THE REPUBLIC OF UGANDA

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IN THE SUPREME COURT OF UGANDA

AT MENGO

CIVIL APPEAL NO. 13 OF 1996.

(CORAM: KAROKORA, J.S.C., MULENGA J.S.C., AND KANYEIHAMBA, J.S.C.).

BETWEEN

TIFU LUKWAGO……. APPELLANT

AND

1. SAMWIRI MUDDE KIZZA
2. JUSTINA NABITAKA ……RESPONDENTS

(Appeal from judgment and decree of the High Court of Uganda. at Kampala (Mr. Justice W. K. M. Kityo dated the 16th day of June 1994 in Civil Suit No. 624 of 1992)

JUDGMENT OF MULENGA J.S.C.

Samwiri Mudde Kizza and his sister Justina Nabitaka jointly sued their brother Erifazi Kiyaga and one Tifli Lukwago in the High Court. I shall herein refer to them as Kizza, Nabitaka, Kiyaga and Lukwago respectively. The subject matter of the suit (suit property) was a Kibanja (customary land holding) at Kikyusa Trading Centre on which was a seven-shop building.

Before embarking on consideration of the appeal, I am constrained to make two observations. The first is that the original High Court case file was not available to this court at the hearing of this appeal. It took many several months after the hearing of the appeal and a lot of repeated demand on the High Court registry before the file, together with some of the exhibits which were not (or could not) be made part of the record of appeal were traced. The original court file should as a matter of course be remitted to the registry of this court immediately after the typing of the record of the lower Court. The second observation relates to Exhs. P1, P2, P3, Dl and D2. All four are written in the Luganda language. P1 which appears to have been translated in

English by the trial Judge is a sale agreement between Kiyaga as seller and Kizza and Nabitaka as buyers of the suit property. P2 is stated to be a letter written by Kiyaga to Kizza to the effect that he (Kiyaga) had vacated the suit property. P3 is stated to be a 4 sale agreement between Kiyaga and one William Ssentongo in respect of a Plot adjacent to the suit property. DI is stated to be a sale agreement between Kiyaga as settler and Lukwago as buyer of four rooms of the building in the suit property. D2 is stated to be the same as Dl but in respect of the remaining three rooms. Needless to say that the official language of the Courts of Judicature in Uganda is English. Documentary exhibits to be used in Court proceedings, if written in any other language must be translated into English before being filed with pleadings and before being introduced in evidence as the case may be. Where this elementary procedure is not followed in the trial Court, an appellate Court may order a re-trial if the interpretation of the contents of the document in question are crucial to the decision.
In the instant case however, I am satisfied that no material issue turns on the contents of any of the documents. In my view, no injustice will be occasioned by proceeding with the appeal without reference to the detailed contents, since the substance came out in the oral evidence. I now turn to the merits of the case.

The case of Kizza and Nabitaka was brief. They claimed that Kiyaga sold the Suit property to them on 14th June, 1989 at the purchase price of Shs. 1,940,000 which they paid. After the sale, it was mutually arranged for Kiyaga to continue living in part of the building while collecting rent on behalf of the new owners from tenants in the rest of the building. The purpose of which they bought the suit property was to secure income to support their old mother. At the material time Kizza lived in Arua and Nabitaka lived in Busia. Kiyaga was therefore entrusted with the duty of applying the rent collected to the needs of the mother or to pass it to her. According to Kizza the arrangement worked well for about one and half years. Thereafter however, Kiyaga, behind the backs of the new owners, resold the suit property to Lukwago, and disappeared from the said owners. Lukwago took possession of the suit property. When Kizza discovered what had transpired, he demanded for the suit property, initially through the R. C's. Lukwago resisted hence the suit in Court against both Kiyaga and Lukwago.

Both defendants resisted the suit but pursued different defences. Kiyaga admitted that he had sold the suit property to Kizza and Nabitaka but denied re-selling it to Lukwago. He claimed

instead, that on 1st March 1991, on behalf of Kizza and Nabitaka, whom he notified in writing, he had rented out the suit property to Lukwago for a year at a monthly rent of 50,000/=. Lukwago's case on the other hand was that he had lawfully bought the suit property from Kiyaga. According to him the purchase was done in two stages. First he bought four rooms of the building at the
1 price of 1,000,000/=. That was on 1t March 1991. Next, in April 1991 he bought the remaining three rooms at the price of 350,000/=. Lukwago claimed that after the purchase he demolished the building and constructed a new one of 9 rooms and that he had been in possession of it ever since. He maintained that the allegation of an earlier sale of the suit property to Kizza and Nabitaka was a false claim hatched up by the family i.e. Kizza, Nabitaka, Kiyaga and presumably others. They conspired to deprive him of the property he had lawfully bought from one of them.

After a full trial, The High Court, on 16/6/94, entered judgment for Kizza and Nabitaka with costs and ordered (a) Lukwago to vacate and hand over vacant possession of the suit property within 30 days after judgment; and (b) Kiyaga to pay S 2,000,000/= as general damages together with any rent he might have collected on behalf of Kizza and Nabitaka.

Against that judgment Lukwago appealed to this Court. Kiyaga did not appeal. The grounds of Lukwago's appeal are that: -
1. The learned trial Judge erred in law and fact when he failed to properly or at all evaluate the evidence relating to the law and practice of sale of Kibanja (customary interest in land) and consequently made the wrong conclusion that ERIFAZI KIYAGA (1t defendant in the original suit) had sold the suit property to the respondents validly or at all.

2. The learned trial Judge misdirected himself on the law custom and usage relating to contracts for the sale of land and erred in law and fact when he came to the wrong conclusion that there was not valid agreement for the suit property by ERIFAZI KIYAGA **(**1st defendant in the original suit) to the appellant.

3. The learned trial Judge erred in law and fact when he failed to properly or at all evaluate the evidence before him and consequently failed to hold that the agreement of sale between ERIFAZI KIYAGA (1st defendant in the original suit) and the appellant had been proved.

