. **THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA

AT MENGO

CIVIL APPEAL 63/95

(CORAM KAROKORA. J.S.C. MULENGA. J.S.C. AND KANYEIHAMBA. J.S.C

BETWEEN

AZIZ KALUNGI KASUJJA……..APPELLANT

AND

NAUNE TEBEKANYA NAKAKANDE ……**RESPONDENT**

(Appeal from Judgment of the High Court of Uganda

(Hon. Justice G.M. Okello in Civil Suit No. 625 of 1984.)

JUDGMENT OF KANYEIHAMBA .J.S.C.

This is an appeal from a Judgment of the High Court in Civil Suit No. 625 of I 984 against the findings, ruling and orders of Mr. Justice Okello. By consent of the parties, the appeal was to be determined by way of written submissions under r.97 of the Rules of SC. Counsel for the respondent was served with a Record of Appeal on 29/12/95.

On the 10th January 1996. Counsel for the appellant filed a written statement of argument in support of the Appeal in accordance with rule 97.On 22nd May 1997, the Registrar of the Supreme Court received a letter from the same Counsel, informing Court that his clerk had failed to serve a copy of the written submission to Counsel or respondent. Consequently, he requested (that under the circumstances he had no alternative but to abandon and withdraw the written submission, and intimated that instead he would argue the appeal orally.

The appeal was fixed to he heard on 2/1O/97. When court convened on that day both, parties where represented by counsel. Mr. Zaabwe.and Mr.kawenja respectively.
Mr. Zaabwe addressed and informed us that following his last communication

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to court, the appellant,Mr.Juma Kasule had since died and Counsel wished to make the application by way of notice of motion to court to substitute the names of the deceased with that of Aziz Kasujja who is one of the personal representatives permitting Mr.

Aziz Kasujja to be substituted for the plaintiff was produced to the satisfaction of the court. Counsel for the respondent addressed court and indicated that he had no objection to the application for substitution of the appellant being granted. The court granted the order as applied for.

After an adjournment of thirty minutes to enable counsel prepare themselves, the hearing

After an adjournment of thirty minutes to enable Counsel prepare themselves, the hearing of the appeal resumed. Counsel for the appellant addressed Court and said that he had decided in withdraw his letter of 22nd May 1997**,** in which he had withdrawn written submission with the intention of arguing orally in Court. He now sought leave of Court to reinstate his written statement of argument for the appeal and to ask Court to allow Counsel for the respondent enough tine in which to prepare and file a written statement of defence for the respondent. The application for leave was made under rule 1 (3*).* Counsel for the respondent informed Court that he had no objection to the application. Counsel having assured Court that he could serve his written statement of arguments to respondent on 2/10/97, the Court granted the application and ordered counsel for the appellant to serve the written statement of argument on that day. Counsel for the respondent was ordered to submit the written statement of defence by the 16/10/97. This written statement was received by the Registrar of the Court on 14th October 1997 and, this Judgement is based on the written statements of both Counsel; the record of the proceedings and judgment in the Court be low.

The background to this appeal is briefly as follows For all intents and purposes the appellant and respondent grew up together as brother arid sister with the latter, a much younger person than the former. Until differences of opinion occurred between them is apparent from the evidence and pleadings that both had lived together amicably and shared most things including some of the parcels of land they acquired together from time to time. The facts show that over a period of years parcels of land were acquired by the two persons and registered or recognised as owned either jointly or individually. Tue cordial relationship between the appellant and defendant stretched back to the late 1930’s, and it is only in tire 1970’s and later that differences of opinion developed.

In 1984 the respondent as plaintiff, through her Counsel, filed Suit No. 625 of 1984 in the High Court seeking a declaration that certain lands registered or acquired while she lived with appellant, then as defendant, either belonged to her as a beneficiary and should vest in her as

sole owner or were jointly owned and she sought an order of Court to sever her interest in each of those parcels of land so that it may invest in her solely as owner, She also asked for mesne profits from appellant for some of the properties he had been renting for cash at Shs: 5,000 p. a. as from the year 1978. The appellant resisted these claims with counter claiming ire that as a result of a purported letter by the respondent, he was entitled to the whole of the land registered in their joint names by virtue of that letter which offered an exchange of that the land if he permitted the respondent to own, wholly and beneficially one valuable parcel of land situated at Makindye. After hearing the parties and witnesses and having examined all the relevant titles arid documents and lead Counsel's submissions, the learned Judge delivered judgment which resolved the issues between the parties as follows: -

a) That the land mentioned in paragraph 4 of the plaint shall be partitioned in equal shares between the plaintiff and the defendant.

b) That the defendant would be entitled as sole owner and beneficiary to all the parcels of land mentioned in paragraph 6 of the plaint.

c) That the plaintiff would be entitled to retain the valuable Makindye holdings as sole owner arid beneficiary, and

d) The parties were to bear their own respective costs.

It is against this ruling and orders that the appellant who was the defendant in the high court suit appeals to this court. The grounds of the appeal are set out in the memorandum of appeal and appear on page 3 of the record of proceedings. There are six grounds of appeal. However an analysis of the six grounds reduces to two.
the issues to be considered by this Honourable Court. These are whether the learned Judge erred in law and fact in holding that the plaintiff was entitled to a half share in the lands comprised in paragraph 4 of the plaint and, whether her the learned Judge erred in law in refusing, to hold that the defendant was entitled to an order of specific performance on the evidence alone of the letter of plaintiff represented as exhibit D. 15 which issue must be joined with ground 4 of the appeal. Once ground one of the appeal is resolved then grounds**.** 2, 3 and *5* follow the decisions reached on that ground.

