upon payment, property in land passes to the purchaser who acquires an equitable interest in it and the vendor holds the land in trust for the purchaser, the first defendant acquired in the suit property, an equitable interest as against Mr. Robert Felix Cwinya-Ai when he paid him the shs. 30,000,000/=. Once the first defendant obtained that equitable estate or interest in the land, the second defendant's spousal interest would kick in the moment the property became family land within the meaning of the law. This leads to the third element.

In the instant suit, the plaintiff contends that the house did not constitute family land. He admitted though that he had known the defendants as husband and wife since 1992. The second defendant testified that the plaintiff used to visit their home at plot 7A Mango Road frequently and they would share meals at that home. The second defendant stated she was occupying the

disputed house at the time of the impugned sale, and is supported in this by the first defendant who testified under cross-examination that they were living in that house by the time the national population census occurred during 2002. The Plaintiff refuted this and testified instead that the defendants were at the time resident at plot 8 Go-down Road. I find the evidence of the plaintiff, being uncorroborated by any other evidence, self serving and unreliable in comparison with that of the two defendants. I do not see any reason why the defendants would continue to live at plot 8 Go-down Road where the first defendant had developed misunderstandings with his other siblings when he had by 2002 an arrangement with Robert Felix Cwinya-Ai where he was fully in charge of the house and servicing the mortgage. This is supported by the powers of attorney (exhibit D.E.1). The defendants' version is more believable compared to that of the plaintiff, more especially since the defendants remained consistent regarding this fact, even under the rigorous cross-examination by counsel for the plaintiff. I have not found the departure alluded to by counsel for the plaintiff in his final submissions. What I found is an inconsistency and the first defendant satisfactorily explained the inconsistency between that aspect of his pleadings and his testimony as a lapse of memory which was jogged by his subsequent retrieval of records relating to the 2002 national population census.

Under section 38A of *The Land Act*, "ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period. Furthermore, the second defendant testified that the first defendant had during or around 2008 told her that he had purchased the house from Robert Felix Cwinya-Ai and that it would constitute their home. He kept with her all important documents relating to the house including the powers of attorney and kept on updating her with information relating to his mortgage payments. On this account, it was treated as family land according to the norms and traditions of the family. I find that the defendants by their conduct intended to make plot 7A Mango Road their home for an indefinite period and resided there with a degree of continuity apart from accidental or temporary absences. Before that, they had freely and voluntarily agreed that the house would constitute the ordinary residence of the family. For those reasons, the property constituted family land.

The first issue is therefore resolved in the affirmative. The land in dispute was family land and the defendants' interests therein, legal as well as equitable, are rights which Mr. Robert Felix Cwinya-Ai as registered proprietor created by contract and by conduct, in favour of the first and second defendants, which became enforceable against the plaintiff, provided that the interests are not affected by the protection which indefeasibility gives to those who deal with the registered proprietor on the faith of the register. According to section 136 of *The Registration of Titles Act*, equities against Mr. Robert Felix Cwinya-Ai as registered proprietor arising out of the transaction that took place between him and the first defendant before the plaintiff's registration may be enforced against the plaintiff only if he had notice of them and proceeded to procure registration fraudulently despite that knowledge and with the intention of defeating those interests. Mere knowledge of their existence would not be sufficient.

This then leads to the second issue as to whether the transfer of the suit land to the plaintiff was fraudulent. In the system of registered land the title of every proprietor registered therein is "absolute and indefeasible" and cannot be impeached or affected by the existence of an estate or interest which, but for the registration, might have had priority. This is of course subject to certain exceptions such as that of fraud in the transaction. Fraud in land transactions has been variously defined as; "fraud implies some act of dishonesty," (see *Waimiha Saw Milling Co. Ltd. v Waione Timber Co. Ltd. [1926] AC 101 at p. 106*), "a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or suppression of the truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated," (see *Frederick Zaabwe v Orient Bank and five others, S.C. Civil Appeal No. 4 of 2006*), "dishonest dealing in land or sharp practice intended to deprive a person of interest in land, including unregistered interest," (see *Kampala District Land Board and another v Venansio Babweyaka and others, S.C. Civil Appeal No.2 of 2007*) and "fraud is defined as an act or conduct of obtaining a material advantage by unfair or wrongful means. It involves moral obliquity... Fraud is proved when it is shown that a false representation has been made (a) knowingly or (b) without belief in its truth or (c) recklessly, careless whether it be true or false," (See *Imelda Ndiwalungi Nakedde v Roy Busulwa Nsereko and another, [1997] HCB 73*). The list goes on but the essence is that material dishonesty will constitute fraud.