4. The learned trial Judge erred in law and fact when he failed to consider and resolve the issues as to whether fraud had been properly pleaded and proved and as to whether the appellant was aware of the plaintiffs' property rights when he purchased the suit property.

At the hearing of the appeal Mr. Byaruhanga, Counsel for the appellant devoted most of his effort on the first ground. He then combined the second and third grounds and argued them together. He rounded up with the fourth ground. I shall consider them in the same order.

The first ground was argued on two alternative propositions.

The main argument was that if the suit property was sold to Kizza and Nabitaka as alleged, the sale was, according to customary practice, voidable and had been voided because Kizza and Nabitaka were not introduced to the Mailo land owner or his agent and did not give a gift of a Kanzu as required under the customary practice. In the
alternative, Counsel reiterated Lukwago's defence at the trial, namely, that the alleged sale to Kizza and his sister never took place. I will consider the two propositions separately starting with the one related to the customary practice.

Mr. Byaruhanga's main complaint ran as follows: - He maintained that at the trial, evidence was adduced: -
a) to prove the existence of the customary practice in question; and
b) to show that upon the alleged sale to Kizza and Nabitaka, there was no compliance with the custom.

He concluded that although the trial Judge was invited to take that into consideration he never did so. I would say, that thus far, Counsel's complaint is correct. In the judgment, only passing reference is made to the custom in the course of summarising witnesses' evidence ad Counsel's submissions. The learned Judge did not evaluate the evidence with a view to determine whether the existence of the customary practice had been established; and if so what were the consequences, if any, of the failure to comply with it must observe that neither the existence of the customary practice
-nor the consequence of non-compliance therewith, was among the framed issues for determination by the Court. This in turn is not surprising because the questions were not subject to any pleading. In the written statement of defence Lukwago denied the claim that Kiyaga sold the suit property to Kizza and Nabitaka. He did not in an alternative plead that

the sale was vitiated by reason of non-compliance with custom. Even when the matter featured during the trial, it appears to have been canvassed more as proof that there had been no sale to Kizza and Nabitaka than as an issue to be determined whether the sale had been vitiated. Although ultimately it is the duty of a trial Judge to frame the issues, the obligation of Counsel to assist the Judge, first by articulating, in the pleadings all points in controversy, and secondly by highlighting them at the time of framing the issues, cannot be over-emphasized.

Be that as it may, it seems to me to be clear that where, during trial, a party raises the question of applicability of a custom to the case, it is incumbent on the Court to consider and determine whether such custom is established and applicable. The Judicature Act, 1967, as far as is relevant to the question at hand provided in S 3 (2)

"Subject to the provisions of the constitution and of this Act, the jurisdiction of the High Court shall he exercised

(a) In conformity with the written law.……..

(b) Subject to any written law and in so far as the same does not extend or apply, in conformity with, the common law and the doctrines of equity any established and current custom or usage: and

(i) The common law and the doctrines of equity

(ii) Any established and current custom or usage; and

(iii)…….

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience."

The Act further provided in S.8 (1)

"Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of or shall deprive any person of the benefit of any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.

It is noteworthy that these particular provisions were reproduced almost verbatim in ss. 16(2) (a) (b) (c) and 17 (1), respectively, of the Judicature Statute t996 which repealed the 1967 Act.

The upshot of these provisions is that they set out the hierarchy of laws, doctrines, principles and practices and usages which the Court must apply in exercising its jurisdiction to decide disputes or issues before it for determination. Custom, like common law and doctrines of equity, is primarily to be applied where the written law is silent. Secondly the Act expressly preserved the right of the Court to apply, and the right of any person to benefit from, such custom as is not repugnant to natural justice, equity and good conscience and as is not incompatible with any written law.

In the instant case, I think that the learned trial Judge ought to have considered whether the customary practice raised in evidence and in Counsel's argument, was applicable or not. He did not. I think that was an error on the part of the learned Judge. It is however open to this Court, sitting as a first appellate Court, to consider the question and come to its own conclusion. I now proceed to do so. I start on the premise that it is settled that where custom or customary law is not documented or not so notorious as to warrant the Court taking judicial notice of it, it has to be proved in evidence. (See KIMANI VS GIKANGA (1965) EA 735).

The customary practice in question in this case relates to the sale of Kibanja. From what I can discern from the evidence, it is to the following effect. Whenever a Kibanja is sold, the seller introduces the buyer to the owner of the Mailo land on which the Kibanja is. If the owner had an agent who looks after that land the buyer is introduced to the agent, who in turn introduces him to the owner. In either case, the buyer upon being so introduced gives to the Mailo land owner or to the agent as the case may be, a gift called a Kanzu.

Thereupon the buyer is recognised by the owner as the new Kibanja holder. This is what comes out from the evidence of Lukwago himself and his witness Charles William Mpiima, the 62 year old agent of the owner of the Mailo land in question. Mpiima, for example, contended that he had never come across anybody who bought a Kibanja without giving the traditional Kanzu. The substance of this evidence was neither challenged nor rebutted. Indeed Kizza appears to have conceded the existence of the custom. He testified that he had not given the Kanzu because initially he was waiting to be introduced. He also confirmed that later. when he sought the introduction it was not done apparently because Lukwago had already been introduced and had given the Kanzu. The existence of the custom therefore was nbt in dispute. It was also common ground that upon the sale to Kizza and abitaka. no introduction was made and no Kanzu was given in accordance with the custom. On basis of

that M:. Byaruhanga now asks this Court to hold that pursuant to that custom, the sale of the Suit property to Kizza and Nabitaka was voidable and had been voided. In effect therefore, he is asking Court to enforce the custom by applying its sanction or remedy, i.e. a sanction or remedy ordained by the custom. Mr. Byaruhanga however, was at a loss to explain on v hat he based his contention that failure to comply with the custom of introduction and giving a Kanzu rendered the sale voidable.

On the authority of the decision in KIMANI v GIKANGA (supra) the customary sanction or remedy must also be proved as part of the custom. It cannot be sufficient to prove the practice only and leave it to the Court to guess or work out what sanction or remedy would be suitable for the non-compliance. There may well be a diversity of plausible sanctions. There could even be a custom without sanction. In the evidence adduced to prove the custom as reviewed above, no sanction was alluded to.