In attempt to prove ground one of the appeal, Counsel for the appellant argued at great length and cited several authorities to show that since the plaintiff was a liar in her testimony to the Court, she should be held to have written the letter which purports to offer an exchange of land between the parties, Counsel's arguments and citation of what he deems to be relevant authorities covers some sixteen pages of typed wordage. I can find no relevancy whatsoever for the proposition that the letter written by the plaintiff created a binding contract between her and the defendant as argued in the High Court. It may be true that the plaintiff did write the letter in question. Counsel for appellant cities a number of cases including**, R.G. Patel V.Lalji Makanji (1957) E A. 317 Khatijabhai Jiwa Hasham V Zenab (1957) E.A 38 and Pope vs R (1960) E.A 132** All along Counsel argued that these cases support the appellant's case. Unfortunately, I can find none, either on the facts or on the principles they established as propositions for allowing this appeal. They were all decided on different facts and criteria and, while some of them do indicate that a Judge should take into account contradictory statements or be cautious of witnesses lying in Court, they do not support the appellant. In the words of Connell, J. in Khatijiabhai_Jiwa Hasham V. Zenab _2 E A. 38 at P.54 "The falsehood shall he considered in weighing the evidence, it may be so glaring as utterly to destroy confidence in their witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrary rejected because of want of veracity on perhaps some minor point.Infact in this particular case, no minor point arises for which it could be said there is support for appellant.

Even if we were to believe Counsel that the plaintiff wrote the letter, this does not prove in any way that there was a contract between the parties to exchange the land in question. The appellant did not show in the High court nor does he do so now that he accepted the offer allegedly made by lire respondent. The letter was dated 5th August 1972. The only reference available to suggest hint the appellant accepted the offer is the written statement of defence filed in the High court on 30/08/84 .It cannot be seriously contemplated that an offer made in 1972 for the transfer of land was eventually accepted more than ten years later and Court should sanction such a fiction The submission of Counsel for the respondent that the burden of proof lies upon the person who wants Court to believe the existence of certain facts is

correct. They cannot be inferred from any alleged falsehood by a witness who is testifying on an entirely different matter.

In any event**,** once it is shown that there was no agreement or contract to exchange the parcels of land in dispute, the question of whether or not the respondent wrote the letter becomes irrelevant. Therefore, the appeal fails on the first ground.

As already indicated, once the first ground fails, grounds 2, 3 and 5 of the Memorandum of Appeal also fail. The arguments and authorities contained in pages 17-34 of the written submissions for the appellant are superfluous. The cases cited in these pages suggest that the parties therein attempted to avoid valid and legally competent transactions whereas there was none between the appellant and the respondent in this case. Counsel for the appellant on pages 26 of his written statement in support of the appeal draws an analogy from the principle that circumstances in the conduct of the parties may establish a binding contract between the parties. He cites such authorities as National and Grindlays Bank v Kentiles (1966) E.A 17, Credit Finance corp. Ltd v Ali Mwakasanga (1957) E.A 79 Brogden v Metropolitan Railway Co.(1972) 2 Ac,66 and Figueriredo v Moorings Hotel (1960) E.A 926 in support I am grateful to Mr.Zaabwe for having cited all these cases almost in full fact by fact with long extracts from their Lordships Judgements.However it will be noted that each of these cases is clearly distinguishable from the facts and circumstances of this appeal. Page 17 of the written statement in support of the counsel.

Counsel is at pains to show that the series of letters v. written by the respondent. requesting for money to be paid for land or acknowledging receipt of such **;,** constitutes a pattern of behaviour that proves that a contractual relationship in the parties exists. However, it will be recalled that for all the land owned or otherwise by the parties, it was always the appellant who handled or used the money to purchase the same and the evidence alluded to from page 17 reply confirms this admitted relationship. Consequently, the authorities cited do 1st the appellant in any way. I therefore agree with Counsel for the respondent c written statement of arguments in support of' the appeal does not disclose any to be admitted for the purposes of allowing the appeal. Indeed. Mr. Kawenja for respondent is right when he states on page 5 of his written statement arguments respondent that the appellant fails to show why he believes

the learned Judge in ordering the demarcation and division of land which was registered in the names of tire appellant and respondent.

The sixth ground of appeal, the argument that the Judge erred in law it refusing to specific performance of the contract is not convincing. It is borne out neither by facts of this case nor the arguments of the counsel nor is it supported by any law concluded that there was no contract between the parties for the transfer of it follows that the learned was correct in refusing to order an act of specific performance. To do so would be enforcing a non-existent contract for the transfer of land.

Passing. it may be said that tire whole thrust of this appeal is nothing more than an expedition. Counsel for the appellant ought to have advised appellant that there was need than to impute a contract through the alleged or actual falsehoods of respondent Counsel might have assisted the court better by being selective of authorities and only extracting the relevant and applicable dicta. By throwing in every thing that seemed plausible without carefully asssessing its relevancy arid applicability, and by leaving it court more or less to choose and select whatever might be authoritative. Counsel for the appellant was inviting court to accompany him on this expedition. Court will not and cannot do so. I have carefully read the judgment of the learned Judge in the High Court and I find no fault with it. This appeal cannot succeed. It is dismissed with costs to the respondent.

