THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(COR: ODOKI J.S.C., ODER, J.S.C., & PLATT, J.S.C.)

CIVIL APPEAL 16/1993

FAM INTERNATIONAL LIMITED……...…1ST APPELLANT

AHMED FARAH……2ND APPELLANT

-VERSUS-

MOHAMED HAMID EL-FATIH…….RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Uganda (Tinyinondi, J.*)* dated 5th January, 1993 in Civil Suit No. 436 at 1991).

JUDGMENT OF ODOKI, J.S.C.

This is an appeal against the judgment of the High Court whereby the appellants' suit against the respondent was dismissed but part of the respondent's counter—claim was allowed and the court granted a declaration that the first appellant, Fam International Ltd, was fraudulently an incorporated and ordered that it be wound up.

The first appellant, Fam International Ltd. is a private Limited Company incorporated in Uganda. The second appellant is the Managing Director of the first appellant Company. The respondent is a Sudanese National resident in Kampala.

The appellants brought an action against the respondent for a permanent injunction to restrain the respondent and his agents or servants from holding out as a Director of the first appellant Company or disclosing any of the Company's secrets or processes, the knowledge of which he obtained while in the appellants employment. They also prayed for a declaration that the respondent was not a director of the first appellant or its employee.

It was alleged in the plaint that the respondent was employed on a casual basis from October, 1988 till his dismissal, on 11 June, 1991, for gross misconduct and fraud. The particulars of fraud set out in para. 5 of the plaint were as follows: —

(i) On the 12th of June 1987 the defendant caused to be incorporated sham private limited Liability Company in the name of "Ayfa Trade and Birds Breeding Limited" contrary to the provisions of Section 13A (1) of the immigration (Amendment) Act 1984 and forged the signature of one fictitious F.M. AHMED allegedly a Co-director of the aforesaid sham company.

(ii) On the 7th of September, 1988 the defendant fraudulently attempted to change the name of Ayfa Trade and Birds Breeding Limited" to "Fam International Limited" then already in existence under the directorship of the 2nd plaintiff and one other by uttering a false document to wit a certificate of incorporation improperly obtained in respect of the above and a special resolution purportedly signed by their Directors of the sham Company contrary to the provisions of section 20 of the Companies Act with the intention of defrauding the first plaintiff.

(iii) Between April and June 1991 the defendant attempted to divert goods of the 1st plaintiff which came under his control by virtue of his employment with the 1st plaintiff to yet another sham Company in the name ELSAFA with the intention or causing substantial loss to the 1st plaintiff.

In his Written Statement of Defence, the respondent denied the allegations made by the appellants. He contended that he was an original Shareholder and Director in Ayfa Trade and Birds Breeding Limited which on 7th September, 1988 lawfully changed its name to Fam International Ltd.

The respondent pleaded a counter-claim in which he prayed for (a) a declaration that the first appellant was illegally and fraudulently incorporated, (b) an order that the first appellant be struck off from the Registrar of Companies, (c) a permanent injunction to restrain the second appellant from holding himself out as a Shareholder or Director in Fam International Limited and (d) an order that the property listed in the counter-claim belongs to Fam International Ltd. formerly known as Ayfa Trade & Birds Breeding Ltd.

The respondent contended in the counter-claim that the second appellant had never been a member of Ayfa Trade & Birds Breeding Ltd/Fam International Ltd. He contended further that second appellant had purported to illegally promote a Company bearing the name Fam International Ltd in which he and his wife were to be the only shareholders and unlawfully caused the incorporation of the said Company at the Registry of Companies, Kampala, to be backdated to 5th September 1988, with intent to defraud the respondent as a Shareholder of Ayfa Trade & Birds Breeding Ltd/Fam International Ltd. It was alleged further that as a result of the above illegal acts, the respondent was detained at the Central Police Station for 11 days from the 8th June, 1991 at the instigation of the appellants and the property of Ayfa Trade & Birds Breeding Ltd/Fam International Ltd of which he was a shareholder was unlawfully claimed or converted by the appellants.. The particulars of the properties were one Mercedes Benz Reg. NO UPA 411, office premises on 9th Floor of Uganda House, stock in the shop on Nakivubo Road, unspecified amount of money in the bank account of Ayfa Trade & Birds Breeding Ltd/Fam International Ltd and Cash at hand, good will and other property.

The evidence adduced at the trial by the parties was along the lines of the pleadings. According to the evidence of the second appellant, the Company in dispute, Fam International Ltd, was his and was incorporated with himself and his wife as the Shareholders. He maintained that the respondent was employed as a casual employee but designated as Director of Import and Export until he was dismissed in June, 1991. He testified further that when he met the respondent he was told that Ayfa Trade and Bird Breeding Ltd existed but he did not know when it changed its name.

In support of his claim, the second appellant produced a certificate of incorporation of the first appellant company and the evidence or Charles Elem Ogwal (PW1O) as the person who issued the Certificate of Registration and the circumstances surrounding its registration.

On the other hand the respondent claimed that the Company in dispute was his and it was first incorporated in June, 1987 in the name of Ayfa Trade & Birds Breeding Ltd. Its Directors were himself and one F.H. Ahmed. The Company carried out business of exporting birds until January 1989 when the Government put a ban on export of birds. The Company then went into import and export business. On 7th September, 1989 the Company changed its name to Fam International Ltd. By this time the respondent had struck acquaintance with the second appellant and they agreed to carry out business under the same Company.

The arrangement was not in writing, but it was agreed that the second appellant would take 30% of the business. The second appellant never became a Shareholder. The business was carried out until May/June 1991 when a dispute arose from the imported sugar. As a result of that dispute, the second appellant rushed to cause the incorporation of another Company under the name of Fam International Ltd and fraudulently caused the incorporation to be backdated to 5th September, 1988, two days before the respondents Company changed its name from Ayfa Trading & Birds Breeding Ltd to Fam International Ltd.

In support of his case, the respondent produced the Certificate of Incorporation of Ayfa Trade & Birds Breeding Limited (Exh. D.1) statement of Nominal Capital and Declaration of Compliance with the requirements of the Companies Act (Exh. D2), application for change of name to Fam International Ltd (Exh. D6), special resolution (Exh D.7) and Certificate of Change of name (Exh. D.8) among other documents. He also called his advocate Didas Nkurunziza (DW2)

At the trial the following issues were framed by the Judge after both Counsel had failed to agree on the issues:

1. Whether the 1st plaintiff ever employed the Defendant as a casual employee at all. If yes, whether and when it dismissed him and whether he had obtained any secrets or processes of the 1st plaintiff by virtue of that employment.

2. Whether on .12th June, 1988 the Defendant fraudulently caused the incorporation of Ayfa Trade & Birds Breeding Ltd. and on 7th September, 1991 he fraudulently attempted to change the name of Fam International Ltd.