The nearest was the evidence that the Mailo land owner recognizes a buyer of Kihanja when the latter is introduced and gives to him the Kanzu That, however, is not the same thing as to say that an otherwise valid sale of Kibanja is rendered voidable if subsequently the buyer is not introduced, and or does not give a Kanzu to the Mailo land owner. It was not suggested in evidence that there was any time frame within which the introduction had to be made and the Kanzu to he given. If therefore, as appears to have happened in the intant case, a parson purchases a Kibanja and waits to be introduced before giving the Kanzu, does the custom not protect him until he is so introduced? Does the custom permit the seller, as appears to have happened in this case, to resell the Kibanja and ignore the first sale with impunity on the ground that the first buyer is not yet introduced? Who, according to the custom, is entitled to treat such sale as voidable? These are some of the questions that ought to be answered in evidence in proof of the custom and its sanction. They were not answered. In my view, therefore, the sanction sought was not proved as part of the sanction.

What is more, Mr. Byaruhanga's contention cannot be sustained on another account. In his reply Mr. Kusiima. Counsel for Kizza and Nabitaka. argued that the Customary practice relied on so heavily by Counsel for the appellant was of no legal significance. It was based on Mailo land system which was abolished by the Land Reform Decree 1975. In his view**,** by virtue of that Decree, there was no requirement for the Mailo land owner to give consent for a sale or transfer of Kibanja to be valid**.** In view of the finding I have arrived at, that the

customary remedy sought was not proved, I do not find it necessary to consider this second point in detail.

The Land Reform Decree 1975 converted Mailo land into public land; and the Mailo land owner into a lessee on conversion. It preserved Kibanja holding as a customary tenure on public land without any apparent liability or obligation, on the part of the Kibanja holder, to the lessee on conversion. It expressly provided that "Busulu and Envujo Law" would cease to have any effect anywhere in Uganda It had been under the Busulu and Envujo Law, and in particular S. 8 thereof that the requirements for the Mailo land owners consent was provided for.

The customary practice of introduction and given a Kanzu was for the par pose of soliciting such consent. The position after the Decree therefore was that while the customary tenure was continued, the customary rights and obligations appertaining to that tenure were not preserved. That is not to say that none of the customary practices were continued in practice. No doubt, the likes of Mr. Charles Mpiima (DW3) continued with some of the practices notwithstanding that they had to have any force of law. In the circumstances Iam satisfied that the custom in question. i.e. S.8 of Busulu and Envujo Law and attendant practice, even if it still be is no longer enforceable by the Court because it is incompatible with the written law which provides that it ceased to have effect anywhere in Uganda. Iam satisfied that the failure by the learned trial Judge to consider the customary practice in his judgment did not occasion a miscarriage of justice. That is so because even if he had and had properly addressed his mind on the law, he would have come to the conclusion that non-compliance with that customary practice did not vitiate the sale of the suit property to Kizza and Nabitaka.

The second alternative proposition by the appellant was that there had been no sale to Kizza and Nabitaka and that -the claim by the two arose out of a family conspiracy to deprive Lukwago of the Suit property. Mr. Byaruhanga made only two points in support of this proposition. He contended, that when Lukwago made the assertion in evidence at the trial he was not challenged. Secondly he said that there was a discrepancy between the oral testimony of' Kizza and Nabitaka on the one hand and their documentary evidence i.e. the agreement of sale, on the other hand, concerning the place where the agreement was made. According to him that is a pointer to the falsity of the allegation of sale. This proposition, in thy view, was not made or argued

any seriousness expected in an appeal at this level. In the first place the allegation of the family conspiracy was not supported by any reliable evidence whatsoever. Besides, contrary to Mr. Byaruhanga's contention, Lukwago was challenged on the allegation in cross examination at the trial.

In examination-in-chief Lukwago stated that be had heard from Kizza's brother, one Wasswa, that the Conspiracy for Kizza to take the suit property was discussed at a family gathering. Clearly, that was inadmissible hearsay. In cross-examination he was questioned on that and he conceded that he had not attended the meeting where the alleged Conspiracy had been discussed, He called Eriya Wasswa as a defence witness. Wasswa testified that at the family meeting which he had at attended neither Kizza nor anybody else in the meeting had spoken or raised anything about the suit property. However he confirmed that he had told Lukwago about the meeting but added that before the meeting he had told him about a rumour that Kizza wanted to take the suit . property. This is what Wasswa said in evidence: -

"Kizza never spoke anything about (the dispute)……..Nobody raised anything about the house and there was no dispute about (it) I went and told Lukwago about the meeting. I told him about the rumours from my brother that Kizza wanted to take back the house from Tiff- advised him to go to Kiyaga and find out about the owner. That was before the meeting……(emhasis added)

This is not evidence on which any reasonable Court can hold that there was a conspiracy to unjustifiably deprive Lukwago of the suit property. Even the witness who was called to prove the alleged conspiracy could only call it a rumour without disclosing its source. All I need observe here is that this serves to illustrate the danger of admitting classic hearsay and recording it in evidence. What started as a rumour of undisclosed source ended up being adopted as evidence to base a ground of appeal on!

On the discrepancy, Mr. Byaruhanga pointed out that both Kizza and Nabitaka testified that their sale agreement was itself **(**Exh. P1) is headed "Ndeeba" implying that the agreement'äs made at a place called "Ndeeba". In my view the discrepancy is very minor. It is capable of innocent explanation. Ii the issue had been raised at the trial it may well have been explained away. It is not material enough to warrant investigation at this stage. In conclusion. I find that the second proposition also has no substance. In the result I would hold that the first ground of appeal fails.

The second and third grounds of appeal were argued together. They amounted to an attack on the holding of the learned trial Judge on issues Nos. 3 and 4. The issues had been framed thus-;

"(3) Whether Kiyaga sold the suit property to the 2nd Defendant.