Allegations of fraud must be proved strictly and to a standard higher than a balance of probability but not as high as beyond reasonable doubt (see *Kampala Bottlers Limited v. Damanico (U) Limited*, S. C. Civil appeal No. 22 of 1992 and *Ratilal Gordhanbhai Patel v. Lalji Makanji* [1957] EA 314). For fraud to form the basis of impeaching a title, it must meet the requirement stated in *Kampala Bottlers Limited v Damanico (U) Limited*, S.C. Civ. Appeal No. 22 of 1992, where it was held that such fraud must be:

Attributable to the transferee. I must add here that it must be attributable either directly or by necessary implication. By this I mean the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. ... Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters.

According to section 77 of *The Registration of Titles Act*, any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, is void as against all parties or privies to the fraud. Similarly, section 176 (b) of *The Registration of Titles Act* allows actions for recovery of land against the person registered as proprietor under the Act where that person was registered as proprietor of that land through fraud. For that reason, any person who fraudulently procures, assists in fraudulently procuring or is privy to the fraudulent procurement of any certificate of title or instrument or of any entry in the Register Book, or knowingly misleads or deceives any person authorised to require explanation or information in respect to any land or the title to any land under the operation of the Act in respect to which any dealing is proposed to be registered, that person commits an offence by virtue of section 190 (1) of *The Registration of Titles*. The combined effect of all these provisions is that fraud in the transaction will vitiate a title.

In order to acquire a title which is comprehensively indefeasible, which provides a complete protection from all forms of defeasibility, the title must be held by a person who is registered and who is either bona fide for value without notice, or who is bona fide for value and has dealt only with the previous registered proprietor in the circumstances envisaged by section 181 of *The Registration of Titles Act*. Otherwise, when a person becomes the registered proprietor of an estate or interest which has been derived directly from a transaction, the legal effect of which

may be abrogated or modified in equity, that person is registered through fraud or error and the title may be impeached.

In her counterclaim, the second defendant pleaded that transfer of the land to the plaintiff was done fraudulently since it was done with the knowledge of her spousal interest and yet her consent was not sought, with the sole purpose of defeating that interest. The plaintiff refutes this in his defence to the counterclaim and contends that the second defendant had no registrable interest in the property and that the plaintiff acquired the land lawfully and in accordance with the relevant procedures. The basis of the second defendant's claim is her having been in occupation of the house during the time of the transaction as wife to the first defendant which marital relationship the plaintiff was aware of yet did not take any trouble establish from the first defendant, herself or otherwise that her consent had been obtained.

The plaintiff's contention that the second defendant did not have a registrable interest in the land is erroneous. A spouse has a caveatable interest in family land as recognised by section 39 (7) of *The Land Act*. Caveatable interests, being interests which do not have their own title, but which may be protected by an entry on the charges register of the title burdened by them, are registrable interests. Regarding the second defendant's argument that the plaintiff had actual notice that she lived in the house, by analogy in *Smith v. Lones [1954] 2 ALL E.R 823*, it was held by Upjohn J. that a tenant's possession did not give notice to a purchaser of the reversion of the existence of an equity of rectification relating to his tenancy agreement. A person's occupation of land will only give notice of his equitable interests and not his mere equities. The reason is obvious. A person's possession of land can only be relevant to those interests he has which relate either directly or indirectly to that land. The possession cannot be considered relevant or indicative of rights which relate not to the land but rather to a transaction. Therefore a purchaser who acquires notice of possession of a property by the spouse of the seller does not acquire notice of mere equities of the spouse but of interests the spouse has which relate either directly or indirectly to that land. The law protects the unregistered spouse as against the fraud of the registered spouse as well as a third party purchaser who acquires the registered title with a view to depriving the unregistered spouse of those rights.