3. Whether in May 1991 there was fraud behind the incorporation and backdating to the5th September, 1988 of the 1st Plaintiff.

4. Whether the defendant has held himself out as a Director or Shareholder of the 1st Plaintiff.

5. Whether the Defendant’s counter-claim can be maintained.

6. What are the remedies available to the parties?

The Learned Judge answered the first issue in the negative and held that the respondent was never employed by the first appellant and could therefore not be dismissed. He also answered the second issue in the negative, holding that the appellants had failed to prove the allegations in the plaint that on 12th June 1988, the respondent fraudulently caused the incorporation or Ayfa Trade Birds and Breeding Ltd or that he fraudulently attempted to change it to Fam International Ltd on 7th September, 1988.

The third issue was answered in the affirmative, the Learned Judge holding that the 1st appellant was fraudulently incorporated through backdating of the incorporation.

The Learned Judge answered the fourth issue in the negative and held that there was no evidence to show how the respondent held himself as a Director of the first appellant and that the first appellant had no secrets which the respondent could steal. As regards the fifth issue, the Learned Judge answered it in the negative and dismissed the part of it claiming damages for wrongful arrest and imprisonment while the rest was struck out.

On the question of remedies the Learned Judge dismissed the appellant's action. He allowed part of the respondents counterclaim and granted him a declaration that the first appellant was fraudulently incorporated and ordered that it be wound up. He struck out the part of the counter-claim alleging conversion of property and dismissed the claim for unlawful detention.

Against this decision, the appellants have appealed to this Court on six grounds. The first ground of appeal is that the Learned Judge erred in law and fact when he merely struck out part of the respondents counter—claim after hearing on the merits, and when he granted the respondent a remedy on a counterclaim that had totally failed. The second ground is that the Learned Judge erred in law and fact in that he went behind the first appellants Certificate of Incorporation and declared that the first appellant incorporation was fraudulent, and ordered the first appellant to be wound up. In the third ground the appellants complain that the Learned Judge erred in law and fact as regards the question of fraud in that he applied the

wrong standard of proof and imputed the act of a third party to the appellants thus holding that there was fraud on their part. He also erred when held that the respondents pleading sufficiently particularized the alleged fraud.

The fourth ground is that the Learned Judge erred in law and fact when he found that the Respondents Company was properly incorporated, and that it had properly changed its name. It is complained in the fifth ground that the Learned Judge erred in law and fact in that he failed to evaluate and scrutinise the evidence before him thereby coming to wrong conclusions on the issues before him. The sixth ground is to the effect that the Learned Judge erred in not determining the question of ownership of the suit property, in considering the question whether or not the second appellant had held himself out as a Director/shareholder of the respondents Company to be a non- issue, and in framing the issues after consideration of the evidence.

It will be convenient first to deal with grounds three and five which raise the issue whether the Learned Judge was justified, on a proper evaluation of evidence, in holding that there was fraud on the part of the appellants. It was submitted that the Learned Judge was wrong in going behind the first appellant's Certificate of Incorporation, and in holding that its incorporation was fraudulent. I shall deal with the issue of fraud first.

The first complaint is that the Learned Judge was wrong in holding that the pleadings sufficiently particularized the alleged fraud on the part of the appellants. Mr. Tibaijuka, for the appellants, submitted that the Written Statement of Defence did not contain sufficient facts to show what fraud was being alleged against the appellants, but merely contained vague statements about backdating. He contended that particulars of fraud should have been set out in paragraphs. He relied on the decisions of this court in **J. Okello Okello v. UNEB Civil Appeal 12 of 1987 (unreported). Kampala Bottlers v. Daminico— Uganda) Ltd, Civil Appeal No. 22 of 1992 (unreported and Stephen Lubega v. Barclays Bank, Civil Appeal No. 2 of 1992 (unreported).**

Mr. Mulenga, Learned Counsel for the respondent, submitted that a distinction must be drawn

between what amounts to fraud and evidence of fraud. What was required in pleadings, he contended was to set out the acts and omissions constituting fraud, but not evidence, as stipulated in o.6 r.1 of the Civil Procedure Rules. He argued that the act of fraud alleged was the backdating or incorporation from May 1991 to 5tn September, 1988, and the allegation of squeezing and use of false stamp and false receipt were merely evidence to prove the backdating. Learned Counsel distinguished the cases cited by Mr. Tibaijuka on the ground that in those cases, fraud was not pleaded but in the present case it was pleaded in para. 4 of the Written Statement of Defence which stated,

> "4. The defendant shall contend further that on a date unknown in May 1991 the second plaintiff purported to illegally promote a Company bearing the name FAM INTERNATIONAL LTD in which he and his wife were to be the only shareholders and unlawfully caused the incorporation of the said Company at the Registry of Companies, Kampala, to be backdated to the 5th September, 1988 with the intent to defraud the Defendant as a shareholder of AYFA LTD/FAM INTERNATIONAL LTD**".**

In his judgment, the Learned Judge considered the question of pleadings in actions for fraud as follows:

> "As for pleadings in actions for fraud I find **BEA Timber Co V. Gill (1959) EA 1005** binding on me let alone being a sound approach to the issue. In that case Forbes V.P, stated:
>
> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. Fraud, however, is a conclusion of the law. If the facts alleged in the pleadings are such as to create fraud it is not necessary to allege the fraudulent intent. The acts must be set out, and then it should be stated that these acts fraudulent intent may be inferred"

The Learned Judge observed that the above case was applied by the Court of Appeal in **David Nalima V. Rebecca Musoke Civil Appeal No 12 of 1985 (unreported)** and concluded,

> "According to my interpretation of the above authorities there are two courses open to a plaintiff when he is drawing his plaint. He may specifically employ the word fraud and proceed to particularise the instances of fraud. Alternatively he may set down a catalogue of allegations, without using the word fraud, which clearly point to the Defendants state of mind. These are the tests I shall adopt in this case".

Later in his judgment he held that paragraph 4 of the counterclaim satisfied the law as enunciated in **B.E.A Timber case** (supra).

Mr. Tibaijuka Learned Counsel for the appellant did not criticize the Learned Judge's statement of the law but he submitted that the Learned Judge did not apply the test he set out to the facts of this case.

It is well established that in an action for fraud, the allegations of fraud should be specifically pleaded and particularised see **Okello Okello V. UNEB** (supra).
In this connection O.6.r 2 of the Civil Procedure Rules provides,

> "2. In all cases in which the party pleading relies on any misrepresentation, fraud, breach trust, willful default or undue influence and in all other cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings"

Fraud is a serious matter and the party against whom it is alleged should be afforded sufficient notice to enable him answer the allegations. In the present case, paragraph 4 of the Written Statement of Defence gave the appellants sufficient particulars of what fraudulent

acts the respondent was alleging against them, namely, the backdating of the incorporation of the first appellant from May 1991 to 5th May 1988, with intent to defraud the respondent. Therefore I agree with the Learned judge that the pleadings for fraud satisfied the requirements of the law and I find that no prejudice was occasioned to the appellants.

