

**REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT MENGO**

**COR: ODOKI, AG. D.C.J., ODER, J.S.C., & TSEKOOKO, J.S.C.**

**CIVIL APPEAL 32/1994**

**SHOKATALI ABDULLA DHALLA.....APPELLANT**

**-VERSUS-**

**SADRUDIN MERALLI.....RESPONDENT**

(Appeal against the judgment and decree of the High Court of Uganda (Kityo, J.) dated 4/5/1994 in Civil Suit No. 397/1992).

**JUDGMENT OF ODER, J.S.C.**

This is an appeal by Shokatali Abdulla Dhalla (the appellant) against a decision of the High Court in a Civil Suit in which he was unsuccessful plaintiff. The appellant had instituted the Suit against the successful defendant, Sadrudin Meralli (the respondent) for recovery of land on grounds of alleged fraud.

The appellant's father, Abdulla Dhalla (deceased) was the registered proprietor of a residential house comprised in Leasehold Register Volume 222, Folio 6, Plot No. 2, Kanjokya Street, in Kampala (the suit property) before his death in 1972.

The appellant's father having died leaving a will, the appellant was granted probate and administration of the estates of his deceased Father on 24/11/1972 by the High Court of Uganda Administration Cause No. 148 of 1972. The probate and Administration was Exh. P.9 at the trial of the Suit.

In the plaint instituting the suit the appellant pleaded that:-

6. On or about the 27<sup>th</sup> day of February, 1979, the defendant, without any colour of authority from the plaintiff or at all illegally and fraudulently purported to apply and did apply through M/S Kityo & Company, Advocates, for the registration of the plaintiff as the proprietor of the land and by virtue of the letters of Probate and Administration issued by the High Court in favour of the Plaintiff (vide annexure "B" herein) and the said illegal and fraudulent application for registration was subsequently effected under instrument No. 204274 in the Land Registry (a copy of the forged Application is attached hereto and marked "C").

7. On or about 27th day of February, 1979 the defendant illegally and fraudulently caused the transfer and registration of the defendant as the proprietor of the land by forging the plaintiffs signature on a Transfer Form purporting to transfer the land in favour of the defendant by the plaintiff and the defendants names as a result of the said forgery were illegally entered on the Certificate of Title pursuant to Instrument No 204275( a copy of the forged Transfer Form is attached hereto and marked. ("D :).

**Particulars of fraud of the Defendant:**

The defendant committed fraud by:-

(a) Knowingly and falsely applying in the plaintiffs names for the Registration of the Plaintiff as the registered proprietor of the Land under Instrument No. 204274 and forging the plaintiff's signature on the said Instrument No. 204274.

(b) Forging the plaintiff's signature on the Transfer Form.

(c) Knowingly and falsely declaring to the Registrar of Titles that the plaintiff had transferred the land to the defendant.

(d) Knowingly presenting a forged document to wit a Transfer Agreement form dated 4th January, 1979 to the Registrar or Titles for Registration.

(e) Illegally causing the registration of the defendant as the proprietor of the land without a valid transfer.

8. By reason of the above fraudulent acts of the defendant the plaintiff is deprived of the land and suffered and continues to suffer loss and damages and claims mesne profits accrued since February, 1973.

9. At all material time since 1973 the plaintiff has been residing outside Uganda after 1973 expulsion by Idi Amin and only returned for a visit to Uganda in January, 1992 and realising the fraud aforementioned perpetrated by the defendant, the plaintiff on or about the 27th day of March lodged a caveat on the said land title.”

The Plaintiff then prayed for:

(a) A Declaration that the registration of the suit property in the names of the defendant is null and void;

(b) An order to the Registrar of Titles to cancel the names of the defendant from the certificate of title and to reinstate the plaintiff's names.

(c) Mesne profits in respect of the Suit property from 27<sup>th</sup> February 1979 till vacation;

(d) An eviction order against the defendant;

(e) Costs of the Suit;

(f) Interest on the decretal amount at 51% p.m. from the date of judgment till payment in full.

The suit was defended:-

In his written statement of defence, the respondent denied all the allegations in the plaint and averred that as he was in possession of the suit property by deed the appellant was estopped from maintaining the court action against the former.

At the trial of the suit only one issue was framed. It was whether the appellant authorised the transfer by annexures “D and “C”.

The learned trial Judge answered the issue in the positive, and found for the defendant, dismissing the suit with costs.

Four grounds of appeal were set out in the memorandum of appeal. They were that:

1. The Learned trial judge erred both in law and in fact in failing to properly evaluate the evidence contained in Exh... P.1, and in particular in failing to find that the appellant left Uganda on 21st March, 1973 and only returned to Uganda in March, 1992.

2. The learned trial Judge erred in both law and in fact in failing to properly evaluate the evidence on record as a whole and merely relying on the submission of Counsel for the defendant to hold that the plaintiff’s evidence was riddled with contradictions which contradictions do not appear in the evidence on record.

3. The learned trial judge erred in both law and in fact in failing to find that the appellant’s signature was forged.

4. The learned trial judge erred both in law and in fact in failing to hold that the appellant had proved that fraud had been perpetrated by the respondent purporting to effect transfer of the suit property in the names of a deceased person to the respondent instead of by the Executor of the deceased person and up the basis of a forged document.