The plea of bona fide purchaser for value without notice is available to a purchaser who, at the time of the purchase, obtains a legal estate without notice of a prior or existing equitable claim or interest and the onus of proof usually lies with the party making the plea of bona fide purchaser. Notice includes actual or constructive notice of such facts as would have been discovered if all usual and proper inquiries were made of the vendor's title, interests and encumbrances affecting the land. Within the system of land registration, one is not required to search the root of title to ensure that there is a good root. However it is practice, and perhaps incumbent on a potential purchaser, that the usual checks for "hidden" encumbrances be made. That is to say, not all interests or encumbrances affecting the land appear on the certificate of title. Thus the purchaser ought to visit the land to ensure for instance that the land is free from trespassers or other forms of possessory encumbrances, and where the seller of the property is known to be married, to make inquiries as to whether the land is or is not family land and in the former case, if the consent of the unregistered spouse has been obtained.

It seems to me that by the time the plaintiff entered into an agreement to purchase the land from Mr. Robert Felix Cwinya-Ai, the plaintiff had prior actual notice that the first defendant claimed an equitable interest in the property as an unregistered purchaser (beneficial owner). This is evident in the preamble to exhibit P.2.in the words "has an equitable interest..."He had knowledge that the first defendant had an unregistered interest in the land which he held as owner pursuant to an agreement between the first defendant and Robert Felix Cwinya-Ai, and therefore, knowing that the first defendant was married to the second defendant, the plaintiff was put on inquiry as to whether it was family land or not. It can only be a matter of speculation as to what, if any, disclosures were made to the plaintiff by the first defendant when he entered into the agreement of purchase with him. The plaintiff has maintained all along that he knew nothing about the land in question being family land. The plaintiff however did not disclose what inquiries he made, if any, as to whether or not the property was family land. He instead appears to have been pre-occupied only with the question as to whether or not the house was occupied.

Under section 136 of *The Registration of Titles Act*, notice of the existence of an unregistered interest and the fact that the holder of that interest does not concur in a sale by the registered proprietor, does not amount to fraud so as to prevent the purchaser from relying upon his transfer registered after such notice. It would seem further that under that section, it is not fraud merely

for a purchaser who has become registered to take advantage of the priority that is conferred by registration, even if the purchaser proceeded to registration with the knowledge of the unregistered interest and the consequential knowledge that he was depriving another of an unregistered interest in the land. Even if it could be argued that the previous owner as vendor in the sale had acted fraudulently that fact alone would not render the plaintiff's acquisition of title by registration fraudulent. But where there is a clear intention to cheat the unregistered spouse of their known existing rights, an inference of fraud may be more readily drawn by the Court. Dishonest assistance of the registered spouse to breach the fiduciary duties owed to the unregistered spouse introduces the element of dishonesty into the transaction and hence fraud. Such fraud may be manifested by wilful blindness or constructive notice on the part of the purchaser; a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have (wilful blindness), or a state of mind of neglecting or failing to make such inquiries as a reasonable and prudent person would make after one's suspicion is aroused, and deliberately doing so for fear of learning the truth (constructive knowledge - see *Assets Company v. Mere Roihi* [1905] AC 176).

Wilful blindness is distinct from rules of law that infer, without proof, knowledge by a party of a further fact from the proved actual knowledge of that party of a primary fact, where knowledge of that primary fact would naturally have led to knowledge of the secondary fact. The distinction was drawn by Lord Sumner in *The Zamora* [1921] AC at 812 when he observed that;

There are two senses in which a man is said not to know something because he does not want to know it. A thing may be troublesome to learn, and the knowledge of it, when discovered may be uninteresting or distasteful. To refuse to learn any more about the subject or anything at all then is a wilful but real ignorance. On the other hand, a man is said not know because he does not want to know, where the substance of the thing is borne in upon his mind with the conviction that full details or precise proofs may be dangerous because they may embarrass his denials or compromise this protests. In such a case he flatters himself that while ignorance is safe, 'tis folly to be wise, but then he is wrong for he has been put upon notice and his further ignorance, even though actual and complete, is a mere affectation or disguise.