It was submitted for that the learned judge applied the wrong standard of proof when he stated in his judgment as follows:

> "As for the standard of proof I content myself by referring to a statement from 26 Halsbury's laws of England (3rd Ed):
>
> …….the standard of proof applicable is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt but the degree of probability to establish proof may vary according to the gravity of the allegation to be proved (Underlining is supplied)"

Learned Counsel for the appellant argued that the statement quoted by the Learned Judge did not set out the correct standard of proof in fraud cases which is always higher than in other civil cases although it is less than the standard in criminal cases. He submitted that the correct standard is set out in **R.G.Patel Laiji Makanji (1957) E.A 314 where the Court of Appeal** said,

> "Allegations of fraud must be s t r i c t 1 y proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required"

It seems to me that while the statement quoted from **Halsburys Laws of England** (supra) represents the law on the standard of proof in fraud cases in general terms, it does not go far enough to emphasis that in fraud cases the standard is more than a mere balance of probabilities though less than proof beyond reasonable doubt, as pointed out in the **Patel**

Case (Supra). However, it is clear that the Learned Judge was alive to the correct standard of proof when he concluded in his judgment,
"1 am satisfied by the evidence adduced that this proof has amounted to more than a balance of probabilities"

Therefore the criticism that the Learned Judge applied the wrong standard of proof has no merit.

Learned Counsel for the appellants submitted that the Learned Judge erred in imputing fraud of a third party on the appellants, and in holding that there was fraud on the part of the appellants. He pointed out that the Judge came to the conclusion that fraud had been established on the part of Charles Elem Ogwal (PWIO) and that the other perpetrators of the fraud were Mohamed Farah (PW1.) and his advocate James Matsiko (PW3). He argued that since the stamping and entry of the name in the register was done by a Filing Clerk and the issuing of a receipt by the Accounts Office, these irregularities could not be attributed to the Registrar of companies (PW10) or the promoter of the Company (PW1) nor his Lawyer (PW3) who never went to the Registry of Companies, as there was no evidence that the appellants colluded with the officials in the Registry of companies. Moreover, he submitted, the irregularities complained of were mere slips common in the Registry and did not amount to fraud. It was his contention that using a wrong rubber stamp, issuing a false receipt or mere incompetence or unlawfulness did not amount to fraud which had to be actual and not merely constructive fraud.

On the other hand, Mr. Mulenga Learned Counsel for the respondent submitted that the respondent relied on circumstantial evidence the totality on which he asked the court to conclude that there was backdating of incorporation of the first appellant Company. It was his contention that the evidence of fraud consisted of the following;

1. Use of rubber stamp on the Memorandum and Articles of Association of the first Appellant company (Exh. p2) which stamp was in existence in 1991 but not in 1988 which shows that the incorporation was carried out in 1991 and not 1988.

2. The squeezing of the name of the first appellant company in the Register (Exh.P3) in a space supposed to be left blank and giving the company the same number as another company, which shows that the company was given a serial number which had already been allocated to another company.

3. The issuing of a General Receipt endorsed on Ex.P.3 which was not in use at the time.

4. The fact that between September 1988 and June 1991, there was only one company by the name of Fam International Ltd in existence and operational.

5. The fact that Ayfa Trade & Birds Breeding Ltd was issued with a certificate of change name as way back as 7th September 1988 which means that both the second appellant and respondent started trading under this company.

6. Use of the same file No.29969 for income tax as records in the Income Tax Department and Ministry of Commerce showed that the file was first opened in the name of Ayfa Trade and Birds Breeding Ltd and Income Tax Certificates and Trading Licenses were issued in that name until changed to Fam International Ltd.

7. Conduct of the appellant after the dispute broke out tends to show that he was in a state of desperation and was capable of committing fraud. This conduct included reporting to the Police that he was being swindled and causing the arrest and detention of the Respondent, obtaining an injunction to the Respondent from entering me shop at Plot 13 Nakivubo Place and Offices at Uganda House, and transferring the motor vehicle to his nephew Umar while the injunction was still in force and when the Respondent repossessed the car, the appellant advertised that the car had gone missing.

On this evidence, Mr. Mulenga contended, the only reasonable hypothesis was that the incorporation of the appellant was backdated. He submitted that the Registrar of Companies was presented with a batch of documents for incorporation in May/June 1991 but in incorporating the company, he backdated it to September 1988 and it was with intent to defraud the respondent by the second appellant in order to lay a claim to the properties that had been acquired by the respondent's Company prior to 1991.

The Learned Judge carefully evaluated and considered the evidence of Charles Elem Ogwal (PW10) who actually incorporated the first appellant Company. The Judge noted that PWI0 received the documents from the second appellant (PW1) for incorporation and these included annual returns, and was satisfied that the registration fees were paid and General Receipt issued by the Accounts Department. PW10 however admitted that General Receipt NO Y538669 which was issued was not among the General Receipt Books issued to the Ministry of Justice. When investigations in the matter started, PWIO reconstructed a duplicate file on the basis of documents issued to the second appellant, and certified the documents since he had signed the original. The Judge wondered how he could do this from mere memory.

The next piece of evidence the Learned Judge considered was relating to the rubber stamps. He referred to the Loose Minute dated 26th July, 1991 (Exh.P.38) in which the Registrar General clearly points out that the rubber filing stamp used by PW10 on Exh. p.2,

> "Is a new stamp which we bought this year. I received this rubber stamp on 14th March 1991... . There is no way this stamp could have been used by the Registry staff or you in 1988. It was not there. At time we were using the old stamp which has small letters"

The Learned Judge then commented on PW10 evidence,

> “PW10 did not explain away this during his testimony. He simply stated: `I had used the stamp then available for certificate´ I think the witness told lies”.

The Learned Judge concluded that PW10 knowingly used a rubber stamp not used in the department in 1988 when incorporating the 1st appellant Company, and that he was committing a fraud. In my view the Learned Judge was justified in coming to this finding in view of the evidence before him on this matter.

The Learned Judge was not satisfied with the explanation of PWI0 regarding the irregularities of not reserving the name, squeezing the name of the Company in the Register and giving it similar number with another Company. He observed,

> “The were other, not altogether fortunate landmarks in PW10 evidence including the absence of evidence of reservation of name as required by Section 19 of the Act, squeezing of Fam International Ltd in a gap supposed to be left open, and on assigning of a serial number to Fam International Ltd already given to another company. The witness explained these in a very unconvincing manner. These coincidences are suspect indeed. I was not content with the explanation offered”.