(4) Whether the 2nd defendant lawfully bought the suit property from the 1st defendant (Kiyaga).

In my view, the two were in reality one question put in different forms, and also they had a converse relationship with issue No. I which was

A simplified question covering all the three could have been framed thus: "to whom did Kiyaga lawfully sell the suit property?"

The learned trial Judge nevertheless answered the three framed issues separately. He answered issue No. 3 in the negative, and held that it was not necessary to repeat (himself) on issue No. 4 as it was disposed of by the answer to issue No. 1. The latter had been answered in the affirmative. The combined substantive holding by the learned trial Judge imbedded in these answers is that Kiyaga sold the suit property to the plaintiffs (Kizza and Nabitaka) and that therefore there was no subsequent lawful sale of the Suit property by him to (or purchase from him by) Lukwago. Mr. Byaruhanga submitted that the learned trial Judge did not properly address his mind on the evidence and the law, and that if he had, he would have held that there was a valid agreement of sale of the suit property between Kiyaga and Lukwago. He stressed the point of law that the ingredients of a legal contract had been proved. He cited for authority the judgment of Viscount Dunedin in MAY AND BUTCHER LTD. VS THE KING (1934) 2KB 17 and a chapter in THE LAW OF REAL PROPERTY by R.E. MEGARRY and H.W.R. WADE 4th Edition. 9 Para. 203. He further stressed that the learned Judge erred in law when he held the written agreement Exh. Dl and D2 to be invalid simply because Lukwago did not sign them as buyer. On evidence, he contended that both the oral and documentary evidence adduced for the defence had been ample proof of the sale of the Suit property to Lukwago.

I have read the above mentioned authorities. Counsel did not indicate, and I have not detected, in what way those authorities depart from or add to the proposition of the law which

the learned trial Judge took in consideration. While considering issue No. 1 the learned trial Judge took into account the essential elements of a valid contract as set out in HALSUBY'S LAWS OF ENGLAND 4th Edition, Vol. 9 Para. 203. The paragraph reads as follows: -

"203. The elements of a valid contract. To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is there must be a consensus ad idem; (3,) those parties must tend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4,.) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient; generally speaking, the law does not enforce a bare promise (nudum pactum,) but only a bargain."

There is no reason to believe that the learned trial Judge did not have the same in mind when he came to consider issue Nos. 3 and 4. However, in judgment the above passage was not reproduced verbatim. The learned trial Judge appears to have paraphrased the essential ingredients in his own words to suit the case before him. Unfortunately, in so doing he interposed inaccurate expressions which have given rise to the criticism of misdirection. This is how the learned trial Judge paraphrased the essential ingredients of a valid agreement.
"There must at least be two or more persons to make the agreement i.e. (sic).

"(a) That the seller and the buyer ought to have signed the agreement to sign j5i *their consent to create the alleged* relationship.
(b) *That the subject matter of the sale must be clearly understood by both parties in the agreement in the same sense otherwise the agreement will lack tile consensus ad idem.*
(c) That the agreed price as the consideration the parties must have agreed as to the mode of payment should be effected

(d) That the seller must have an undisputed right of ownership of the subject of the sale which is capable of being transferred to the buyer.

This, obviously, is not an accurate summary of the passage in Halsburys Laws of England (supra). But when considering issue No. 3 the learned trial Judge summarised submission by Counsel for Lukwago as a contention that the alleged sale by Kiyaga to Lukwago was "the only valid sale enforceable by law." In apparent reaction to that contention, the learned trial Judge expressed great surprise that Lukwago, the supposed buyer, had not signed the two

agreements Exhs. DI and D2 which he relied on at the trial. He then declared that the omission rendered the two agreements invalid. Mr. Byaruhanga's attack, was focused on the holding that the omission of Lukwago to sign the two agreements Exhs. Dl and D2 rendered them invalid. He maintained that a contract may be proved by oral evidence or by writing signed by one party. He urged this Court to be guided by provisions of an English Statute i.e. S. 40(1) of the Law of Property Act 1925 of England, as discussed by MEGARRY & WADE (supra), which requires that the writing evidencing agreement of sale of land be signed by the party to be charged. He conceded that the Act was not applicable in Uganda but maintained that the particular provision reflected the common law, and submitted that it should be applied since under the Judicature Act 1967 the common law is applicable in Uganda.

With due respect to learned Counsel, though his argument may be legally correct, its thrust verges on being a red-herring. On a proper analysis of the judgment, it becomes clear that the decision in the High Court did not turn on the issue of what constituted essential elements of a contract. It turned on two things, namely, (a) the sale of the suit property to Kizza and Nabitaka in 1989 and (b) the nature of the transaction between Kiyaga and Lukwago in 1991. With regard to the former the contentious issue was whether, as a matter of fact, the alleged sale did take place at all. With regard to the latter there was conflicting evidence as to the nature of the transaction. On the one hand there was evidence of Lukwago and his witnesses that he bought the suit property. On the other hand there was evidence of Kiyaga that what was agreed between him and Lukwago was not a sale but a lease of the suit property.

On the 1989 sale to the plaintiffs (Kizza and Nabitaka) the learned Judge said: -

"…….the evidence of Kiyaga the first defendant is conclusive on the issue of claimed transaction of sale. He repeated and assured this Court that he sold the house to Kizza and also confirmed the agreement — Exh. P1 to have been the one made and signed by him. Therefore I am inclined that fully executed agreement of sale as the concrete proof that the sale had fulfilled all the essential ingredients of a valid agreement as set out in the Halsbury's Laws of England Vol. 9 para 203……. (paraphrase as reproduced above) As regards those above expressed necessary ingredients strong evidence was adduced that they were fulfilled by the agreement in Exh.P1 tendered by the plaintiffs. Therefore the answer to issue number one must be in affirmative. So I hold." (emphasis added,).