Lord Esher MR stated in *English and Scottish Mercantile Investment Co v. Brunton* 1982] 2 QB 700, CA as follows:

"Constructive notice" is the right term to be applied to the process, an inference of knowledge may be drawn from proved fraudulent abstention from inquiry. There is an inference of fact known to common lawyers which comes somewhat near to it. When a man has statements made to him of something which is against him, and he abstains from making further inquiry because he knows what the result would be-or, as the phrase is, he "wilfully shuts his eyes," then judges are in the habit of telling juries that they may infer that he did know what was against him... there is no question of constructive notice, or constructive knowledge about inference; it is actual knowledge which is inferred

If faced with a set of facts, an individual does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing, but if he or she did suspect wrongdoing yet failed to make inquiries because "he did not want to know" or because he regarded it as "none of his business," that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge.

In the instant suit, the plaintiff stated that he visited the house and inspected it before commencing the transaction of purchase. He found the house vacant, unoccupied and devoid of furniture. There is no evidence though that he made any inquiries as to whether it was family land or not and whether the second defendant had given her consent to the transaction, yet he knew the first defendant to be married to the second defendant at the time. He appears to have deliberately closed his eyes and ears, or deliberately not asked questions, lest he learnt something he would rather not know, and then proceeded regardless. That a property is family land is not restricted to it being the ordinary residence of the family or source of sustenance, which appears to have been the thrust of the plaintiff's pre-transaction inspection. It also includes land treated as family land according to the norms and traditions of the family as well as that which the family freely and voluntarily agrees would constitute the ordinary residence of the family. Whereas the former two categories of family land are amenable to a physical inspection of the property, the latter two categories can hardly be established by a mere physical inspection of the property. They require making pertinent inquiries from the most reliable source, the unregistered spouse.

In the circumstances, the plaintiff's purported inspection, restricted only to the determination of whether or not the house was occupied at the time, was rendered perfunctory by his failure to ask the first defendant pertinent questions regarding the status of the property viz-a-viz his known marital status. He as well did not take any steps to inquire from the second defendant whether or not she had given her consent to the transaction, yet he knew her to be married to the first defendant. In doing that, the plaintiff was either willfully blind to the fact or the law will impute knowledge of that fact to him that the second defendant had not given her consent to this transaction. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty.

Lord Nicholls said in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 stated that;

An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will indicate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained...

He went on further to state that;

Acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour

Knowledge may be proved affirmatively or inferred from circumstances. Knowledge of a nature that will constitute fraud may exist in various mental states which were analysed by Peter Gibson J. in *Baden's case* [1993] 1 W.L.R. 509 as comprising: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. After a careful consideration of the material before me, I have come to the conclusion that the plaintiff had actual knowledge that the first defendant had an equitable interest in the land being transferred to him from Robert Felix Cwinya-Ai, he had actual knowledge that the first defendant was married to the second defendant, these were facts which would put an honest and reasonable man on inquiry as to whether the land constituted family land or not and as to whether the necessary spousal consent had been obtained by the first defendant, he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make in those circumstances, he wilfully shut his eyes to the obvious and therefore the only inference is that he acted dishonestly. The second issue therefore is answered in the affirmative. Transfer of the suit land to the plaintiff was fraudulent and the fraud has been directly attributed to the plaintiff.

Having concluded that the transfer of the suit land to the plaintiff was fraudulent, the third issue too is answered in the affirmative. The second defendant was and continues to be in possession of the disputed property as her matrimonial home. She cannot be a trespasser in her own home.