In effect the Learned Judge held that there was no acceptable explanation why PWI0 did not follow the right procedure for incorporating Companies. The failure to follow the well laid down procedure was another piece of circumstantial evidence against PW10, indicating fraudulent intention.

The Learned Judge rejected the evidence of Kawesa Kiwanuka (PW5) and the letter from Income Tax Department (Exh.p.16) and held that it had been made up to enable the second appellant to make up its case. The Judge observed,

> "The evidence of PW5 and Exh. p. 16 was used to prove that the 1st plaintiff was in existence before July 1990. I was not persuaded by this effort. There is no satisfactory explanation why 1st plaintiff should have paid income tax on file NO 29969 which belonged to Afya Limited and changed to Fam International Limited of the Defendant. This evidence was given to PW5 by the 2nd Plaintiff on July 1990 after the dispute had broken out. The evidence was improvised by the 2nd plaintiff to make out a case"

Consequently the Learned Judge found as a fact that the Memorandum and Articles Association (Exh. p.2) was actually not presented to the Registrar on 5.9.88 in accordance with section 15 of the Companies Act because (a) it bears a rubber stamp not in use in 1988 but after 4th March, 1991, and (b) it bears a rubber stamp showing that the registration fees were paid and receipt NO Y53669 was issued therefore, whereas the serial number of that receipt was not in the General Receipt books supplied to the Ministry of Justice at the material time. He then concluded,

> "In these circumstances the 2nd plaintiff cannot legitimately claim to have been regularly and properly incorporated by the 1st plaintiff on 5.9.1988. In fact the circumstances are so grave as to leave no room for any other interpretation except fraudulent registration. This fraud rang its alarm bell through the phenomenon of backdating and subsequent claims to properties. Fraud is such a grotesque monster that the courts should hound it wherever it rears its head and whenever it seeks to take cover behind any legislation"

In my judgment the Learned Judge properly evaluated the evidence regarding the issue of fraud and came to the correct conclusions. The evidence of fraud was mainly circumstantial and consisted of several pieces of evidence as identified by learned Counsel for the respondent. These irregularities which were discovered were not mere slips caused by incompetence in the Registry of Companies. No convincing reason was given why they occurred. The only reasonable conclusion to be reached is that they constituted a chain of actions and omissions calculated to commit a fraud by backdating the incorporation of the first appellant Company.

The officials in the Registry of Companies could not have engaged in these fraudulent actions unless they had been approached by someone outside who stood to benefit by those actions. The person who stood to benefit was the second appellant. There was evidence which was not disputed that he had been engaged in business together with the respondent before a dispute concerning the imported sugar erupted. Then the respondent engaged in certain activities which showed that he was desperate and would do anything to silence the respondent and take over all the properties in dispute. It must have been due to his desperation that he took a batch of papers to PW5 and complained that the respondent was intending to defraud his Company, in an attempt to assemble evidence that his Company was in existence before July, 1990.

It is not in dispute that it was the second appellant himself who presented the documents to the Registry Officials for registration of his Company. These documents had been drawn up by his lawyer PW3 who appears to have conveniently left his client to arrange for the fraudulent registration. In these circumstances, it cannot be maintained that the second appellant was not a party to the fraud, and that the act of a third party was merely imputed on him.

In my opinion, there was more than ample evidence of fraudulent incorporation of the first appellant Company and of the second appellant's actual involvement in the fraud. The and fifth grounds of appeal must therefore fail.

I shall now deal with the second ground of appeal which is that the Learned Judge erred in law by going behind the first appellant's Certificate of Incorporation and declaring that the first appellant was fraudulently incorporated and ordering it to be wound up. Mr. Tibaijuka, Learned Counsel for the appellants, submitted that the 1st appellant's Certificate of Incorporation (Exh. P.1) was conclusive evidence that all matters precedent or incidental to its registration had been complied with as provided for in **Section 17 of the Companies Act** which provides as follows: —

> "A Certificate of Incorporation given by the Registrar of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and matters precedent and incidental thereto have been complied with and that the association is a Company authorised to be registered and duly registered under this Act".

It was the contention of Learned Counsel for the appellants that the alleged issuing of a wrong receipt, the squeezing of the name of the first appellant in the register and the use of a rubber stamp not in use at the time were matters which were either precedent or incidental to the registration of the first appellant and the Companies Act precluded the challenging of the Certificate of Incorporation on account of such matters. He argued that the Court could not go behind the Certificate of Incorporation and that the purpose was to protect commercial transaction as a matter of public policy.
He cited several authorities in support of his submissions which included **Jubille Cotton Mills (1924) AC 958**, **Glover vs. Brougham (1881) 18 Ch. D. 173, Bowman vs. Secular Society Ltd (1917) Ac 406, Cotman vs. Brougham (1918) AC 524. In re Nassan Phosphate Co. (1876) 2 ch. 610, Re Benards Banking Co. (1876) L.R.2, Ch. App 674 Oakes vs. Turquand (1861) 73 All ER 738 Hammond vs. Prentice Bros Ltd (1920) 1 Ch. 201 Solomon vs. Solomon & Co. Ltd (1879) A.C. 22, and R. vs. Registrar of Companies ex parte Central Bank of India (1986) 1 All.E.R. 105.** Learned Counsel for the appellants further contended that even fraud could not vitiate a Certificate of incorporation under Section 17 although he conceded that there some dicta to the contrary and submitted that in even case of fraud, it was the Attorney General to bring an action against the Registrar for cancellation of Certificate of Incorporation.

As regards the order for winding up the first appellant, Mr. Tibaijuka submitted that the Learned Judge erred in making it since no party had applied for it. He argued that the Learned Judge misapplied the decision in **Princes of Reuss vs. Bos (1871) L.RC 5 HL 176** because in that case the proceedings were for winding up which was not the case in the present case.

Mr. Mulenga, Learned Counsel for the respondent, submitted that the Learned Judge was

entitled to go behind the Certificate of Incorporation of the first appellant because of the provisions of section 17 of the Companies Act and because of fraud. He contended that a Certificate of Incorporation was conclusive evidence of the matters specified in Section 17 only and not on other matters. In the present case he argued, the certificate was not conclusive evidence of the date of registration or the name of the first appellant.

He contended that the Certificate is not conclusive as to the name of the Company because under **Section 20 (2) of the Companies Act** if a Company is registered with a name similar to an existing one, it may be directed to change its name. He therefore submitted that the conclusiveness does not prevent inquiry as to whether the name on the Certificate is desirable or who had the name first. According to Counsel, the evidence was that it was the respondent and not the second appellant who reserved the name.