The memorandum of appeal then prayed for:

- (a) The appeal to be allowed with costs.
- (b) A declaration that the registration of the suit property is null and void.
- (c) An order to the Registrar of Titles to cancel the, names of the respondent from the certificate of title and to reinstate the appellant’s names as the registered proprietor.

At the trial of the Suit both the appellant and the respondent adduced evidence in support of their respective cases. For the appellant evidence came from the appellant himself as P.W.1, from an Ag. Commissioner of Land Registration/Ag. Chief Registrar of Titles, Jonathan Tibasasa (P.W.2) and from a handwriting expert and a Government Analyst at the Police .Headquarters, Apollo Mutesasira Ntaawa (P.W.3).

According to the appellant's evidence, he left Uganda in March, 1993 due to the expulsion of the Asians in 1972. He had already applied for, but had not yet received, probate and administration in respect of the estates of his deceased father. Nor had the suit property been registered in his names as Executor and Administrator of those estates. Regarding the duplicate certificate of title to the suit property, the appellant said that he left it with his brother-in-law, one Amin Jaffer. This evidence was inconsistent with what the appellant stated in a Statutory Declaration (S.D.) dated 17/3/1992, which he addressed to the Registrar of Titles for purposes of an application for a Special Certificate of Title. In the S.D., put in evidence by the respondent as Exhibit.D.4, the appellant stated that the duplicate certificate of title was irretrievably lost and that it could not be found. In cross-examination, the appellant said that he had said so in the S.D. because the certificate of title had been taken at gun point in 1992 after he had returned to Canada having, apparently, been on a visit to Uganda.

Further, according to the appellant, when he left Uganda due to the Asian expulsion, he was the holder of a Ugandan Passport No. KL 9969 (Exh. P.1), issued on 9/12/1970 for a period of five years. The passport had been endorsed on 8/12/1972 with a Ugandan re-entry pass valid for two years. In Canada, he was given a Canadian Certificate of identity No. C108414 (CCI) on 14/1/1977, valid for a period of two years. This document, a kind of a passport, was also produced in evidence by the appellant, (Exh. P.2)

The appellant also said in his testimony that he never returned to Uganda until March, 1992. When he visited the suit property on his return, he was surprised that it had been taken away from him and transferred to the respondent. He never signed as the transferrer, annexure "D" to the plaint (Exh. P.4), the document purporting that he had transferred the suit property to the respondent. The appellant denied that he ever signed the document before Brigadier Walisi Alli Faduli (D.W.6) as a witness as it is purported on Exh. P.4.,or at all. Moreover, the name of the vendor on that document was spelt as Sokatali A Dhalla. This was inconsistent

with the spelling of his first name “Shokatali”, because the letter “h” was missing from the name “Sokatali” appearing on Exh. P.4. Further, in Exh. P.4, the purchaser, the respondent, was indicated as having signed the transfer document in the presence of J.F. Kityo, Advocate as the transferee’s witness, but such an Advocate was unknown to the appellant.

The appellant further testified that he never signed the annexure “C” to the plaint (Exh.P.5). This was an application to transfer, written by M/S Kityo & Co. Advocates on 22/2/1979 to the Registrar of Titles. The letter stated as follows;

"TO The Registrar of Titles, Kampala. Leasehold Register Volume 222, Folio 6, and Plot No. 2 Kanjokya Street Kololo Hill:

Dear Sir,

RE: APPLICATION TO TRANSFER LAND IN THE NAME OF THE EXECUTOR UNDER SECTION 143 OF THE REGISTRATION OF TITLES ACT.

We act for Shokatoli Dhalla, of P.O. BOX 6378, Kampala. We have been instructed by our client named above to apply to you to transfer the above-mentioned land in his name on the following grounds:

(a) The registered proprietor Abdulla Dhalla of P.O. Kalungu died and by his will dated 18th June, 1962 he appointed our Client as his Executor.

(b) Our client obtained probate of the Will of the deceased from the High Court of Uganda at Kampala in Probate and Administration cause No. 148 of 1972.

(c) Copy of the Will and that of Probate attached to this application.

Yours  
Kityo

and

faithfully,  
Co. Advocates.

Signed: Sokatali A.Dhalla”.  
“SHOKATALI ABDULLA DHALLA.

The appellant denied that he ever gave instructions for, or himself made, such an application, or signed the document, the signature appearing on which is not his.

In cross-examination, he said that he had a re-entry permit valid for two years but never returned to Uganda before 1992, when he eventually did. He also said that he never knew Brigadier Alli Faduli (D.W.6) until he first heard about him in the same year. He further said that he had an industrial accident in 1975, as a result of which he can neither hold a pen nor write with his right hand. Since then he can only write with his left hand. He denied that there were differences in his signatures appearing on the probate petition (Exh. 0.1) dated 12/10/1972; on the S.D. (Exh.D.4), dated 17/3/1992; on the notice for a caveat, dated 27/3/1992; and on the letter he wrote to the Chief Registrar of Titles (Exh. 0. 1 -3) complaining about the transfer of the suit property to the appellant. He also said that although he had shortened his name, he had not signed differently on the documents just referred to.

The appellant also denied that he either agreed to sell or sold the suit property to the respondent. He also denied ever having gone to M/S Kityo & Co. Advocates or given the probate and administration (Exh. P.9) to them.