Dated at Mengo this 26th day of March 1997.

G. W. KANYEIHAMBA
JUSTTCE OF THE SUPREME COURT.
I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGU'AL.
W. MASALU - MUSENE
REGISTRAR. THE SUPREME COURT. –

JUDGMENT OF KAROKORA, J.S.C.

I have had the benefit of reading in draft the judgment of Kanyeihamba J S. **C** , and do agree that the appeal must be dismissed with costs to respondent.

The facts are clearly set out at page 3 of the draft judgment of Kanyeihamha J. S. C. I therefore, do not have to repeat them here. Suffice, however, to say that Plots referred to paragraph 4 of the plaint were alleged to have been jointly purchased and registered in the names of both the appellant and respondent as joint tenants. The respondent claimed that these Plots add up to 43 acres. The Plots which appear in paragraph 6 of the plaint are registered in the names of the appellant. However, the respondent claimed that she had jointly purchased those Plots with the appellant but claimed that the appellant had fraudulently registered them in his own names as the owner. She prayed for an order that the plaintiff gets half share of Plots in paragraphs 4 & 6.

The appellant denied having purchased Plots of land comprised in paragraph 6 of the plaint jointly with the respondent.

At the trial, the learned trial Judge ordered that the Plots enumerated in paragraph 4 of the plaint be partitioned in equal shares between the respondent and appellant whilst the Plots enumerated in paragraph 6 of the plaint belonged solely to appellant.
The appellant was not satisfied with the order of the Court and hence this appeal.

There were six grounds of appeal which shall be considered in the manner I am going to handle them.

The first ground complained that the trial Judge had erred in law and fact in that he accepted that the plaintiff's evidence that she did not write and sign Exh.D15 and that by doing so, he failed to appreciate the fact that the weight and bearing of the plaintiff's falsehood and other evidence indicated that she wrote and signed it.

The learned Counsel for appellant dwelt o-n this ground in his written statement of arguments, citing several authorities which I (lid not find useful or relevant. It must be noted that Exh.D15 was put in by appellant. The respondent had denied having written and signed it. The onus in such case was on the appellant to adduce evidence to prove that it had been

written and signed by respondent. It is the principle of law in our law of evidence Act, Section 100, that: -

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

In this case there was no evidence adduced to pin down the respondent that she had written and signed the Exh. D15. The onus was the appellant to adduce expert evidence (handwriting expert) to state that the handwriting and signature, appearing on Exh. D15 was of respondent. The submission by Mr. Zaabwe, Counsel for the appellant was that had the Judge carefully compared the plaintiff's signature, he would have come to a different conclusion.

With due respect, the trial Judge, not being a witness and moreover an expert witness on handwriting, his comparison of the handwriting and signature on Exh.D 15 with respondent's samples would not help appellant's case. In any case, the onus was on the appellant to request for handwriting. samples of respondent to be compared with the signature on Exh.D15, which, with respect, he never did.

Further, Mr. Zaabwe, Counsel for appellant dwelt on the issue of falsehood in the paternity of the parties, which respondent had never denied, and as such, the Court ought not to have believed the respondent. n my considered view, considering the evidence which emerged during the course of the trial, respondent had grown up together with the appellant in the same home more or less as sister and brother. In our African cultural setting, it would not be out of the ordinary for appellant to call respondent loosely as brother.

In any ease, even if that was false on the part of respondent and had never been denied by respondent, that was falsehood which did not touch on the land transaction which is-subject matter of this appeal as the dispute of land has-no relevance to the paternity of respondent and the appellant.

It must be observed that the land covered by paragraph 4 of the plaint is registered in the names of the appellant and respondent as joint tenants. The title deed of the Plots specifically state that both the appellant and respondent are joint tenants. I do think that there is any-amount of oral evidence that would change the status quo, unless there was evidence, which

was not adduced, that the appellant was holding the other half on behalf and for the benefit of the respondent in which case the respondent would be entitled to trace the other halves of each of the Plots from the trustee. In my view, the theory of appellant having been a trustee, holding the land for respondent would not be correct, because if the respondent was then a minor, how come that she was registered for the other halves. Why were these Plots in paragraph 4 of the plaint not registered in the names of the appellant as a trustee for the benefit of the minor?

In my view, in the absence of evidence that the appellant was a trustee for the benefit of the respondent, I think Section *56* of the Registration of Titles Act would leave the land in the names of the persons appearing on the title deed. No amount of oral evidence or other evidence according to Section 90 of the Evidence Act would change proprietorship of the Plots referred to in paragraph 4 of the plaint.

Section 56 of Registration of Titles Act (RTA) provides as follows: -
"No Certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or account of any informality or irregularity in the application or in the proceedings previous registration of the certificate and certificate of title issued under any of the previous here in contained shall be received in all courts as evidence……..and shall be conclusive evidence that the person named in such certificate as the proprietor of or……..is seized or possessed of such estate or interest."

However, notwithstanding the above provision, any Certificate of title will be null and void if there is evidence that it was obtained by fraud. Section 76 of RTA is an authority for the above proposition. It provides as follows: -
"Any Certificate of title ……processed or made by fraud shall be made by fraud shall be void as against all parties or privies to such fraud."