On the question of fraud, Learned Counsel for the respondent argued that it was not being canvassed that the first appellant was not a registered Company but that it was registered for fraudulent motives. He submitted that it was established that in May 1988, the second appellant and his wife floated a Company in the name of Fam International Ltd knowing that there was already in existence a Company by the same name with certain property and which was carrying on business in which the respondent was a Director, and that the second appellant intended to defraud the respondent. He contended that the Learned Judge acted appropriately in granting the winding up order to prevent the appellants benefiting from their fraud. It was his submission that fraud vitiates everything and a court will not allow a party to partake of its fraud.

It is now well settled that a Certificate of Incorporation of a Company is conclusive evidence that the entire requirement of registration and of matters precedent and incidental thereto have been complied with and that the Company is duly registered as such**. See Hammond vs. Prentice Bros Ltd (supra). Oakes vs. Turquand (supra), Jubille Cotton Mills Ltd vs. Lewis (supra) Bowman vs. Secular Society Ltd (supra), R. vs. Registrar of Companies ex parte Central Bank of India (supra).**
The purpose is to give security to persons relying on the Certificate; See **In Re CL NYe Ltd (1970) 3 All ER. 1061.** It would otherwise be difficult for the persons dealing with the

company by relying on the Certificate to prove that all the requirements of the Act have been complied with: **Re Tolland. & Birkett Ltd Leicester (1908) I ch. 152.**

The provisions of Section 17 therefore facilitate proof of the registration of the Company and preclude the need to adduce evidence to prove incorporation. In effect this means that no party is entitled to adduce evidence for the purpose of challenging the correctness of the Certificate. The Registrar is given power to decide finally and conclusively that all the requirements of the Act have been complied with: **R.vs. Registrar of Companies ex parte Central Bank of India (supra).**

The issue then is whether there are any circumstances under which the Court is entitled to go behind the Certificate of Registration. It was argued for the respondent that the Certificate of Incorporation is conclusive evidence of only the matters mentioned in Section 17 that is that all the requirements of the Act, and matters precedent and incidental to the incorporation have been complied with, and that it is not conclusive of any other matter. That argument must be correct, but the question still remains as to what these matters are?

Learned Counsel for the respondent submitted that the Certificate was not conclusive as the date of registration. I do not agree with him. In **Jubille Cotton Mills Ltd vs. Lewis** (supra) it was held by the House of Lords that a certificate of incorporation is conclusive as to the date on which a company was incorporated. Next Counsel submitted that the Certificate is not conclusive evidence of the name of the Company. He relied on **Section 20 (2) of the Companies Act** which provides:

> "If through inadvertence or otherwise a company on its first registration or on its registration by a new name is registered by a name which in the opinion of the Registrar is too like the name by which a company in existence is previously registered, the first-mentioned company may change its name with the sanction of the Registrar and if he so directs within six months of its being registered by that name, shall change it within a period of six weeks from the date of the direction or such longer period as the Registrar may think fit to allow"

It seems to me that the above provision lays open the door to inquire into the name of a Company which is registered with a name similar to a Company previously registered, and the Registrar is given power to direct the later Company to change its name. In these circumstances therefore while the Certificate is conclusive evidence that the Company is registered by that name, it is not conclusive evidence that it is the only Company with that name or that the name is not too similar to another Company.

The decision in **Bowman vs. Secular Society (1917) A.C.406** is rather instructive. The House of Lords held that although the Certificate of Incorporation was conclusive evidence that all the requirements of the Act had been complied with and that the society was duly registered under the Act, this did not mean that the Certificate was conclusive evidence that the objects of the Society were not unlawful. It only meant that the incorporation was valid. Lord Finly L.C. said at p.421**,**

> "It was argued before us that the Society could not have been properly incorporated if its objects were illegal, and that as the Certificate is conclusive to show that the Company is one authorised to be registered, it follows that it cannot for any purpose be contended that the objects are illegal. In my opinion this argument is an attempt to extend the effect of these Enactments beyond their fair meaning and manifest object. What he Legislature was dealing with was the validity of the incorporation, and it is for the purpose of incorporation and for this purpose only that the Certificate is made conclusive"

The Learned Judge held that he was entitled to go behind the Certificate of Incorporation because, firstly, it was Counsel for the appellants who "laid open the ground for the Courts inquiry when he led evidence at great length" in respect of the incorporation of the first appellant. Secondly he held that although the Attorney General had power to take proceedings by certiorari and by scire facia, an inquiry by the Court to ascertain whether and on what basis the Registrar satisfied himself was not precluded by the Act. He observed,

> "If such inquiry disclosed that in fact despite the issuance of Birth Certificate the company has never been born the provisions of the section would sound ridiculous. The revelation would be reflecting on a central or fundamental matter of incorporation"

Thirdly he held that the Court was entitled to go behind the Certificate of Incorporation on the ground fraud. In this connection the Learned Judge said,

> "Further if it were discovered that fraud was committed during the incorporation of the company the law would be justifiably called an ass if the certificate were to be held conclusive"

The Learned Judge distinguished the English Authorities cites on the interpretation of Section 17 on the ground that in none of the Authorities did any two Companies lock horns claiming fraudulent incorporation by the other. He observed that in those cases the companies had in fact been regularly incorporated as opposed to the present case where the Certificate of Incorporation was backdated.

Finally the Learned Judge rejected the argument that the court could not inquire into how the documents of the two Companies were related on the ground that Section 17 was intended to protect commercial transactions a matter of public policy. He accepted the argument of Counsel for the respondent that if public policy demands that commercial transactions be protected by not going behind the Certificate of Incorporation, "what would be the effect of public perception of justice that just winks at a deliberate fraudulent incorporation in order to enable the promoter to grasp the assets of another Company".

In my judgment the main ground upon which a Court is entitled to go behind the Certificate of incorporation is fraud. Once fraud is alleged, then it is open to the court to extend its

inquiry to matters precedent and incidental to registration. In **Solomon vs. Solomon & Co (1897) AC 22,** Lord Halsbury L.C. said at P. 30.