The Ag. Commissioner of Land Registration/Ag. Registrar of Titles, Jonathan Tibasasa (P.W.2) testified that as a result of the application dated 24/2/1979, (Ex.P.8) which was lodged together with the probate and Administration (Exh. P.9) by M/S Kityo & Advocates, an instrument of transfer was entered on the certificate of title for the suit property (Exh. P.9), reading as follows: —

“REGD. 27.2.79 AT 9.30 A.M. INST.204274. PROBATE ANDADMINISTRATION CAUSE NO. 148 OF 1972”

Although this entry was supposed to have registered the transfer of the suit property from its deceased previous owner to his successor, the appellant, was not stated by the entry.P.W.2

Said that this was not the normal practice. Normally the names of the appellant as the Successor of his deceased father, which was in this case, should have stated in the entry as such Successor by means of the probate and administration, which had been granted to him in respect of the estates of his deceased father.

The entry just referred to was immediately followed by another entry No. 204275, made on the same day at 9.35 a.m., registering the respondent as the next proprietor of the Suit Property. P.W.2 explained that the transfer registered by this entry was the One dated 4/1/1979, (Exh.P.5), prepared and submitted for the appellant by M/S Kityo & Co. Advocates on 27/2/1979 to the Land Registry. I have already set out in full the contents of Exh. P.5.

P.W.2 further explained the mandatory requirement and procedure for obtaining consent to transfer public land under **Sec 22(5) (i) of the Public Lands Act.** He said that in the instant case, the application for consent (Exh. P.8) was also prepared by M/S Kityo & Co. Advocates. It was stated that the transfer for whom consent was sought by that application was from Abdullah Dhalla to the respondent. It will be recalled that Abdullah Dhalla was the deceased registered owner of the Suit property before his death in 1972. So, the transfer in question was not from the Successor, the appellant, of the deceased. P.W.2 said that what happened was abnormal. The proper procedure would have been for the appellant as the Successor to transfer to the respondent.

In cross-examination, P.W.2 said that looking at the application for consent (Exh. P.8) and the application for transfer (Exh. P.5) he would have rejected the transfer for lack of consent, because the proprietor was unregistered; and the application for consent reading different names, should have been rejected. I understand that by the expression “the proprietor” P.W.2 meant the appellant; and “consent reading different names”, he meant that while in Exh. P.5 the names of the Executor to be registered by virtue of the provisions of Section 143 of the Registrar of Titles Act were Shokatali Abdullah Dhalla of P.O. BOX 6378, Kampala “(the appellant)”, the transfer for which consent was sought by Exh. P.8 was from “Abdulla Dhalla” - the deceased previous registered owner.

Apollo Mutesasira Ntawaa, a Government Analyst at the Police Headquarters (P.W.3), testified about signatures on the documents used to transfer and register the suit property in the names of the respondent on the one hand and specimen signatures submitted to him by the appellant on the other. He had examined and compared the signatures on the two sets of documents, and wrote out a report, Exh. P.6. According to his evidence and the report the questioned signatures were those appearing on the instrument of transfer dated 4/1/1979 (Exh. p.4), purportedly signed by the appellant as the vendor; and on the application to transfer, dated 2/2/1979, (Exh. P.5) purportedly signed by the appellant as the person on whose behalf M/S Kityo & Co. Advocates wrote the application.

The applicant's signature which he furnished to P.W.3 consisted of, first, the application for probate dated 12/10/1972(Exh.D.1) and secondly a Standard Bank Cheque No.002006 dated 28/2/1973 (Not Exhibited). Both documents were signed by the appellant using his right hand before the accident of 1975. The other specimen signature were those appearing on the Statutory Declaration for a special certificate of title, dated 17/3/1992; hand written receipt of securities dated 25/3/1992; photo copies for Royal Bank of Canada, of June and July, 1980; a caveat document dated 23/3/1992; and one sheet of specimen signature signed before P.W.3.on1/11/1992 and many other documents.

In the opinion of P.W.3, the questioned documents were not written by the appellant either with his right hand or with his left. In my view, this opinion must be correct because the questioned signatures on the one hand and the specimens on the other look patently different, while the signatures in each category look similar.

In support of his case, the respondent testified that the appellant was married to his cousin in the 1960's. So, they were known to each other. He discussed with the appellant about purchasing the suit property in 1978 and on 7/11/1978 they struck the deal. The appellant then approached a firm of lawyers, M/S Kityo & Co. Advocates to draw up the agreement of sale of the suit property for Shs. 100,000/=. This was done, and the two of them signed the transfer agreement (Exh. D.1) on 7/11/1979. Then Brigadier Alli Fadull (D.W.6) who was a Minister of Local Administration at the time, signed as the witness for the appellant, and Mr.

Kityo of M/S Kityo & Co Advocates signed as a witness of the respondent. The appellant signed with his left hand, because he had had an accident. The agreement of sale (Exh. D.1) was not availed to court. Further, according to the respondent, they then signed the transfer on 4/4/1979 (Exh. P.4). The appellant signed as the vendor and the respondent as the purchaser. Brigadier Alli Faduli, again signing as the appellant's witness and M/S Kityo & Co., Advocates as the respondent's witness. The appellant again used his left hand. This document was signed in the office of D.W.6.