Furthermore, Section 90 of the Evidence Act provides as follows: -
"When the terms of a contract or of grant or of any other disposition or property, have been reduced to the form of a document and in all cases in which any matter, is required by law to be reduced to the form of a document no evidence save as mentioned in Section 78 (of the Evidence Act,) shall be given in proof of the terms of such a contract, grant or other disposition of property…….. except the document itself."

It must state that since there was no evidence of fraud on the part of respondent regarding the acquisition of Plots referred to in paragraph 4 of the plaint, each of the ties must get half of each of the Plots enumerated in that paragraph. Therefore, und one of appeal must fail.

On the 2 ground of appeal where *it* is alleged that the trial Judge erred in law when he held that there was no evidence to prove that the evidence on record established clearly that the respondent wrote and signed Exh.D 15, 1 must state that I have already covered this ground during the process of discussing the first ground.

It is, however, necessary that I comment on the counter-claim and failure by the respondent to reply to it and the effect of that failure to do so.

1 do agree that under Order 8 r 18(5) of the Civil Procedure Rules (CPR) where facts raised in the counterclaim are not denied by the plaintiff they would be presumed “to have been admitted.”

However, in the instant case, there were no facts pleaded in the counterclaim as was required of him under Order 8r.8, which would require the appellant to reply to the counterclaim. In any case, it is clear from the record of Appeal on page 13, that the reply to the counterclaim was filed in Court on 5/9/84, but this does not appear in the record of appeal. The record of appeal was prepared by the appellant who ought to have ensured that all relevant documents were included in the record of appeal. It cannot therefore be said that the counterclaim was not denied.

I would in view of the above say that there is no merit in the second ground of appeal.

On 3rd ground of appeal, where the learned trial Judge was criticized as having erred in law in rejecting Exh.D15 as forming a basis of contract of exchange between the respondent and appellant when the evidence on record indicated that there was such a contract, I must state that there was no evidence on record to support any finding o there having been a contract of exchange of land between appellant and respondent. I have already adequately dealt with Exh.D15. The onus was on the appellant to prove that Exh.D15 had been written and signed by plaintiff/ respondent. This is especially so when the respondent denied ever writing and

signing it. In my view the learned trial Judge was correct in his finding when he rejected Exh, D I 5 as forming a contract of exchange of 37 1/2 acres of land.

It was not clear whether not the 37 1/2 acres of land were the land forming land in paragraph 4 of the plaint or those which were falling in paragraph 6 of the plaint.

In my view, Exh.D15 was so vague that it could not form a basis of a legal binding contract so as to vary the proprietary rights in the Land either referred to in paragraph 4 of the plaint or paragraph 6 of the plaint.

In the circumstances, I think this is a case where status quo in the suit land must be maintained. Accordingly, this ground would fail.

Turning to 5th and 6th ground, which I shall discuss together, I must point out that I have already discussed these two issues while dealing with the 1 ground. I do not find it necessary to repeat what I have stated therein. The Certificate of title is conclusive evidence of ownership of the Plots referred to in paragraph 4 of the plaint, unless fraud was proved on the part of the registered proprietor, which was iot proved. On the issue of specific performance, the issue would not arise, when there was no evidence on the balance of probabilities that the respondent had written and - signed the agreement of exchange of land between the appellant and respondent. Exh.D15. Accordingly therefore these two grounds would fail.

In the circumstances, this appeal has no merit and must be dismissed. As Kanyeihamba, J. S. C., and Mulenga, J. S. C., also agree the appeal is dismissed with costs to respondent here and in the Court below. The orders of the High Court are confirmed.

Dated at Mengo this 26th day of March 1998.

A. N. KAROKORA,

JUSTICE OF THE SUPREME COURT

JUDGMENT OF MULENGA. J. .S.C.

This appeal was brought to this Court by .JUMA MUNYWANI KASULE, who subsequently died. By order of this Court made in Civil Application No. 27/97, on 2/10/97, AZIZ KALUNGI KASUJJA, one of the personal representatives of the late Juma Munywani Käsule with written consent of the other personal representatives, was made a party, in place

of the deceased, as the Appellant. In this judgment I shall refer to the late Juma Munywani Kasule as “Kasule” and the Respondent Nauni Tebekanya Nakakande as “Nakakande”.

By a plaint dated 17th July 1984, Nakakande sued Kasule in respect of 15 Plots of land, situate at diverse places in Kyaggwe County. Nakakande and Kasule were registered proprietors as joint tenants of nine of the plots totaling 43 acres. Kasule was registered sole proprietor of the other six Plots totaling to 39 acres. I shall refer to the former as the “9 Plots” and the latter as the “6 Plot”. All the land was held in Mailo tenure. In the plaint it was claimed that Nakakande and Kasule being sister and brother had in their young days acquired all the land together, but while the 6 Plots were registered in their joint names, Kasule who had handled the transactions had fraudulently caused himself to be registered as sole proprietor of the 6 Plots. Nakakande claimed that the 6 plots, having been purchased with money from a common fund, were held by Kasule as trustee and that she was joint beneficial owner thereof. It was also claimed that Kasule had been collecting rent and rates from tenants without accounting. Nakakande therefore prayed for:

(a) An order that she was entitled to half share in all the land
(b) Alternatively a declaration that the 9 plots be her own property and Kasule takes the 6 plots as his share
(c) The Court to divide the land between the parties equitably.
(d) Mesne profits at the rate of Shs. 5,000 per year from 1978 till judgment.