"1 am simply here dealing with the provisions of the Statute, and it seems to me to be essential to the artificial creation that the law should recognise only artificial existence-quite apart from the motives or conduct of individual Corporators. In saying this I do not at all mean to suggest that if it could be established that this provision of the Statute to which I am adverting had not been complied with you could not go behind the Certificate of Incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the Certificate and that by some proceedings in the nature of scire facias you could not prove the fact that the company had not real existence. But short of such proof it seems to me impossible to dispute that once a Company is legally Incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the Company are absolutely irrelevant in discussing what those rights and liabilities are"

In **R.V. Registrar of Companies ex parte Central Bank of India (1986) 1 All ER 105,** it was held that although a Certificate of Registration granted by the registrar under s. 98 (2) of the Companies Act 1948 is conclusive evidence that the requirements of that Act as to registration have been complied with, that section does not, on its true construction, preclude the charge from being challenged on any other ground, for instance, of fraud or duress. Lawton LJ said at page 117,

> "Counsel for the Registrar invited o u r attention to the words of exclusion in S. 98 (2) viz that the Certificate shall be conclusive evidence that "The requirements of this part of the Act as to registration have been complied with" They are words excluding the admission of evidence not words excluding the jurisdiction to grant judicial review. If an unsecured creditor seeks judicial review sorely on the ground that the charge did not deliver the prescribed particulars he cannot put the necessary evidence before the court. But if he seeks judicial review on some other ground as for example if he alleges a registration was obtained by some fraudulent means, may be the court would grant judicial review: See National Provincial and Union Bank of England **vs.** Chainley (1924) IKB 431at p.454 per Atkin LJ. Probably the Attorney General could ask for judicial review to quash a Certificate since the 1948 Act is not so expressed as

to bind the Crown: See Bowman vs. Secular Society Ltd (1917) AC 406 AT p. 4398-440,478"

In my opinion, the above two cases are sufficient authority for the proposition that a certificate of Incorporation of a Company may be impeached on grounds of fraud. As the learned judge observed, "Fraud is such a grostegue monster that the courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation" Indeed fraud unravels everything and vitiates all transactions. This principle was emphatically stated by Denning LJ in Lazarus Estates Ltd V. Beasley (1956) 1QB702 at 712 as follows:

"No court in this land will allow a person to keep an advantage which he has obtained by fraud No judgment of a court no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved it vitiates judgments, contracts and all transactions whatsoever"

In the instant case, the respondent challenged the first appellants Certificate of Incorporation on ground of fraud. He alleged that the first appellant was fraudulently incorporated by backdating the Certificate of incorporation. The appellants led evidence to prove that the incorporation was not fraudulent. The Learned Judge had to inquire into the allegations of fraud. He found that the first appellant was fraudulently incorporated by backdating the Certificate of Incorporation. He granted a declaration to that effect. In these circumstances I am unable to say that the Learned Judge erred in going behind the Certificate of Incorporation and in declaring that the first appellant• was fraudulently incorporated.

However, I do not think that the Learned Judge was correct in ordering the first appellant to be wound up. In the first place, no party applied for it. The respondent prayed for an order striking out the first appellant which the Learned Judge rightly refused to grant because under S.353 Of the Act it is for the Registrar to direct striking off a Company or its dissolution. Secondly, there was no proper application before the Court in accordance with the provision of Section 224 of the Act for winding up the first appellant. It is common ground that the Court has power under 5.218 to order winding up of any Company registered in Uganda. But

that power must be exercised in accordance with the law and under circumstances which are prescribed by law. The order for winding up was therefore not justified. The second ground of appeal would succeed only to this extent.

It was complained in the fourth ground of appeal that the Learned judge erred in law and fact when he found that the respondents Company was properly incorporated and had properly changed its name. This finding is based on issue No.2 as framed by the Trial Judge. Mr. Mulenga, Learned Counsel for the appellant, however, submitted that the appellant's Counsel had abandoned the first part of the issue challenging the incorporation of the respondents Company, Ayfa Trade Birds Breeding Limited both in the issues he framed and in his final submissions before the Trial Judge. He also argued that the burden was on the appellants to prove fraud against the respondent but they failed to do so.

I think there is merit in the submission of the Learned Counsel for the respondent. It is clear from the record that Learned Counsel for the appellant did not include the question of whether the respondent's Company was fraudulently incorporated in his version of issues and subsequently did not address it in his final submissions. Instead, Learned Counsel for the appellants concentrated on the issue of whether the respondent properly changed its name.

Be that as it may, the appellants alleged fraudulent incorporation of the respondents Company, and called some evidence in support of the allegation. The Learned Judge framed it as an issue and considered the evidence adduced in support of it. Therefore it remained a live issue and the question is whether the Learned Judge came to the correct conclusion on it.

The allegation of fraudulent incorporation of the respondents Company was pleaded in para. 5 of the plaint which is set out at the beginning of this judgment. The Learned Judge observed that the second appellant had admitted in cross- examination that when he met the respondents in April, 1988 he learned that the respondent had incorporated Ayfa Trading and Birds Breeding Limited for exporting birds and that he did not know when it was incorporated, nor did he have any reason to suspect that the Company was incorporated fraudulently. The second appellant also stated that the allegations in that paragraph were not

made on his instructions. The Learned Judge wondered why such a language was used by the appellant Lawyers in drafting the pleadings and why the second appellant did seek to amend it. In effect therefore, the second appellant denied claiming that the respondent's Company was fraudulently incorporated.

The responsibility for this allegation then passed on the 2nd appellants Lawyer James Matsiko (PW3) who prepared documents for incorporation of the first appellant as well as the plaint in this case. When Matsiko was cross-examined about the reason why he called the respondents Company Ayfa Ltd "a sham" he gave a number of reasons. The first reason was that it appeared to him that the second Director F.H. Ahmad did not sign the memorandum and Articles of Association and that he believed that the respondent signed for both Directors. Secondly, the Immigration Officer had said that the second subscriber never stepped in Uganda according to the Aliens Register. Thirdly, there was a Company by that name incorporated in Holland before and therefore the Dutch Ayfa company should have submitted its Memorandum and Articles of Association to the Registrar of Companies, with authority from the Directors for incorporation of the company in Uganda. The witness however conceded that he was not aware of any law requiring this. Fourthly, he stated that the respondent had no valid entry permit, but it was seen by DWI and DW2. Fifthly he claimed that the Company had neither a registered premises nor a Bank Account. Again this was not correct.

The Learned Judge concluded on this issue as follows:

> "Much of PW3 evidence is not helpful in any sense as far as the issue of fraudulent incorporation of Ayfa Limited is concerned. It was fanciful ferriage based mainly on hearsay. The defence case was merely to establish that Afya Limited was incorporated on12.6.1987. DW1 and DW3 together with exhibit D.1 and D.2 supported this argument. The plaintiff has failed to prove the allegations in paragraph 5 (1) of the plaint. The answer to the first part of the 2nd issue is in the negative".

In my judgment the Learned Judge came to the correct conclusion that the evidence of PW3 was of no value since it was hearsay and speculative. The second appellant was not a party to

those allegations and did not associate himself with them. On the other hand there was sufficient evidence from DW1 and DW3 to establish that the respondent's Company was properly incorporated. Therefore the Learned Judge was correct in holding that the appellants failed to prove the allegation that the respondent's Company was fraudulently incorporated.