The respondent further said that it was utterly wrong to say that he and other persons fraudulently transferred the suit property to himself. The appellant lied to have said so. In cross-examination, the respondent said that the transfer was prepared by his lawyer, Mr. John Kityo, Advocate, (D.W.2). The appellant, respondent and one Jaffer were present, but the document was not signed in Mr. Kityo's office. It was signed in the office of D.W.6, in the presence of the appellant, respondent, Jaffer and Mr.Kityo, (D.W.2) This was at Uganda House, Kampala Road, Kampala, where the Minister's office was located. According to the respondent, the appellant knew the Minister and it was his suggestion that the document should be signed in the Minister's office. The transfer was signed on 4/1/1979, but the parties concerned had first been there earlier, in November, 1978. The Minister was happy to deal with the matter. The purchase price of Shs. 100,000/= was not paid in the Minister 'S office, but it was done in the lawyer's office.

The respondent denied the suggestion that the appellant never signed the transfer document (Exh. P.4), or that he the respondent) forged the appellant's signature on the documents under consideration. He further said that he bought the suit property in and he moved into it on 27/2/1979.

The evidence of Mr. John Kityo, Advocate, (D.W.2), tallied with that of the respondent, except concerning who instructed the lawyer. He said that the respondent, as his client, instructed him to act for him in matters concerning the purchase and transfer of the suit property, and introduced the appellant to him. The appellant's right hand appeared to be normal but he wrote with his left hand, signing Exh. D.1, P.4 and P.5 with his left hand.

D.W.2 signed the relevant documents as the buyer's (the respondent's) witness and Minister, Alli Fadull (D.W.6) signed as the appellant's seller's witness.

As this was a transfer of property previously owned by a deceased owner, D.W.2 advised the appellant to produce the Certificate of Title to the Suit property and Probate, which he did. The latter document was a certified copy of the original. D.W.2 then prepared the application to transfer (Exh. P.8). D.W.2 further said that he filled in the names Abdalla Dhalla as the transferor because those names were still on the Register and the Executor (the appellant) had not yet transferred the Suit property into his names. Regarding the absence of the names of the \_Executor from entry No. 204274 dated 27/2/1979 on the certificate of Title (Exh.P.7),D.W.2 said that it was the fault of the Registrar that the names were not included, He also said that the transfer (Exh. P.4) was drawn by his firm on instructions by the appellant and the witness's advice. Thereafter, it was executed by both the parties to the transfer in the office of Alli Fadull (D.W.6), who was at that time the Minister of Local Administration; who also signed the document as the appellant's witness, while he (D.W.2) signed as the respondent's witness. The appellant signed the document with his left hand. The advocate denied that he was instrumental in the commission of a fraud in this matter.

The appellant's movements out of and into Uganda, when he left and returned to Uganda subsequent to the Asian expulsion, was an important matter for both sides in this case. An immigration Officer, Sezi Begumisa (D.W.3) testified in this regard. According to him, the appellant's Ugandan Passport issued on 9/12/1970, for five years, (Exh. P. 1) was endorsed on 8/12/1972 with a re-entry permit, valid for two years. The permit allowed the appellant, as a Ugandan Asian, to re-enter Uganda at any time during the period stated therein. Though parts of the exit endorsement on page seven of the passport (Exh. P1) was not clear to the witness; the entry appears to indicate that the appellant left Uganda on 5/2/1973. There was also a corresponding Kenyan entry, so there was a Ugandan exit stamp from Entebbe dated 25/8/1973. This last date must be an error in the typed record because the original record appears to read 25/3/1973. Regarding when the appellant returned to Uganda, D.W.3 said that he could not see the relevant date stamp in the Ugandan passport.

D.W.3 also testified about what he had noticed in the appellant's Canadian Passport No. HA 747077 issued on 18/12/1990 (Exh. P.10). This document was not made available to us, because it was handed back to the appellant soon after the trial of the suit. D.W.3 noticed an exit-stamp at Busia, Uganda, on 28/3/1992 and an entry stamp on 8/5/1992.

In cross-examination, D.W.3 said that page six of the appellants Ugandan Passport showed an exit from Entebbe Airport on 21/3/1973; page seven of the document showed a Kenyan entry before March, 1973, but did not show Ugandan exit entries before that date. The passport also showed exit from Entebbe on 5/3/1973 and 21/3/1973. The witness said in the end that he could not tell when the appellant left Uganda.

Grace Bonabana Blue who had been the Chief Registrar of Titles in Kampala Lands Office from 11/3/1974 testified about the registration of the respondent as the transferee of the suit property. Her evidence tallied with that of Jonathan Tibasasa, the Ag. Commissioner of Land Registration/Ag. Registrar of Titles (P.W.2) in most material particulars, except that her explanation of the requirements for consent to transfer of land; and for registration of transfers of lands previously owned by deceased persons was far more thorough. Regarding the instant case, her evidence was that she signed entries appearing on page two of the Certificate of Title to the Suit property (Exh. P.2), cancelling the names of the deceased proprietor, Abudalla Dhalla; authenticating entry No. 204274, registering the Executor in respect of the Probate No. 148/72 (Ex. P.9) which had been granted by the High. Court in the place of Abudalla Dhalla (Deceased); and entry No. 204275, registering the respondent as the next transferee. Regarding the absence of the appellant's name as the Executor of his father's estate, D.W.4 explained that if, as the Executor, the appellant has already executed the transfer, as happened in this case, there was no need for the appellants names to be mentioned in the relevant entry as the Executor. Only the names of the transferee to whom the Executor had made the transfer had to be mentioned by the entry registering such a transfer. Such was the case in the instant case. D.W.4 also said that it was in order for a Minister of Government to witness a transfer of land, because such a Minister was in the service of the Uganda Government, a requirement for a person to be a witness under **Section 155 (1) (c) of the**