Despite the reference to necessary ingredients of a contract in this passage, in my view, the basis of the answer to the issue no.1 was the evidence of Kiyaga (which the learned Judge called "conclusive") that he sold the suit property to Kizza and signed the sale agreement. It is noteworthy that the said transaction was not challenged for lack of any ingredient of a valid contract. It was challenged for non-compliance with what I may call a "customary condition subsequent", and in the alternative for not having occurred. Although in the judgment it is not expressly stated, it is evident that on the nature of the 1991 transaction the learned trial Judge preferred and accepted Kiyaga's version that it was a tenancy not a sale agreement. This is apparent from the following passages in the judgment. After he noted that the contention for Lukwago was that the 1991 transaction was the only valid sale enforceable by law, the learned Judge went on to say: -

"In this regard I have therefore been prompted to peruse and scrutinize the two agreements .Exhs. Dl and D2 upon which Lukwago was relying to claim the valid sale. But I am greatly surprised to find that Lukwago as the buyer did not sign any of the two agreements. The omission to do so renders the two agreements to be invalid as the earlier stated ingredients of a valid agreement are lacking in those two agreements as indeed both parties to the Apart from that argument, Mr. K/yoga the alleged seller test fled and disputed each of the signatures in the two agreements, attributed to him. But on the other hand he has clearly admitted of having a different kind of transaction with Lukwago, i.e. a lease for a period of one year only, payment of rent to a to/al sum of Shs. 1, 000, 000/= which he concedes as having been paid to mm in full by Lukwago. But that transaction has not been raised in this suit and it is completely different from an outright sale.

And later while considering issue No. *5* he observed: -

"However having earlier made findings that Kiyaga admits of having entered into a settlement of a different kind. i.e. in the form of a lease of the suit property, perhaps Lukwago's remedy may lie in pursuing that admitted transaction against Kiyaga but not against Kizza who was not indicated to be a party to it."

I am inclined to agree that, if considered in isolation, the statement complained of in this appeal, namely that Exhs.D1 and D2 were invalid because they were not signed by Lukwago as buyer, may well have amounted to a misdirection. However, I am satisfied that having regard to other considerations and surrounding factors the misdirection is not so material as to

warrant a reversal of the decision. In the first place I think the learned trial Judge was entitled to express the surprise, which I share, that Lukwago did not sign the alleged agreements after taking initiative to get them drawn. His explanation that he was advised by R.C. Officials that it was not
necessary for him to sign is far from convincing. More importantly however, it is quite evident that the learned trial Judge was heavily influenced by the evidence of Kiyaga, who not only disowned the signatures on Exhs. Dl and D2 ascribed to him, but also testified that what he had agreed with Lukwago was to lease not to sell the suit property. Needless to say of course that the other influential consideration was the earlier holding on issue No.1 that Kiyaga had in 1989 sold the Suit property to Kizza and Nabitaka. It seems to me, therefore, that even if the learned trial Judge had appreciated that the omission of Lukwago's signature, as the buyer, did not per se invalidate the document, he would still have legitimately doubted and refused to take the documents as genuine evidence and would in preference to the defence evidence still have accepted the evidence of Kiyaga, that the 1991 transaction was not a sale but a tenancy.

Perhaps Counsel for the appellant might have done better to direct his criticism on the decision of the learned trial Judge to accept the evidence of Kiyaga in preference to that of Lukwago without appearing to subject either to adequate evaluation and give clear reasons for the preference. Counsel however did not adopt that approach. I have considered whether, if he had, this Court could have on a fresh evaluation of the evidence come to a conclusion different from that of the learned trial Judge. I find however that most probably it would not. Basically the decision depended on credibility of the witnesses. There are no manifest indicators to lead me to the view that the learned trial Judge came to a wrong conclusion because he relied on the evidence of Kiyaga instead of that of Lukwago and accepted the plaintiffs' case. Although the plaintiff's side did not call independent witnesses to support its case, the testimony of both plaintiffs was not shaken in cross-examination or otherwise. On the other hand some aspects of Lukwago's case raise very considerable doubts. The following are examples: (a) The claim that Lukwago bought the suit property, and in particular the building, piece-meal, paying unproportional prices, i.e. Shs. 1,000,000 for four rooms and only Shs. 350,000 for 3 rooms seems unlikely. (b) The testimony by Lukwago that after the purchase he demolished the whole building and constructed a new one, when his witnesses testified that he only modified some of the rooms to by Lukwago that after the purchase he

demolished the whole building and constructed a new one, when his witnesses testified that he only modified some of the rooms to make an additional two rooms is a material discrepancy. (c) Lukwago even made a claim in his evidence which he never substantiated that he had acquired lease hold title over the Kibanja. What is more I am mindful of the fact that the learned trial Judge had the advantage of seeing and hearing the witnesses which this Court does not have. I am therefore not inclined to reverse the holding of the learned trial Judge that there was no lawful sale of the suit property by Kiyaga to Lukwago. In my view therefore the second and third grounds of appeal also fail.

Under the fourth ground of appeal, Mr. Byaruhanga submitted that fraud was not properly pleaded because the particulars of fraud were not specifically set out in the plaint. He also contended that there was not sufficient evidence adduced to prove fraud and that on the contrary there was evidence which tended to show that when
Lukwago bought the suit property he might have not known of Kizza's interest in it. He concluded with the argument that the learned trial Judge ought to have held, and therefore erred in not holding, that Lukwago was an innocent purchaser. He asked this Court to so hold. Counsel was allowed to argue this ground without interruption and Mr. Kusiima, for the respondents replied fully, submitting that fraud was properly pleaded and proved to the satisfaction of the Court. This ground of appeal however raised questions which were not raised in the Court below. They could have been raised in the written statement of defence but were not. They could have been canvassed in final submissions at the trial, but were not. The defence at the trial were content with the position that Kiyaga did not sell the suit property to the plaintiffs. It is an established practice however that, on appeal, a party is not entitled to raise a new point which was not considered in the trial Court except with leave of the appellate Court. And the Courts have consistently held that such leave would be granted only if the Court is satisfied beyond reasonable doubt that if the facts had been fully investigated they would have supported the new point. In TANGANYIKA FARMERS VS UNYAMWEZI (1960) EA 620, GOULD Ag. V.P. referring to part of submission by Counsel for appellants said:

"*The objection to this submission is that it raises a question which was never in the contemplation of the parties in the court below. It was not argued there nor was it ever mentioned in the correspondence between the parties. An appeal Court has discretion to allow a new point to be taken on appeal but it will permit such course only when it is assured*

that full justice can be done to the parties."
The Privy Council took the same position in UNITED MARKETING CO. Vs. HASHAM KARA (1963) EA 276. Lord Hodson said at p.281.