Finally, the court has to determine what remedies are available to the parties. All the issues having been decided against the plaintiff, the suit is dismissed with costs to the second defendant. Although technically a successful party in regard to the suit filed against him by the plaintiff, the first defendant was complicit in the fraud committed by the plaintiff and himself against the second defendant, for that reason he will not be awarded any costs.

In her counterclaim, the second defendant sought a declaration that the alleged sale of the suit land to the plaintiff is null and void, an order of cancellation of the plaintiff's name from the title,

general damages and costs. According to section 39 (4) of *The Land Act*, any transaction entered into without the required spousal consent is void. In the instant case, the first defendant explained that at the time he sold the house to the plaintiff on 30th November 2008, the second defendant had travelled to Arusha, Tanzania and the first defendant was not in touch with her and therefore could not obtain her consent yet the bank was threatening to sell off the house. This explanation is a most unsatisfactory justification for the first defendant's failure to obtain the required consent of the second defendant to this transaction. The transaction spanned a period of nearly a year and three months from January 2008 when the offer to sell was made, to 30th November 2008 when the first instalment was paid until 23rd April 2009 when the plaintiff secured registration of the title in his names. It was the second defendant's testimony that she never left the home for any period exceeding a month and in any event she had not travelled to Arusha during November 2008 as alleged. At no time during that period of one year and three months did the plaintiff or the first defendant attempt to ascertain from the second defendant whether she had given her consent to the transaction. Consent by the unregistered spouse is a mandatory requirement, the only exception being situations where it is unreasonably withheld, in which case the statutory processes for dealing with that challenge the must be followed. Lack of spousal consent renders the contract of sale of family land *void ab initio*.

The purchaser in a transaction where the necessary spousal consent was not given is entitled to claim from the person with whom he or she entered into the transaction, any money paid or any consideration given by him or her in respect of the transaction, only if he entered into the transaction in good faith and for value without notice that the requirement of consent had not been complied with. The plaintiff in this case acted dishonestly in wilful blindness to this requirement, I am unable to make an order for a refund as against the first defendant. Harsh as it may seem, the court will not come to the aid of a person guilty of fraud to enable that person recoup his or her perceived loss arising from a fraudulent transaction perpetuated by him or her. The law does not provide a remedy for a person complicit in the fraud. Under section 177 of *The Registration of Titles Act*, upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances

of the case require; and the registrar is required to give effect to that order. By virtue of that provision, the Registrar of Titles / Commissioner Land Registration is hereby directed to cancel the entry made on the title to LRV 3254 Folio 20 Plot 4A Mango Road in Arua Municipality, measuring approximately 0.57 Hectares on 23rd April 2009 at 8.40 pm under instrument number 41229 in the name of Draza Moses of P. O. Box 645 Kampala, and in place thereof insert the name Abdul Salam Gulam, the first defendant in these proceedings, being the person who had lawfully purchased it from the previous registered proprietor, Robert Felix Cwinya-Ai, before the transaction that has now been declared to have been fraudulent.

I have not found any reason that would entitle the second defendant to an award of damages as compensation in an action of this nature. She has not proved any material loss or damage that she suffered which would require to place her in the same position she would have been in had the fraud not occurred. I therefore reject the prayer for general damages. In the final result, the suit is dismissed with costs to the second defendant. The first defendant shall meet his own costs. Judgment is entered in favour of the second defendant against the plaintiff on the counterclaim with orders that;

- a) The transfer of title to LRV 3254 Folio 20 Plot 4A Mango Road in Arua Municipality which was effected on 23rd April 2009 is declared void.
- b) The Registrar of Titles / Commissioner Land Registration is ordered to cancel the name of Draza Moses of P. O. Box 645 Kampala from the LRV 3254 Folio 20 Plot 4A Mango Road in Arua Municipality, and in place thereof insert the name Abdul Salam Gulam, the first defendant.
- c) The plaintiff meets the second defendant's costs of the counterclaim and of the suit.

Dated at Arua this 14th day of December 2016.

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Stephen Mubiru
Judge