**R.T.A.** Alli Fadull (D.W.6) was therefore, qualified to witness the transfer (EXH.P.4); D.W.4 concluded that she relied on the signed transfer (Exh. P.4); on the application to transfer (Exh. P. 5); and on the application for consent to transfer (Exh. P.8) to register the transfer by the appellant of the suit property to the respondent.

From the evidence of Musota Stephen, Deputy Registrar of the High Court (D.W.5) who testified about the Probate and Administration granted in Cause No.148/72 (Exh. P.9) the following points are discernable. Firstly, whereas the name “SHOKOTALI” was one of the names of the person who applied for the probate by a petition dated 12/10/1972 (Exh.D.1) the grant dated 24/11/1972 was made out to “SHOKATALI”. Secondly, normally probate was collected after it had been signed by the judge and sealed. Then the Deputy Registrar would normally release it to the applicant or his advocate. But in the instant case there was no record of collection of the probate.

Alli Fadull (D, W.6) was a prisoner at Luzira when he gave evidence for the respondent in this case on 2/7/1993. He said that the appellant used to go to his (D.W.6's) office in Uganda House when the witness was the Minister of Provincial Administration at the material time. The appellant was in his office more than four times. On some of the occasions, the appellant went to the witness to ask for letters for travelling outside, and on others, to seek advice about selling the suit property. There were regulations about Asians selling properties to Ugandans. In accordance with those regulations D.W.6 asked the appellant to produce documents and certificate of title showing that the suit property had been owned previously by the appellant's father. Appellant was also required to identify himself as his father's son. Consequently, the appellant produced the relevant documents, including his Ugandan passport (Exh. P.1). Thereafter, D.W.6 required the appellant to come with his lawyer and the prospective buyer of the suit property to sign the sale and transfer agreements. This the appellant did, about three to four days later. D.W.6 knew neither the lawyer nor the buyer, whose names he learned to be John Kityo (D, W.2) and the respondent respectively. The appellant, as the seller, and the respondent, as the buyer, then produced the sale and transfer agreements as D.W.6 had asked them to do, and then signed the documents. The appellant signed with his left hand, because the right hand was in plaster due to an accident. D.W.6 also signed as the appellant's witness, and the lawyer (D.W.2) as the respondent's witness. All this was done

towards the end of 1978. Subsequently the appellant returned to D.W.6 to sign more papers in connection with the same transaction.

In cross-examination, D.W.6 said that he first knew the appellant in 1978 when the latter was seeking clearance to travel outside Uganda, which was necessary for all Asians who had remained behind as citizens and for all other citizens who were not Government Servants. All clearances had to be sought through D.W.6 as the Minister of Provincial Administration. The witness asserted that the appellant lied to have denied that he knew the witness or went to his office. For purposes of clearance for travelling abroad, D.W.6 had to look at his passport' and identity card, which he did.

The basis of the learned trial Judge's dismissal of the suit is found in the following findings, which he made immediately after reproducing the appellants and the respondents respective evidence, and the submissions by the learned Counsel for both the parties at the trial:-

“Therefore, after considering the totality of the evidence presented by the plaintiff, I find that it is riddled with several submissions reproduced in the proceeding paragraphs of this judgment. The plaintiff's evidence cannot be believed. Therefore, the court has chosen to rely upon the defendant's evidence of the sale agreement and the subsequent registration; to hold that the sale transaction was valid. The plaintiff's suit has thus failed”

I shall now turn to consider the grounds of appeal.

Mr. Nkurunziza, learned Counsel for the appellant, took grounds one and two together. I think that that was proper, because the two grounds make the same point. In his submission under these grounds, the learned Counsel contended that the appellant's evidence that he never set foot in Uganda during the material time was not challenged. That evidence was supported by the three passports produced in evidence by the appellant. They were his Ugandan passports (Exh. P.1); his Canadian C.I. issued on 1992 (Exh. P.3). As the suit property was allegedly transferred to the respondent during the period when the appellant was not in Uganda, he could not have been a party to the transaction. It was further contended that the learned trial Judge neither considered nor evaluated the evidence in this case, but merely reproduced the

evidence and Counsel's submissions on both sides, and relied on the defence Counsel's submissions to dismiss the Suit.

Countering these arguments, Mr. Ayume, learned Counsel for the respondent submitted that the absence of Uganda re-entry stamps from the appellants passport during the period in question, did not mean that the appellant did not return, to Uganda at the material time. That in essence, the learned Counsel said, was the effect of the evidence of the Immigration Officer, Sezi Begumisa Kato (D.W.3) and the appellant's evidence that he left Canada in 1978 and stopped in Kenya for a visit, where he was informed by telephone that it was unsafe to enter Uganda. With respect one would have expected such an assertion to have come from the Immigration Officer (D.W.3) if that was so and not from the learned counsel in his submission.