It seems that the main attack on the respondents Company was that it did not validly change its name from Ayfa Trade & Birds Breeding Ltd to Fam International Ltd in accordance with **Sections 19 (1)and (3) of the Companies Act.** Mr. Tibaijuka submitted that there were seven pre-requisites which had to be fulfilled and these were reservation of the name, Special Resolution, Registrar's Approval, Notice Change, Entry of the new Name in the Register, issue of Certificate of Change and publication of Notice in the Gazette. He contended that only the first prerequisite was fulfilled, namely, reservation of the name. He argued that there was no evidence to prove that the special resolution produced as Exh. D. 7 was received by the Registrar. It was his submission that the Certificate of Change issued, in favour of the respondent's Company was not conclusive because it was issued contrary to the law.

On the other hand Mr.Mulenga submitted that five of the prerequisites were fulfilled. These consisted of the reservation of the name, the special resolution which was made by DW2 who produced it, the Certificate of Change of name which was produced and marked as Exh.D.8 and a Notice of Change of name given to the registrar which indicated that he had received it. He pointed out that there were only two omissions namely entry of the name in the register and publication of the notice in the Gazette. He submitted that these two were not conditions precedent to registration and therefore could not form a basis for challenging the Certificate of Change of name because they could be rectified without offending the Act. It was his contention that a change of name under Section 20 (1) of the Act was effected by a special resolution with approval of the Registrar.

On the allegation of fraud, Learned Counsel for the respondent submitted that the appellants had failed to produce any evidence to prove fraud, and had resorted to irregularities which were mere slips due to inefficiency.

In his judgment the Learned Judge found that Exh. D.7 which was a copy of the special resolution was a genuine document, and that Notice of Change of name was served on the Registrar. On this point the Judge said,

> "Counsel further submitted that there was no Notice of Change given to the Registrar. Counsel submitted that DW1's evidence in this respect was hearsay because Bisereko - Kyomuhendo who signed the Certificate or Change of name should have been the one to testify. DW2 who prepared and signed exhibit D. 7 actually tendered his office copy. DW1 had testified earlier that the relevant file was sent to the Criminal investigations Department for Investigations. DW2 also testified that he personally followed up me matter of the registration of the change of name. He agreed that it was Bisereko Kyomuhendo who signed the Certificate of Change of name on 7.9.1988. He testified that copies of the Certificates were issued to him. He gave his client a copy and retained the original which he tendered as exhibit D.8. The witness's evidence so far remains unchallenged and uncontradicted. I believe it. DW2 was steady and did not falter. I hold that a Notice of Change of name was served on the Registrar of Companies"

The Learned Judge found that there was no gazetting of the change of name because DW2 admitted so. He concluded that an exhaustive evaluation of Dw2's evidence in its totality led to no other conclusion than that the change of name on 7.9.88 was properly made.

On the question of fraud, the Learned Judge observed that the appellants had omitted the word fraudulently in their version of issues thereby evading the heavier burden of proof. He held,

> "My answer to the whole of this issue is that on the 12th June 1988 the Defendant neither fraudulently caused the incorporation of Afya Limited nor fraudulently changed it to Fam International Limited on the, 7th September

In the present case it is common ground that a name was reserved by the respondents Counsel DW2 through his letter to the Registrar dated 6th September, 1988 which also forwarded me Special Resolution of even date for change of name of the respondents Company. There is evidence that the Special Resolution was received by the Registrar Mr. Bisereko Kyomuhendo on 7th September, 1988 who issued a Certificate of Change of name on the day, (Exh.D.8). It reads:

> "CERTIFICATE OF CHANGE OF NAME
> (under section 20(3) of the Companies Act) I here e certify that AYFA TRADE &BIRDS BREEDING LIMITED having, with the sanction of a SPECIAL RESOLUTION of the said Company, with the approval of the Registrar of Companies changed its name, is now called FAM INTERNATIONAL LIMITED and I have entered such new name on the Register accordingly. Given under my hand at Kampala this 7th day of September one thousand nine hundred and eighty eight."
>
> Bisereko Kyomuhendo
> Asst. Registrar of Companies"

Although the Certificate indicates that the change of name was entered in the Register, it is common knowledge that it was not. It was not also disputed that there was no publication in the Gazette of the change of name. The learned Judge held that these were mere irregularities of procedure rather than of substantive matters and that the validity of change takes effect upon the Registrars signing of and issuing of the Certificate.
I am unable to hold that the Learned Judge came to the wrong conclusion. It cannot be said that the two steps which were not carried out, the entry in the Register and publication of change in the Register were conditions precedent which affected the validity of the change of name. In my judgment the change of name was effectual on the issuing of the Certificate of Change of name, and i can find no material irregularity with the issue of the Certificate.

Be that as it may, the appellants alleged that DW1, DW2 and DW3 conspired to commit a fraud in this exercise, but they produced no evidence to establish their allegation. Instead they relied on the so-called seven pre-requisites which in any case were substantially complied

with. There was no evidence to show that failure to fulfill any of the pre-requisites was actuated by fraud rather than inefficiency. I find no merit in the fourth ground of appeal.

I shall consider next the sixth ground of appeal. Learned Counsel for the appellants abandoned the complaint regarding the Judge's framing of issues after consideration of the evidence. Indeed both Counsel failed to agree on the issues and therefore submitted separate issues to the judge from which the Judge formulated his own issues. However, in my view, it is always better to frame issues at the beginning of the hearing in order to guide the trial and save time.

It was complained in this ground that the Learned judge erred in considering the question of whether or not the second appellant had held himself out as a Director/Shareholder of the respondent Company to be non-issue. This complaint is a direct result of the failure to frame issues at the beginning or during the trial. As it turned out Counsel for the plaintiffs, Counsel for the defendant and the Learned Judge ended up with three sets of issues. The fourth issue framed by Counsel for the plaintiffs was as follows:

> "Whether the defendant has held himself out as a Member/Director of the 1st plaintiff and whether the 2nd plaintiff has held himself out as a Member or Director of the Defendants Company"

Counsel for the Defendant framed the issue in these words:

> "2.Whether the Defendant has at any time held himself out as a Director or Owner of the 1st plaintiff or threatened to do so"

The Learned Judge framed the issue as follows:

> "4 Whether the Defendant has held himself out a Director or Shareholder of the 1st plaintiff"

In dealing with this issue in his judgment the Learned Judge stated,

> "Although Counsel for the plaintiff might have included in his issue the 2nd plaintiff holding himself as a Director or Shareholder of the defendants Company because of the wording of prayer (c) in the Written Statement of Defence this wording cannot be interpreted to mean that the defence was asserting that the 2nd plaintiff ever held himself out as such. No where else in the pleadings is this alleged. As it turned out both DWI and DW2 gave evidence contradicting such a notion. So also did Counsel in their submissions"

I think the Learned Judge was right in making these findings. There was no claim or allegation neither in the plaint nor in the Written Statement of Defence that the second appellant had held himself out as a Member or Director of the respondent. The only allusion, to this matter is the prayer in the respondents counter-claim, praying for an order of a permanent injunction to restrain the second appellant from holding himself out as a Shareholder or Director of Fam International Limited.