"Their Lordships would not depart from their practice of refusing to allow a point not taken before to be argued unless satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated would have supported the new plea."

(See ***also WAREHOUSING & FORWARDING CO. v JAFERALI & SONS LTD. (1963 EA 385. and VISRAM & KARSAN v BHATT (1965) EA 789***)

In the instant case what should be considered is whether the new point, namely that fraud was not properly pleaded and *I* or proved by the plaintiff, would without doubt have been upheld if it had been raised and investigated filly at the trial. I think not. It is correct that when a claim is based on fraud, then if must be specifically so stated in the pleading, setting our particulars of the alleged fraud; and that those particulars must be strictly proved. However what is required in pleading is to disclose clearly, the facts which, if proved strictly, would constitute fraud. In the case of B.E.A. TIMBER CO. v. INDER S1NGH GILL (1959) EA 463 FORBES V. P. said:

"It is of course established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud however is a conclusion of law. If the-facts alleged in the pleading are such as to create a fraud, it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently; but from the acts fraudulent intent may be inferred"

Bearing that in mind, I am not satisfied that the plaint was deficient, particularly having regard to the nature to the fraud alleged. After alleging in paragraphs 3 and 4 that Kiyaga sold the suit property to Kizza and Nabitaka on 14th June 1989 and that it was mutually arranged for the former to stay in part of the property while collecting rent on behalf of the latter from tenants in the rest of the property, the rest of the pleading as follows:

"5 On or about 1st March 1991 the 1st Defendant FRAUDULENTLY and in breach of the sale agreement did sell the same house yet again to the 2nd Defendant for an undisclosed sum of money and vacated it.

6. The plaintiffs on learning of the re-sale of the same house approached the 2nd defendant and requested him to vacate the house but the 2" defendant refused and is still refusing to hand over the house to its true owners, the plaintiffs.

7. The plaintiffs' claim against the 1st Defendant is (or general damages for breach of contract and mesne profits since 14th June 1989.

8. The plaintiffs claim from the 2nd Defendant vacant possession of the house he purports to have bought from the 1st (Defendant with full knowledge that the same house was the property of the plaintiffs.

9. The plaintiff's further claim from the 2nd Defendant general damages for his interference with their right of possession to the house together with mesne profits from the date of the purported sale till disposal of this suit."

Mr. Byaruhanga did not indicate in what way these pleadings were deficient, apart from asserting that particulars of fraud were not set out. It seems to me, however, that the pleading left no one in doubt as to what facts the allegation of fraud was based, and as to the nature of fraud alleged. As against Kiyaga (l[st] Defendant) the alleged facts were that, he (Kiyaga) being in possession of the suit property as rent-collecting agent for the plaintiffs, fraudulently re-sold the suit property to Lukwago, when he had himself sold it earlier to the plaintiffs. In my view, these facts, if proved would amount to fraudulent conversion. As against Lukwago the alleged facts pleaded were that he took possession of the suit property and on demand by the plaintiffs as owners refused to hand it over, purporting to have bought it from Kiyaga notwithstanding that he knew the property belonged to the plaintiffs. These facts, if proved, could, in my view amount to participation in the said fraudulent conversion. It appears to me therefore that if the point was taken up in the trial Court, one of the two things could have happened. It could have led to amendment of the plaint to supply more particulars. But, more probably, it could have been held that the pleading contained sufficient particulars of the alleged fraud.

The point about proof of the alleged fraud is not wholly new. However I have, in the course of considering the second and third grounds of appeal dealt with the major aspect namely the basis of decision by the learned trial Judge. What remains to

consider there, is the submission that the Court below ought to have found that Lukwago was innocent purchaser because he did not know the plaintiffs' proprietary interest in the suit property; and the prayer that this Court should so hold. The knowledge of Lukwago was subject to issue No. *5* which was framed thus: -

"(5) Whether the 2nd Defendant was aware of the plaintiffs' property rights in the suit property at the time he alleges to have bought the suit property."

In a passage of the judgment which, to say the least, is not so clear, the learned trial Judge decided that it was not necessary to answer the issue. He said: -

"On issue number five, of whether Tifu Lukwago was aware of proprietary interest of Kizza in Kiyaga's house, which he claims to have bought at the time when the alleged agreement of sale was concluded. Having already made findings on issue number three that the two agreements relied upon by Lukwago were irregular, void, and inoperative or unenforceable in law it is not necessary to deal with the present issue of whether Lukwago knew the plaintiffs' proprietary interest at the time he attempted to buy However having earlier made finding that Kiyaga admits of having entered into settlement of a different kind, i.e., in the form of a lease of the suit property, perhaps, Lukwago 's remedy may lie in pursuing the admitted transaction."

I must say that on the face of it this passage suggests that there was ambivalence in the mind of the learned trial Judge as to whether the transaction between Kiyaga and Lukwago in 1991 was a sale or a lease, leading to apprehension that there was a failure to determine a material issue. On a final analysis however I am satisfied that. the central question that had to be determined, and which was determined, by the learned trial Judge as against to Lukwago was the allegation that he had assumed possession of the suit property to the prejudice of the owners' interest and had wrongfully refused to hand it over to them on demand. Viewed in that context and given the holding that Kizza and Nabitaka had in fact bought the suit property in 1989, the question whether Lukwago took possession pursuant to a purported purchase or pursuant to a tenancy which he subsequently claimed to have been a purchase,

becomes secondary. No doubt, it is in that regard that the learned trial Judge concluded that it was unnecessary to determine what was in the mind of Lukwago at the time of the transaction. Although another Judge may have gone on to determine the question, I do not think that failure to do so affected the final decision.

Before taking leave of this case, I have considered whether an earlier decision of this Court in Civil Appeal No. 8 of 1993: PAUL KISEKKA SAKU VS. SEVENTH DAY ADVENTS CHURCH ASSOCIATION OF UGANDA (unreported) is applicable to the instant case. In the earlier case A sued R in the High Court claiming compensation and general damages in respect of developments he had effected on a Kibanja he had purchased in 1984 on Mailo land. R had acquired the Mailo title in 1987, and although initially it undertook to compensate A for the developments, this did not undertook to compensate A for the developments, this did not materialize due to disagreement on quantum of compensation, hence the suit. R defended the suit on the ground that A had not acquired the Kibanja lawfully and that he was not entitled to compensation for developments effected in trespass. The High Court upheld the defence on the ground that A had not obtained written permission of the "prescribed authority" in accordance with the provisions of *S.5* (1) of the Land Reform Decree *1975.* On appeal, this Court held that the said permission under *S.5* (1) of the Decree was required only for new customary occupation. In the case of transfer of an existing customary holding, the Court held that the relevant provision was S.4 (1) of the same Decree which provides that a holder of a customary tenure may transfer it after three months' notice to the "prescribed authority," The Court, for different reasons, namely that there was no evidence that the person who had sold to A had given notice to the prescribed authority, upheld the High Court decision that A did not lawfully acquire the land (sic) lawfully. The Court however noted a serious lacuna in the law, in that the "prescribed authority" for purposes of S.4 (1) of the Decree is not clear.

In the instant case there is neither evidence nor argument on whether or not Kiyaga gave notice to the "prescribed authority" under S.4 (I) of the Decree either at the time he sold to Kizza and Nabitaka in 1991 when he sold or leased the Kibanja to Lukwago. I think it would not be correct for me to assume, however likely it may be given the said lacuna, that the notice was not given. I hasten to add however that if I had considered non-compliance with S.4 (1) of the Decree as an illegality such as contravention of *S.5* (1) of the same Decree (being an offence) is, I would not have taken a lenient view. In my view failure to give notice

under S.4 (1) of the Decree is a curable irregularity, so that even if it had been proved that notice had not been given, I would not have regarded the sale a nullity for these reasons. I am of the view taken a lenient view. In my view failure to give notice under S.4 (1) of the Decree is a curable irregularity, so that even if it had been proved that notice had not been given, I would not have regarded the sale a nullity for these reasons. I am of the view that the decision in PAUL KISEKKA's case (supra) is not applicable to the instant case.

In the result I would dismiss this appeal with costs of the appeal and in the lower Court to the respondents.

Dated at Mengo this 26th day of March 1997.

J. N. MULENGA

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THES IS A

TRUE COPY OF THE ORIGINAL.

W. MASALU - MUSENE

REGISTRAR, THE SUPREME COURT.

JUDGMENT **OF** KAROKORA. J.S.C.

I have had the advantage of reading in draft, the judgment prepared by Mulenga, J.S.C., and I concur that the appeal must be dismissed with costs. The brief facts of the case were ably brought out in the judgment of Mulenga, J. S. C., and so I do not have to repeat them here. However, this was a case whereby the respondents purportedly bought suit property on Mailo land which Erifazi Kiyaga, their brother was occupying under customary tenure. After the purported purchase, they entrusted it to him to rent it out to tenants for purpose of raising funds to assist their mother.

However, according to their evidence, their brother E. Kiyaga, went behind their backs and resold it to appellant and thereafter, he disappeared from the respondents. The appellant took possession of the suit property.

When the respondents discovered what had happened, they demanded for suit property from the appellant who resisted and thereafter the matters ended up in the High Court, which decided the suit in favour of the respondents.

When the respondents discovered what had happened, they demanded for suit property from the appellant who resisted and thereafter the matters ended up in the High Court, which decided the suit in favour of the respondents.

The appellant was dissatisfied and hence this appeal. Four grounds of appeal were filed and argued. Mulenga, J. S. C.has so ably discussed the law regarding the proof of a custom or customary law and the consequences of failure to comply with such custom, if ever it was still applicable after the coming into force of the Land Reform Decree No. 3/75 that I would not repeat what he has stated. I do agree with him and have got nothing to add.

I would however, wish to comment on the case of Paul Kisekka Saku Vs Seventh Day Adventists Church Association of Uganda SC Civil Appeal No. 8/93 (unreported) which came to our attention in the course of writing the judgment. The case is almost on all fours to the instant case.

There, the appellant had bought a Plot of land in form of a Kibanja at Kanyanya village in Kawempe, Kampala District from one Ezra Nandaula who was occupying under customary tenure. He claimed that he had been introduced to the owner of the land, one Tekera, according to customary practice. He started constructing a residential house on the Plot. Later in 1987 the land was sold to respondent by Ndibarekera, the mailo owner. The respondent thereafter got registered and obtained title over the Plot-and promised to compensate the appellant. However, they failed to agree on the amount of compensation. The appellant filed the suit in the High Court.

The learned trial Judge dismissed the suit on the ground that the plaintiff had not lawfully acquired the Plot, because he had not obtained permission of the prescribed authority in accordance with the provisions of Section 5 (1) of the Land Reform Decree.

On appeal to the Supreme Court, it was held that the appellant had bought an existing Kibanja or customary tenancy from Nandaula. In the circumstances it could not be said that the appellant's occupation was a creation of a new customary tenure. The

tenure acquired by appellant was governed by Section 4(1) of the Land Reform Decree which provides as follows: -

"A holder of any customary tenure on any public land may, after notice of not less than 3 months to the prescribed authority or of any less period as the said authority may approve, transfer such tenure by sale or gift inter vivos or otherwise, subject to the conditions that such transfer shall not vest any title in the land to the transferee except the improvements or developments carried out on the land."

Before us, this issue was not argued. Moreover, there was no evidence that notice had been served and moreover, there is lacuna in the law as to where such a notice would be served. Even in Paul Kisekka Saku Case (supra) the Supreme Court observed at page 6 of the judgement as follows: -

"It is not quite clear what that prescribed authority is. Section of the Decree does not define prescribed authority but defines the word "prescribed" to mean "prescribed by the Regulations made under this Decree. " But the Land Reform Regulations 1976 S1 26/ 76,) do not prescribe such authority. Regulation (1) provides that any person wishing to obtain permission to occupy public land by customary tenure shall apply to the Sub-County in charge of the area where the land is situated it appears to us that the Regulations deal with ,fresh acquisitions of customary tenure, not transfers of it."

From that judgment, there is no doubt that there is lacuna in the Land Reform Decree. That lacuna was noted by the Supreme Court in Kisekka Saku case (supra) on page 7 of the judgment when it stated as follows: -

"Before we take leave of this case, we would like to express the need for legislature to clarify who is the prescribed authority in relation to section 4(7,) of the Land Reform decree'. It is accordingly directed that the reasons for the judgment on this appeal be transmitted to the Attorney General."

Clearly there is no evidence in the instant case that notice pursuant to provisions of Section 4(1) of the Land Reform Decree was given in respect of each of the parties i.e. appellant and respondents. In any case, as it was observed by the Supreme Court in Paul Kisekka Saku (supra) there is a lacuna in the Decree as to who is the prescribed authority for the purpose of Section 4(1) of the Land Reform Decree. In other words there was no prescribed authority to which the notice would be given.

In my view, failure to give notice in a case of this nature, where the prescribed authority was not clearly spelt out by the law, would be an irregularity which would not vitiate the transaction in question. In view of the above, I would find the Paul Kisekka Saku Case (supra) not applicable to the facts of this case.

I must state that after fully considering all the facts of this case, it is clear that both the appellant and respondents have equal equities on the land in question, because both purported to buy existing customary holding of one Kiyaga, who was a customary tenant on Mailo land, without complying with the provisions of Section 4(1) of the Land Reform Decree No. 3/75. As I have already stated herein, the prescribed authority to which they were supposed to give the notice under Section 4(1) of Land Reform Decree was not spelt out by the Decree. In my view this was an irregularity which would not vitiate their transaction.

However, since none of them acquired the land in accordance with provisions of Section 4(1) of the Land Reform Decree. I would invoke one of the maxims of equities which states: - *"Where there are equal equities, the first in time prevails."*

Accordingly, since the respondents bought first, they must prevail over the appellant, who bought after them.

In the circumstances, I do agree with Mulenga, J. S. C., that this appeal must be dismissed. And as Kanyeihamba J. S. C., agrees, the appeal is hereby dismissed in the terms proposed by Mulenga, J. S. C.

Dated at Mengo this 26th day of March 1998.

A. N. KAROKORA

JUSTICE OF THE SUPREME COURT.

JUDGEMENT OF KANYEIHAMBA J.S.C.

I have had the benefit of reading the judgment of my brother, Justice Mulenga. I agree with the reasons and decision contained in his judgment and only wish to add the following observations: The learned Judge of the High Court was correct in his analytical assessment of the facts and evidence, and in findings for the plaintiffs who are now the respondents in this

appeal. I do not accept the argument advanced by Counsel for the appellant that the two successive land sales involving the parties were governed by customary law.

The land Law Reform Decree of 1975, Section 3 (4) abolished most incidents of customary land tenure and those the same decree preserved were subject to the written permission of the prescribed authority, namely, the Land Commission of Uganda. Thus, Section *5* of the Decree, no person may occupy public land by customary tenure except with the permission in writing of the prescribed authority which permission "shall not be unreasonably withheld". Subsection (2) of the same section provides that "Any Agreement or transfer purporting to create a customary tenure or land contrary to subsection (1) of this section shall be void and of no effect and in addition, the person purporting to effect such transfer shall be guilty of an offence.

It is surprising that Counsel argued a point which, if accepted, would leave the appellant at the risk o being prosecuted for a possible crime. With the coming into force of the 1995 Constitution of Uganda, the law which would have opened anyone to such a risk is obsolete. Unfortunately, for the appellant however, the alleged contracts of sale of land under which he wishes to benefit were made before the 1995 Constitution.

Counsel's argument that the Land Law Reform Decree saved the customary rights and interests is at variance with the provisions of the Land Law Reform Decree. The submission by the same Counsel that as the transaction was based on the customary law which requires the introduction of the buyer to the Landlord by way of a Kanzu, the purported contract for the sale of the Kibanja was voidable is unattainable. Counsel could not nor can this Court find any supporting law or evidence.

It would appear however, that all the parties may have accepted or been persuaded to accept the principle that, in matters of sales of Bibanja, the giving of a Kanzu is important. Indeed, Counsel for the appellant points out, quite rightly, that the respondents did at one time attempt to normalise their relationship with the landlord by offering a Kanzu which he refused since, according to him, he had already accepted another Kanzu from the appellant. There is no apparent mystery about this sequence of events. The first sale and only legitimate sale of the land was between a brother and a sister, and their other brother the respondents. It is not contemplated that formalities which accompany contracts and sales between close members of a family should be so open and ritualistic as those which accompany contracts

and sales between non-related parties. In any event, the evidence shows clearly that the vendor had been expected to introduce his brother and sister as the new buyers and to intercede on their behalf by paying the necessary dues to the Landlord. Moreover, the Landlord's belief that the land had been sold to the appellant even though it was the ground and with some of the evidence given by his own witness. Therefore, on a balance of probabilities, the trial Judge was correct in believing the respondents rather than the appellant. I can find no compelling reasons for allowing this appeal. I therefore agree that the Judgment in the High Court be upheld with the additional reasons I have given.

Consequently, this appeal is dismissed with costs o the respondents.
Dated at Mengo this 26th day of March 1998.

G. W. KANYEIHAMBA J. S. C.
JUSTICE OF THE SUPREME COURT.