The learned Counsel further contended that the contradictions in the appellant's evidence, especially about how the duplicate certificate of title to the Suit property got lost rendered his evidence that he was not in Uganda at the material time unreliable.

The function 'and duty of an appellate court which is asked to review the findings of fact of a trial are clear. They were fully and authoritatively stated in the often-cited judgment of Lord Green, M.R, in **Yuill vs. Yuill (1845) 1 All E.R. 183 at 188 and 190.** They were also clearly set out in two earlier decisions of the Court of Appeal: **Glannibanta (1876) 1 P.D. 283, at 287 and Coglan V. Cumberland (1898) 1 Ch.704:** The relevant passages from these two cases were cited and applied in **D.R. Pandaya VS. R. (1957) E.A 336** (Court of Appeal for East Africa). It is with these principles in mind that I approach my view of the learned trial Judges finding of fact.

The issue of whether the appellant was or was not in Uganda at the material time, in my view, is one of the deciding factors in this case. For that reason, the entries in the appellant's two passports (Exh. P.1 & P.2), the evidence of the Immigration Officer (D.W.3), and that of the appellant provides the answer to this issue. The appellant said that he left Uganda in March, 1973. In 1978 and on 27/2/1979, he was in Canada, returning to Uganda in 1992. His Ugandan Passport indicates that the appellant's last exit from Uganda was 21/3/1973. There is

no reason to believe that he did not leave Uganda on that date. This is on page six of the document. There are many other entries of exit out of, and entry into, Uganda and Kenya before that date all over the passport, but I think that such entries are irrelevant to the issue at hand. With respect, I am unable to accept the submission of the learned Counsel for the respondent that there are many stamps for entry into Kenya but not the same number of corresponding exit stamps out of Kenya and, that therefore, the appellant must have entered Uganda at the material time. This is because by the time the alleged transfer under consideration was transacted, the appellant's Ugandan passport (Exh. P.1) had long expired on 8/12/1975. There was no evidence or suggestion that the appellant had another Ugandan passport subsequently. In fact, during the period relevant to this case, the appellant had the Canadian C.I. (Exh. P.2) issued on 14/1/1977 which expired on 14/1/1979. This apparently was the only travel document the appellant had during that period. According to this document the appellant entered Kenya on 6/3/1977 and left that Country on 20/3/1977. Again, this was long before the transaction under consideration allegedly took place. Exh. P.2 bears no entry or, exit stamps for Uganda. Then there is the evidence of D.W.3, which tends to support the appellant's case, when he said that he did not see any date stamp in Exh. P.1 regarding the appellant's return to Uganda. This witness's evidence in effect, strengthens rather than weakens the appellant's case.

Other aspects of the necessary re-evaluation of the evidence in this case, in my view, include the contradictions in the appellant's evidence, on the basis of which the learned trial Judge disbelieved him, dismissing the suit; and some of the irregularities which characterised the processing of the documents transferring the suit property to the respondent, which I will consider together with ground four of the appeal.

The learned trial Judge did not say which contradictions in the appellant's evidence made him come to the conclusion, he did. Indeed, there were some contradictions on the basis which the learned Counsel for the respondent justified before us the learned trial judge's finding. These were first that the appellant at first said that he did not leave Canada, but later on said that he did and stopped only in Nairobi but did not reach Uganda because he was informed that it was unsafe to do so. Secondly, it was contended that the appellant had said in the Statutory Declaration (S.D) that the certificate to the suit property was lost in the process of fleeing the

country, but said in evidence that it was snatched from him. These could be rightly regarded, in my view, to be contradictions. But the deciding factor in law is whether they were such major contradictions as to indicate that the appellant deliberately told lies to the court. I do not think that they were. On the contrary, I think that they were minor and, in any case, did not relate to the issue of whether the documents under consideration were genuine or forgeries.

There were also some contradictions in the evidence adduced by and for the respondent; but, with respect, they appear not to have been considered by the learned trial judge. First, there was a contradiction between the evidence Mr. Kityo, Advocate (D.W.2) and Alli Fadull (D.W.6) about the state of the appellant's hands when he allegedly signed the transfer documents. While Mr. Kityo said that the appellant's right hand was normal although he wrote with his left hand, Fadull (D.W.6) said that the appellant's right hand had been injured in an accident and was in plaster. Secondly, Mr. Kityo, Advocate (D.W.2) and the respondent testified that the former acted in this matter as the latter's lawyer. The appellant was therefore, D.W.2's client. But this was not so according to the documents prepared and lodged by M/S Kityo & Co. Advocates in the transaction. The transfer document (P.4), the application for consent (P.8) all indicated that M/S Kityo & Co., Advocates prepared the documents for appellant as their client. These documents and other evidence already referred to; do indicate, in effect, that the same firm of lawyers acted for both parties in the same transaction.

Regarding the question of whether the appellant's right hand appeared normal or was in plaster, the contradictions, in my view, was a major one, leaving one to wonder whether the witnesses were telling the truth. On the question of whether the law firm acted or did not act for the appellant, it is quite evident that M/S Kityo & Co. Advocates acted for both the respondent and the appellant in the same transaction. This is the kind of practice against which this Court has had occasions to advise in many previous decisions. It is hoped that those concerned will heed the advice.

With respect, therefore, I have to conclude that the learned trial Judge did not properly evaluate the evidence in this case as a whole. The expressions "as evidenced in the

submissions reproduced in the proceeding paragraphs of this judgment' in the passage of the judgment reproduced above, suggests that he relied more on Counsel's submissions than on evidence in rejecting the appellant's case. Had he properly evaluated as he should have done, I have no doubt that he would have come to a different conclusion. Grounds one and two of appeal must, therefore, succeed.

Next, grounds three and four, which the learned Counsel for the appellant also took together. He made the following points in his submissions under these grounds. First that the absence from Uganda of the appellant at the material time meant that he could not have signed the documents in question. The allegations that he was physically present and signed the documents, therefore, rendered the transaction fraudulent. Secondly, the learned trial Judge did not address himself to the burden of proof, nor decide whether the evidence adduced by the appellant proved to the required standard, the particulars of fraud stated in the plaint, as it was the appellant's case that it did.

In his submission, Mr. Ayume, learned Counsel for the respondent on the other hand, contended that the learned trial Judge, in effect, rejected the appellants evidence that he did not sign the documents in question although the rejection was not made in so many words. What the learned trial Judge said was therefore, a matter of style more than anything else. Mr. Ayume contended that the appellant's evidence so rejected included, first, his claim that the letter "h" was missing from his name as appearing on Exhs. P.4, P.5 and D.1; and that in those documents the name written was "Sokatali", instead of "Shokatali" which was his correct name. On this point, Mr. Ayume contended that the names written on the documents in question were signatures; not printed names as such. In his view, it was normal for signatures to differ from printed names. Second, on the appellant's own admission, he had written his name "Shokatali" differently on other occasions. For instance, on a letter of complaint he wrote to the Registrar of Titles on 27/8/92 and on an application for a caveat dated 17/3/1992. With respect, Mr. Ayume, however, did not refer to the appellants reply in cross-examination in this regard that although he had shortened his name, he had not changed it. Moreover, it should, I think, be born in mind that the documents on which the appellant said he shortened his name were 1992 documents and not those of 1978 or early 1979, when the appellant's allegedly signed exhibits P.4, P.5 and D.1 .

Mr. Ayume next contended that the evidence of the handwriting expert (P.W.3) was of little or no probative value, because, first, the questioned documents and the specimen signatures were submitted by the appellant to P.W.3, and the appellant informed the latter that the signatures on the questioned documents were not his, while those on the specimen documents were his. In the circumstances, it was contended, the appellant merely wanted P.W.3 to confirm that the questioned documents were not signed by him. This was contrary to the normal practice. Secondly, the questioned document and specimen signatures were not examined with a microscope.

Under these grounds of appeal, I will first deal with the issue of whether the appellant's signature was or was not forged on the documents under consideration. To begin with, the fact that the appellant was absent from Uganda at the material time- which I have found to have been proved on the balance of probability when considering grounds one and two of appeal - is very material on this issue. The rest of the evidence relevant on this matter consists essentially that of the appellant, P.W.3, the respondent, P.W.2 and P.W.6. Of all these witnesses only P.W.3 can be considered to be independent on the matter. Only he did not claim to have been a witness. On the other hand, the documents were allegedly signed by the appellant, the respondent, D.W.6 and D.W.2. Besides, D.W.2 claimed to have drawn the documents and witnessed them being signed. The appellant and the respondent's witnesses were therefore, interested parties in the matter.

P.W.3's evidence was to the effect that the questioned documents, namely, exhibits P.4 and P.5 were not signed by the appellant. The relevant part of his report (Exh. P.6) reads as follows: -

**FINDINGS:**

I have compared the questioned signatures on the Land Transfer Forms and on the application to transfer with the specimens provided.

I have observed significant differences in letter structure, letter proportions, slant;

letter joins fluency and other writing characteristics between the questioned and known signatures.

In my opinion, the questioned signatures were not written by the writer of the specimens either with his right hand or with his left”.

I have already referred to the criticisms of the learned Counsel for the respondent of this evidence. With respect, I am unable to accept the suggestion that the evidence is of no probative value in the case. First, because, I do not think that it is necessary in every case to use microscopes in examination of questioned and specimen documents. Each case must depend on its own circumstances. Where, as in the instant case, the handwriting expert had no difficulty in distinguishing forged signatures from genuine ones, examination by microscopes would be unnecessary. Second, though it’s normally prudent to follow the procedure stated in **“Osborn on Questioned Documents”**, 2nd edition, page 288, when submitting questioned documents and specimens to a hand-writing expert, i do not think that what happened in the instant case vitiated P.W.3’s evidence. Briefly, the procedure is that if the questioned writing cannot be distinguished by other conditions than those in the writing itself, it is always advisable to submit it with the genuine writing without any information as to which document, paper, or writing is suspected. In whatever way the question is presented, no outside facts bearing on the question of genuineness should be given until after a definite opinion has been given.

In the instant case, the procedure stated in **“Osborn”** (supra) was apparently not followed. The appellant submitted to P.W.3 the questioned documents and specimens together, indicating to him that the questioned documents were forgeries. But I do not think that the failure to follow the procedure stated by the learned Author in **“Osborn”** (supra) adversely affected the probative value of P.W.3’s evidence in the circumstances of this case.

In the circumstance, I am satisfied that the appellant’s signature on the documents under consideration was forged. There was, therefore, merit in ground three of the appeal.

Ground four of the appeal criticises the learned Judge for failing to hold that the appellant had proved that fraud had been perpetrated by the respondent purporting to effect transfer of the suit property in the names of a deceased person to the respondent instead of by the executor of the deceased person's estate and upon the basis of a forged document.

The complainant raised in this ground of appeal, as I see it, is only part of the irregularities which characterised the transaction under consideration. Such irregularities included the ones I have already referred to as indicated by the evidence of Jonathan Tibasasa (P.W.2), when he was recalled. This witness said that the entry No. 204274 which registered the transfer from the deceased previous owner of the suit property did not state the particulars of his successor as per probate granted in Administration Cause No. 148/72. Nor did entry No. 204275 say the particulars of the transferor who was transferring to the appellant. The entries in question as appear on exhibit P.1 indicate that the witness was correct in the regard. According to the witness, this procedure was wrong, the usual practice being that the names and description of the successor were stated in registration of such transfers.

Jonathan Tibasasa (P.W.2) also spoke of the irregularity concerning the consent to transfer (exhibit P.8), He said that before a transfer such as the one in the present case was effected, a prior application for consent under Section 22(3) (i) of the R.T.A. was mandatory. The application for consent should state the particulars of the registered proprietor as the transferor, and those of the transferee. In the instant case the application for consent was made in the names of Abdullah Dhalla as the registered owner and transferor. There was not the slightest indication that Abdullah Dhalla was, in fact, already dead. Read without any external explanation, Abdullah Dhalla might as well have been alive as far as exhibit P.8 was concerned. This led the witness to conclude that he would have rejected the application for consent had he dealt with the matter. The application for transfer (Exh. P.5) should, therefore, have been rejected due to lack of consent.

Grace Bonabana Blue (D.W.4) the Chief Registrar of Titles at the material time, who signed the entries 204275 on 27/2/1979 saw nothing wrong with the irregularities pointed out by P.W.2. According to D.W.4, the irregularities did not vitiate the transaction.

With respect, I am surprised by D.W.4's evidence and attitude. As the Chief Registrar of Titles at the material time I would have expected her to ensure that the documents affecting the transfer under consideration were not tainted with irregularities.

In my view, had the learned trial Judge properly considered the irregularities revealed by the evidence before him, he would most probably not have fallen into the error complained of in ground four of the appeal. Such irregularities, in my view, were more consistent with a fraud having been committed than that it was not.

The appellant's suit was founded on fraud, the particulars of which he set out in his plaint. In the recent case of **Kampala Bottlers Ltd.VS. Dominico (U) Ltd S.C. Civil Appeal No.. 22 of 1992** (unreported), this Court made what may be said to be a summary of the law on fraud as stated in previous decisions. It is said that fraud must be pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in Civil matters.

As regards the meaning of fraud the word has been defined to mean actual fraud, not constructive fraud. See **Waimiha Saw Milling Co. Ltd. Waione Timber Co. Ltd. (1926) H.C. 101 at 106; Assets Co. v. Mene Roihi (1905) A.C. 176; David Sejjaka V. Rebecca Musoke, S.C. Civil Appeal No.12 of 1985 (unreported);and Kampala Bottlers Ltd. v. Dominico (U) Ltd. (supra).**

In the instant case considering the evidence in, and the circumstances of, the case, as a whole, I am satisfied that the appellant proved that the respondent had committed fraud against the appellant by having the suit property transferred to the respondent in the manner it was done. The provisions of **Section 184(c) of the RT.A** therefore, apply to this case.

In the result I would allow this appeal with costs here and in the court below and;

(a) Grant a declaration that the registration of the Suit property in the names of the respondent is null and void, and

(b) Order the Registrar of Titles to cancel the names of the respondent from the certificate of Title and substitute therefore, the names of the appellant as the successor and administrator of Abdullah Dhalla, (deceased).

As the claim for mesne profit was neither proved by evidence at the trial of the suit nor canvassed on appeal the issue does not arise, I would, therefore not make any Order in that regard.

Dated at Mengo this .....8<sup>th</sup>..... day of September, 1995.

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

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

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

**JUDGMENT OF ODOKI, AG. DCJ**

I have had the advantage of reading in draft the judgment of Oder ,J.S.C. AND I AGREE WITH IT AND THE Orders proposed by As Tsekooko, J,S.C., also agrees, there will be an order in the terms proposed by Oder, J.S.C.

Dated at Mengo this 8<sup>th</sup> day of September, 1995.

B.J.ODOKI,

**AG.DEPUTY CHIEF JUSTICE**

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

**E.K.E TURYAMUBONA,**

**DEPUTY REGISTRAR, THE SUPREME COURT**

**JUDGEMENT OF TSEKOOKO.J.S.C.**

I have had the advantage of reading in draft the judgment of Oder, J.S.C. and I agree with it.

Dated at Mengo this 8<sup>th</sup> day of September, 1995.

**J.W.N. TSEKOOKO,**

**JUSTICE OF THE SUPREME COURT.**

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

**E.K.E. TURYAMUBONA, -**

**DEPUTY REGISTRAR, THE SUPREME COURT.**