In his Written Statement of Defence and.Counter Claim, dated 28/8/84 and filed in Court on 30/8/84, Kasule generally denied Nakakande’s claims and in particular contended (a) that the 6 Plots belonged to him alone and (b) that there had been a settlement between the two whereby it was mutually agreed that Nakakande would “take the valuable holding at Makindye”, and Kasule would take 37’/2 acres of tie land under joint ownership. He counter-claimed for an Order that Nakakande transfers to him the land under joint ownership.

The learned trial Judge did not grant any of the prayers by either part’. He virtually maintained the status quo ante save that he made an Order (more or less applied for as an afterthought) “severing the joint tenancy” by partitioning the 9 Plots between Nakakande and Kasule in equal shares. He held that the 6 Plots were owned by Kasule alone and that there had been no agreement between the two for Nakakande to exchange her share in the 9 Plots

for the customary holding at Makindye. The learned Judge ordered each party to bear his/her costs. Kasule appealed on the following six ground.

"1. That the learned Judge erred in law and fact in that he accepted the plaintiff's evidence that she did not write and sign Exh. D15 and that by doing so he failed to appreciate the fact that the weight and bearing of the plainlff's falsehoods and other evidence indicated that she wrote and signed it.
2. That the learned .Judge erred in law in that he held there was no evidence to prove that the plaintiff wrote and signed Exh. D15 when the evidence on record established clearly that the plaintiff wrote and signed it.
3. That the learned Judge erred in law in that he rejected Eh. D15 as a contract of exchange between the plaintiff and defendant when the evidence on record indicated that there was such a contract.
4. That the learned Judge erred in law in that he held that a contract of exchange did not exist because of failure to execute a transfer in favour of the defendant and yet this was not accord with the law of Uganda.
5. ' That the learned .Judge erred in law and fact in that he held that the plaintiff was entitled to a half share in the land comprised in paragraph 4 of the plaint and that by so doing he failed to correctly evaluate the evidence on record which indicated the contrary.
6. That the learned Judge erred in law in that he held that the defendant was not entitled to specific performance of Exh. D15 when evidence on record clearly established that he was so entitled."

"Land comprised in paragraph 4 of the plaint" mentioned in fifth ground is the 9 Plots. The first ground of appeal attacks credibility of Nakakande and together with the following three grounds is concerned with the alleged contract of exchange and the evidence (Exh. D15) adduced to prove it. Although the fifth ground on surface appears to be an attack on the trial Court finding that Nakakande was entitled to half share in the 9 Plots, its main thrust, is also the complaint that the Court ought to have found that her half share in the 9 Plots had been exchanged for the land at Makindye. The sixth ground is on the remedy but also in respect of the counter-claim. There is no cross-appeal by Nakakande on any holding.

Mr. Zaabwe, Counsel for the Appellant submitted to this Court written submissions in which he argued the six grounds of appeal seriatim. Mr. Kawenja, Counsel for the Respondent, did

likewise in his reply. I shall not follow their order of dealing with the grounds because in my view it entails a lot of unnecessary repetition. 1 shall consider the appeal on the issue of credibility first. Next I will consider the appeal in regard to the alleged contract of exchange.

Mr. Zaabwe opened his lengthy argument on the first ground of appeal ith the following assertions:
"The plaintiff (Nakakande,) told court a lot of lies. Had the learned Judge appreciated the weight and bearing of those lies on falsehoods and other evidence on the record, he would certainly have come to the conclusion that the plaintiff wrote and signed Exh. D15".

He went on to list several falsehoods Nakakande allegedly told the Court and in conclusion invited this Court to re-evaluate her evidence on the ground that though the learned trial Judge appreciated that she told lies to Court, he did not appreciate that that fact showed that she also lied when she said she did not sign Exh. Dl 5. It appears to me that the underlying complaint in this ground of appeal is that the learned trial Judge accepted part of Nakakande's evidence when he should have discarded all of her evidence because of the falsehoods in it.

In his judgment the learned trial Judge expressly disbelieved Nakakande on three assertions she made in her evidence in Court. On her assertion that Kasule was not her brother the learned Judge held: " I am inclined to believe that the plaintiff and the defendant are brother and sister. They were the children of Asuman Lukwalira". On her denial in evidence that she had not instructed her lawyers that her father was Asuman Lukwalira the learned Judge held: *"there is no way these lawyers could have got that fact other than from her* ".

The more material assertion expressly disbelieved is in regard to the source of funds for the acquisition of the land in issue. Nakakande claimed in evidence that she provided the funds, having got some from a Muzungu and the rest from trade. The learned Judge's finding is in the following passage from the judgment.

"That is a matter of credibility. But the plaintiff's (Nakakande 's) own evidence regarding her source of income then is not convincing. She testified that a Muzungu had left Shs. 15,000 in

her name in a Post Office Savings Account. Apart from that assertion, there was no evidence to verify that claim.

The plaintiff further testified that her second source of income then was her export business. She used to export Mangoes to Kenya. 7his was between 1939 and 1940 when she was about 6 years old. This statement sounds more of a joke than real. It is incredible that a child of 6 years can engage in an international trade. It's the money from these sources that plaintiff claimed she gave to the defendant, as her agent to buy for her land. I find the plaintiff's story incredible……there is no credible evidence that the plaintiff (Nakakande) gave money to the defendant (Kasule) to buy lands for her.

There is other material evidence of Nakakande which the learned Judge, without saying so expressly, disbelieved or at the very least ignored. I will only mention two examples. Although in her plaint Nakakande averred that -Kasule had acquired and was joint tenant with her of the 9 Plots, in her evidence she categorically asserted that she was sole owner of those Plots having bought the land with only her own money and that Kasule had caused himself to be registered as joint tenant with her through fraud. The learned trial Judge made no specific finding on this assertion. However, he must have disbelieved it because he held that her entitlement of the 9 Plots was in accordance with the certificates of title, namely as joint tenant with Kasule. Secondly Nakakande averred in her plaint that the 6 Plots registered in the names of Kasule alone were bought with money from the common fund and that she was entitled to half share thereof In her evidence however she also categorically asserted that the Plots Were also bought with her own money and that Kasule had made no contribution: She had given him money to purchase the land for her but he had fraudulently caused himself to be registered as sole proprietor of that land. The learned Judge held, as already noted above that there was no credible evidence that Nakakande had given money to Kasule to buy land for her and then continued:

"Hence the land mentioned in paragraph 6 of the plaint is not held by the defendant in trust for plaintiff as the beneficiary The lands in question are registered in ('his,,) sole name. Without evidence of the existence of trust, the certificates of title are conclusive evidence of (his) sole ownership of' those lands. The plaintiff is therefore not entitled to those lands……"

"Land mentioned in paragraph 6 of the plaint" are the Plots. In her evidence in Court Nakakande also made substantial departures from the prayers she had made in the plaint produced above. In respect of the 9 Plots she had this to say: -
"I pray that the court orders the removal of the defendant's name wrongly put on the title of my land. I will not be satisfied if the land was divided equally between me and the defendant• because the defendant never contributed to the purchase money of these lands."

And in respect of the 6 Plots, she said: -
"As for the lands which are wrongly registered in the defendant's name, I pray that the titles be cancelled and the lands be registered in my name. I would not be satisfied with the Court ordering equal division thereof because these are my land alone".

In the judgment the learned trial Judge did not have much to say on the falsehoods and/or departure from pleadings. In regard to the parentage of Nakakande he said: -

"The plaintiff might have lied on the issue of paternity. But that did not mean that she had parted with her interest in the lands mentioned *in paragraph 4 (Exh. P1)."*

As noted earlier the learned Judge also commented on the evidence regarding Nakakande's source of finds. He described that evidence as incredible, being more like a joke than real. On basis of that he held as a fact that Nakakande, contrary to what she said in her testimony, did not give money to Kasule for purchase of land for her. That holding notwithstanding the Court upheld her interest in the 9 Plots without question as to how she funded the purchase thereof. I would not pursue that point further however since it has no-t been appealed. Suffice to say that this tends to support the criticism that the evidence was not subjected to such evaluation as it was supposed to be. Indeed, on analysis of the judgment, it becomes apparent that what was considered and determined upon was almost solely the evidence on the counterclaim as if the main suit itself was not before Court for determination. It may well be that the learned Judge was swayed by the way Counsel presented their respective clients' cases, and in particular by the way Nakakande's Counsel, in his final address to Court, appeared rightly or wrongly to steer away from her case as presented in her evidence. Presumably upon recognition that he had no other "cogent" evidence to support Nakakande's evidence that all the land had been bought with her money alone and therefore belonged to

her and that Kasule had fraudulently got himself registered is joint tenant in respect of the *9* Plots and sole proprietor in respect of the 6 Plots,

Counsel left the plaint un-amended and in the final address said he would "leave this to Court." In my view where Counsel throws in the towel, as in the instant case, it still remains incumbent on the Court to pronounce itself on the evidence adduced (or absence of it) on material issues in controversy. In this case no specific holding was made on Nakakande's claim as pleaded on the 6 Plots or as presented in her evidence on both the 9 Plots and 6 Plots. In that regard I have considered whether the omission constituted a mistrial warranting an order for retrial, notwithstanding the fact that Nakakande did not appeal. However, after taking into account the contradictions in, and general weakness of Nakakande's evidence as well as her fundamental departures from pleadings, I am satisfied that her contention that Kasule was registered on any of the titles fraudulently and her claim of sole beneficial ownership of all the land in issue would have to fail. An order for retrial is therefore unnecessary.

On the first ground of appeal, I would agree with Mr. Zaabwe only to the extent of the criticism that the learned trial Judge did not sufficiently evaluate the evidence of Nakakande to give due weight to its falsehoods. The main thrust of the ground however relates to the alleged contract of exchange to which I shall turn presently. In conclusion on the question of creditability, I am inclined to the view that Nakakande as a witness, in view of the foregoing observations was not one a reasonable Court would place reliance on. I am satisfied however that the learned trial Judge did not base any finding on her testimony. He relied on the certificates of title. I do not find it necessary to review the very many precedents elaborately cited and summarized by Mr. Zaabwe in his written submission. This is, in my view, a clear case where, without saying that everything Nakakande testified was false, her testimony was not relied upon, and therefore the question of whether her testimony was severable (which is what the precedents are about) does not arise. I now turn to the question of the alleged contract of exchange.

The principal contention in this appeal is that the learned trial Judge ought to have upheld Kasule's counter-claim that it was he, who was beneficial owner of the whole land in question by virtue of an exchange contract evidenced by Exh. D15.

According to Counsel for the appellant the learned trial Judge made the following errors in that regard:

(a) He wrongly held that there was no evidence to prove that Nakakande wrote and signed Exh. D15.
(b) He held on wrong grounds that there was no exchange contract between Nakakande and Kasule.

The submissions of' learned Counsel for the appellant raise two principal questions to be answered in this appeal: - -
(a) Was there adequate evidence on which the trial Court could have held that Exh. D15 was made and signed by Nakakande?
(b) Was there sufficient evidence on which the trial Court could have held that there was a valid contract of exchange binding the parties?

In his submissions Mr. Zaabwe strongly attacked the learned trial Judge ['or relying n Nakakande's denial of writing and/or signing Lx h. D 15 holding that it was not proved to be her document.

First, with due respect to Counsel, I think he took the matter out of context. Although in discussing the issues, the learned trial Judge entered to Nakakande s denial a couple of times, he did not use the denial per se, a evidence or basis for holding that Exh. DI 5 was not made or signed by Nakakande. The context in which the denial was viewed was in regard, to the burden of proof. Time burden was on Kasule to prove that Exh. D15 was made and signed by Nakakande. Since she denied the document, other evidence had to be adduced by Kasule to provide the proof' his context is evident in the judgment. The learned Judge, while discussing issue No. I said: -

Later when discussing issue No 4 he reiterated:
"I have already discussed that letter Exh. D15 earlier in his Judgement rejected it as it as it did not constitute a contract which binds the plaintiff because there was no satisfactory evidence to pin the plaintiff as the author thereof."

I am satisfied that the learned trial Judge refused to uphold Exh. D I 5 as document binding on Nakakande not so much because she denied it but essentially because there was no evidence proving that she wrote and/or signed it.

Secondly, in my view, Mr. Zaabwe virtually conceded, in his written submissions, that there was no direct proof that Exh. Dl *5* was Nakakande's document. This was in the course of his argument that Exh. Dl 5 was admitted by default. The following passage from his written submissions is self explanatory.

In the first place, the defendant pleaded Exh.D15 in his written statement of defence and counter-c/aim. The plaintiff did not deny his letter or state that she did not write or sign it, because she did not reply to the counter-claim. I invite this Court to find as a fact that the plaintiff's failure to file a reply to the counter-claim and specifically denied writing and signing Exh.D15 the defendant would have sought expert opinion on the handwriting and signature of the plaintiff on Exh. D15. (emphasis added).

I shall return to that argument presently. I have first to emphasize here that learned Counsel resorted to the argument because lie recognized that there was no or any evidence adduced to prove that Nakakande authored the letter Exh. D5 Neither Kasule nor any of his witness saw her write it.

Learned Counsel contended, in his written submissions that Kasule as a brother to Nakakande "knew very well (her) handwriting and signature.'' This however, was not founded on any evidence at all. Kasule did not testify that he knew or was familiar with, the handwriting and signature of Nakakande and nobody else did iii evidence. Counsel's said contention therefore was sheer conjecture.

I now turn to the argument as produced above. In my view it is not sustainable on two accounts. First, I am not persuaded that there was no reply to the counter-claim. Counsel himself acknowledged in his submission that there is an official endorsement on the Court file duly signed by the Deputy Registrar to the effect that a reply to

Counter-claim was filed on 5/9/94. He however contended that he was never served with a

copy of the reply. IC indeed no copy was served on Counsel for the defendant, I am inclined to assume that this was through error. And if, as Counsel Further contended in the submission, the original was not found on the Court file when he was compiling the record of appeal I would be more prepared to assume that it was misplaced or otherwise lost rather than assume the official endorsement on the Court file is false. Secondly the argument was not canvassed at the trial; aor did Counsel seek leave to this Court to raise the point on appeal. The Court have consistently held that ordinarily, a party will not be allowed to raise a point on appeal which could have been raised but was not raised in the Court below. (see: Tanganyika Farmers Vs. Unyamwezi (1960) EA 620; United Marketing Co. Vs. Hashan Kara (1963) BA 276 Warehousing Forwarding Co. Vs. Jaferali & Sons Ltd. (1963) BA 385 and Visran & Karsan Vs. Bhatt, (1965) BA 789). Needless to say that if the argument had been canvassed at the trial, the trial Court would have been in a better position than this court, to determine whether or not there was a Reply to the Counter-Claim and whether or not Exh. Dl *5* was expressly denied or implicitly admitted. In the circumstances I would not entertain the argument that Exh. D I 5 should be deemed o maybe been admitted. Accordingly I would hold that the learned trial Judge did not err n holding that there was no proof that Nakakande wrote or signed Exh. Dl 5. In my view therefore the first and second grounds of the appeal ought to fail.

Although in his submissions on the third, fourth, fifth and sixth grounds of appeal Mr. Zaabwe attempted to argue that there was sufficient evidence, independent of Exh. D 15, proving that a contract of exchange binding on both parties was constituted, the arguments kept revolving around the contents of Exh. DI 5. In a nutshell Exh. D I5 is letter, in which allegedly Nakakande undertook to leave her interest in the 0 Plots to Kasule in exchange to the Kibanja at Makindye which Kasule was asked to pay for. the English translation of the letter reads as follows: -

108/72

Dear brother Juma .M.Kasule

I have written in a hurry. I do not want you to worry about the matter of our land and the property thereon. As you decided to which I have been complaining, I have decided to leave you with 371/2 acres with all that is there. Come and pay the balance of shs.950/=

Signed Nakakande Tebekenya Nauni

Mr. Zaabwe contended in the submission that the letter amounted to an offer by Nakakande to exchange her interest in the Plots owned jointly for the Kibanja at Makindye, which offer Kasule accepted by payment of the amount requested for. 1-le concluded that constituted the contract of exchange and that payment by Kasule amounted to part-performance of the contract. He criticized the trial Court for holding that the contract of exchange was not proved because no transfer of Nakakande's interest had been executed.

With due respect to Counsel, I think that once again he took the learned Judge's remarks on absence of transfer out of context. The point was discussed twice in the judgment. First when the learned Judge was considering issue No I he observed that the alleged contract of exchange was made in 1972 without any transfer being executed and added:

'if there *was such agreement, either of the parties would have taken steps to ensure that the transfer was executed. This was not done. As the certificates are still in the joint names……..it is conclusive proof of their joint ownership of those lands(s.56 RTA)*

Later when considering issue No. 3 the learned Judge had this to say:
"1 have already discussed the above issue earlier in this judgment. I had rejected that issue of the contract. I still do not agree with the argument. The plaintiff denied the letter Exh. D15 which is the basis of the alleged contract to exchange.

She denied that she signed the letter. There was no evidence to satisfactorily pin that the handwriting on the letter Exh. D15 was by the plaintiff. Further no transfer was executed by the plaintiff in favour of the defendant. <u>This casts doubt on the alleged agreement to why no step was taken during all this time to have the transfer executed in favour of the defendant"(emphasis added</u>
The learned trial Judge gave two reasons for not accepting that a contract of' exchange had been made. The first in that Exh.D I5 was not proved to have been authored by Nakakande. The second was that Failure to execute a transfer by Nakakande in Favour of Kasule "cast doubt'' on existence of such contract of exchange. It was therefore, incorrect to say, as alleged by Zaabwe that the reason why the learned Judge held there was no contract of exchange was "<u>because of the fact that</u> <u>no transfer was executed''</u>. That fact only cast a doubt in the learned Judge mind (as it does in mine) on the existence of the alleged contract no doubt the learned

Judge had in mind the evidence on record that Kasule had long experience of registration of transfer of land title and must have known that in order for him to become the sole proprietor of the Plots which were jointly owned, he would have to obtain from Nakakande a executed in his favour. It was therefore legitimate for the learned Judge to wonder as he must have, why, if there had been such contract of exchange, Kasule had not insisted on getting the transfer from Nakakande for over 1 2 years and had got round to make the claim Court only after he was sued. This consideration however was not the basis of the court conclusion. It was in addition to the finding that the alleged was not proved through Exh. D 15 or otherwise**.** The burden of proof was on Kasule to prove the contract of exchange. Nakakande added to the burden in her testimony in cross-examination when she explained why Kasule was to pay for the Kibanja at Makindye. She said

"*I did not jointly with the defendant buy a Kibanja at Makindye. I bought it alone. I told the defendant to pay for the kibanja on my behalf. The money was from the rents from my houses which the defendant was collecting. Those houses were at Kitigoma, Jinja Road."*

In view of this, it cannot be said without more that payment for the Kibanja at Makindye was in part performance of the alleged contract of exchange. I agree with the learned trial judge that there was no adequate proof that the parties entered into the alleged contract of exchange. I am therefore unable to hold that the learned trial judge erred in law or fact in this regard. In my view the third, fourth, fifth and sixth also ought to fail. Before concluding I am constrained to refer to a legal that was overlooked at the trial and in toe submissions or appeal, namely determination of action. In his submission Mr. Zaabwe obliquely referred to it, but not surprisingly he did not pursue it, as it obviously destroys his clients case. In the admission on he fourth ground he wrote:
"1 submit that execution of a transfer is not an element in the formation of the contract. An agreement for the exchange of land is valid despite the fact that no transfer is executed. I further submit apart from limitation of action failure to take further steps to have the transfer executed does not make the transfer void.

I counter claim Kasule sought to enforce a contract The alleged contract is said to have been entered into on or about l0/8/72. The counter-claim was filed in court on 30/8/84. That was more than 12 years after the agreement is supposed to be reached. There is scanty evidence as to what transpired after the alleged agreement. In examination-in-chief, Kasule did not indicate why there was no implementation of the alleged contract alter he made the payment.

In cross examination he said that Nakakande refused without indicating when. This is what he said

“We have agreed as brother and sister that the plaintiff takes the kibanja at Makindye when I remained with the lands. We agreed on this in 1970’s. She refused to come to me to have the lands transferred to my sole ownership and instituted this suit.”

This to me that Kasule’s cause of action, if any, arose in the 1970’s when Nakakande refused to transfer her interest in the 9 Plots which she had allegedly to exchange for the “holding” at Makindye. It follows therefore that when the claim was bought to Court on 30/8/84, the action was time-barred under a) of the Limitation Act. On that ground I would also have held as a matter of law that Kasule had no subsisting cause of action and his appeal on the counterclaim could not be sustained.

In the result I find no merit in this appeal and would dismiss it with costs of the appeal to the Respondent. In my view the costs payable should include the expenses of partitioning the 9 Plots as ordered by the High Court.

Date at Mengo this 26th day of March 1998.

J. N.MULENGA
JUSTICE OF THE SUPREME COURT.