Mr. Tibaijuka argued that since that prayer had not been abandoned, it was part of the pleadings. Mr. Mulenga replied that the prayer was not an assertion but merely a cautionary statement, it was not a material proposition which the respondent had to allege in order to constitute a defence or a right to bring a counter-claim.

With respect Mr.Mulenga must be right. As provided under **0.13 rules 1,2 and 3 of the Civil Procedure Rules,** issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show the right to sue or a defendant must allege in order to constitute a defence. It is each material proposition affirmed by one party and denied by the other which must form the subject of distinct issue. The respondent's prayer was not a fact which he had to allege in order to constitute a defence or a right to bring the counter-claim. The prayer was in my opinion superfluous. Therefore on the pleadings, the Learned Judge was right in regarding the matter complained off as a non-issue.

But even on the evidence and submissions, the Learned Judge found that no one claimed that

the second plaintiff held himself out as a Shareholder or Director of the respondents Company, Fam International Ltd. This was common knowledge because the second appellant maintained that he was a Director and Shareholder of his own Fam International Ltd. The respondent never claimed that the second appellant had held himself out as a member of his Fam International Ltd. The allegation was that the second appellant had fraudulently incorporated another Company by the name of FAM International Ltd. Therefore the Learned Judge came to the correct conclusion on this issue.

It was submitted for the appellants that the Learned Judge erred in not determining the question of ownership of the suit property.

The claim for conversion of the suit property was raised by the respondent in paragraph 5 of the counter-Claim, which stated as follows:

> . "5. As a result of the aforesaid illegal acts by the second plaintiff the Defendant was unlawfully detained at the Central Police Station for 11 days from the 8th June, 1991 at the instigation of the plaintiff and the property of M/S Afya Trade & Birds Breeding Limited of which the Defendant is a Shareholder has been unlawfully claimed and/or converted by the plaintiff and the Defendant has suffered loss and damages"

The property was listed in the counter-claim as consisting of one Mercedes Benz Reg NO.UPA 411, office premises on 9th Floor Uganda House; stock in the shop on Nakivubo Road; unspecified amount of money in the Bank Account; cash at hand good will and other property. In their reply to the counter-claim, the appellants pleaded that the Mercedes Benz car was the property of the first appellant which later sold it to one Umar Ahmed, and the office premises at Uganda House were still the premises of the first appellant. They denied knowledge of the other properties. These pleadings gave rise to issue No.4 which was whether the Defendants counter-claim could be maintained. In his judgment, the Learned Judge held that the pleadings in para. 5 of the counter—claim violated the principle of corporate personality and that the respondent could not maintain an action to redress a wrong done to his company Ayfa Trading & Birds Breeding Ltd/Fam International Ltd. In other

words the proper plaintiff to bring an action to claim redress for conversion of the property in question was the Company itself.

The Learned Judge therefore declined to decide the issue of which of the parties owned the disputed properties and he struck out this part of the counter-claim as incompetent. Mr. Tibaijuka submitted that the fact that the respondent's claim to the suit property failed did not mean that the appellant's claim was bound to fail. It was his contention that the Learned judge should have gone further to consider the appellants' claim to the suit property whatever its merits. Mr. Mulenga on the other hand, maintained that the appellants did not claim for the properties in the plaint and their reply to the counter-claim did no amount to a fresh claim but a reply to the counter-claim. He pointed out that the second appellant indicated that he had already recovered the property at Uganda House and was going to pursue the money.

In my opinion, the Learned Judge came to the correct conclusion that the respondent could not maintain an action for wrong committed against his Company since the Company was a separate entity and had to sue in its own name. The counter-claim in respect of conversion of the property of his Company was therefore incompetent and was rightly struck out. The reply by the appellants did not constitute a counter-claim but a reply or defence to the counter-claim and therefore once the counter-claim was struck out as incompetent, it was not necessary to go into the merits of the claim. Consequently ground six must fail.

Finally I shall deal with the first ground of appeal. It was complained in the first place, that the Learned Judge was wrong in merely striking out part of the respondents counter-claim after hearing it on merits. Mr. Tibaijuka submitted that the Learned Judge should have dismissed the entire counter-claim to prevent the respondent bring another suit. Mr. Mulenga contended that it does not become obligatory to dismiss a suit which is incompetent merely because evidence is called.

For the reasons I have already given while considering ground six, I hold that the Learned Judge was justified in ordering to be struck out as incompetent the part of the counterclaim alleging conversion of the property of the respondents company. The claim was brought in

the wrong name as the proper party was the Company itself. Once the claim was brought by a wrong party it was incompetent and was bound to be struck out irrespective of whether evidence had been called on the issue.

The second part of the first ground complains that the Learned Judge erred in considering the respondent's prayers and granting him a remedy on a counter-claim that had totally failed. Mr. Tibaijuka submitted that as the entire counter-claim failed, the Learned Judge was wrong to make an order for winding up in substitution for an order for striking the first appellant off the Register prayed for in the counter—claim. On the other hand Mr. Mulenga argued that the entire counter-claim did not fail because the learned judge found that the first appellant's incorporation was fraudulent. He pointed out that the counterclaim in paragraph 5 was in two parts, of which the claim for unlawful detention was dismissed while that for conversion of property was struck out.

I have already held that the Learned judge was wrong to make an order for winding up of the first appellant because there were no proper proceedings before him to justify him making such an order. It may be that the appellants are complaining in this ground against the declaration that the first appellant was fraudulently incorporated. If that is so then it must be pointed out that the entire counter-claim did not in fact fail because the Learned Judge held that the first appellant was fraudulently incorporated. Accordingly, I find no merit in this ground of appeal.

In the result, I would allow this appeal only in part. I would uphold the order granting the respondent a declaration that the first appellant was fraudulently incorporated, but I would set aside the order that the first appellant be wound up. I would uphold the order striking out the respondents counter-claim for conversion and the order dismissing the counter-claim for unlawful detention. I would award the appellants one fifth of the costs here and in the court below.

As Oder J.S.C. and Platt J.S.C. also agree it is so ordered.

Dated at Mengo this 15th. . . .Day of November, 1994

B.J. ODOKI,
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA,
DEPUTY REGISTRAR, THE SUPREME COURT

JUGDMENT OF ODER. J.S.C.

I have had the benefit of reading in draft the judgment of Odoki, J.S.C. I agree with him that the appeal should be allowed in part and with the order proposed by him. I have nothing useful to add.

Dated at Mengo this .15th....Day of. .November 1994.

A.H.O. ODER,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE COPY OF THE ORIGINAL

E.K.E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT

JUDGMENT OF PLATT, J.S.C

I concur in the result.

Dated at Mengo this 15th day of November 1994.

H.G. PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL.

E. K. E. TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT