THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 061 OF 2009

(Arising from the judgment of the High Court of Uganda at Masindi in H.C.C.S No. 131 of 1989 dated 12th December 2012 delivered by the Honorable Rubby Aweri Opio, J (as he then was))

1. PHILEMON WANDERA
2. HOIMA S. S SCHOOL
3. BOARD OF GOVERNORS HOIMA SECONDARY SCHOOL==========APPELLANTS

VERSUS

1. YESERO MUGENYI
2. REUMAN & CO. LTD ========== RESPONDENTS

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA

JUDGMENT

The Facts

This is a first appeal originating from the suit of the first respondent filed in the High Court of Uganda at Masindi against the appellants claiming general, special and exemplary damages for trespass on his access road and a permanent injunction restraining the appellants from blocking the first respondent's access to the Hoima to Kampala Main road. The first respondent was successful in part and awarded nominal damages of Ug. Shs. 3,000,000=; and general damages of Ug. Shs. 1,000,000= as well as

interest on both awards at court rate from the date of judgment till payment in full and costs. The first respondent sought to have the said Judgment enforced by the issuance of a warrant of attachment of the appellant's immovable property (hereinafter referred to as the suit property) on which was a boarding primary and secondary school in addition to staff quarters. The property was advertised and then auctioned/sold to the second respondent after an unsuccessful attempt by the appellant to halt the sale of the said property.

The appellant being aggrieved by the decision of the High Court as to execution appealed the said decision.

Grounds of Appeal

1. The learned trial Judge erred in law when he declined to nullify an illegal sale.
2. The learned trial Judge erred in law and fact when he failed to hold the first respondent liable for the excessive attachment in execution of the decree in Civil Suit No. 131 of 1989
3. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record that clearly implicated the respondents as parties to the fraudulent sale of the attached property in Civil Suit No. 131 of 1989.
4. The learned trial Judge erred in law and fact when he condoned the illegalities that were manifested in the entire execution of the decree in Civil Suit No. 131 of 1989.

Representation

At hearing of the appeal in this Court, the appellants were represented by Mr. David Kaggwa from Kaggwa - Oweyesige & Co. Advocates. The first respondent was represented by Mr. Peter Nkurunziza and the second respondent was represented by Mr. S. Wakabala. It was decided that the parties address court by written submissions which we shall consider in this judgment.

Having looked at the appellants' submissions, we find that they advance similar arguments in grounds one and four so Court finds it logical to combine them and be determined together.

Ground One & Four:

The learned trial Judge erred in law when he declined to nullify an illegal sale; and

The learned trial Judge erred in law and fact when he condoned the illegalities that were manifested in the entire execution of the decree in Civil Suit No. 131 of 1989.

Arguments for the Appellants

In their submissions, counsel for the appellants submitted that according to **Order 19 (now O. 22), Rule 64** of the **Civil Procedure Rules SI 71-1**, a sale of immovable property can only take place at least thirty (30) days calculated from the date on which the public notice of sale has been advertised. In the instant case, the sale was illegal because the immovable property in question was advertised on 30th January 1999 and sold on the

19th of February 1999 to the second respondent which is a period of 19 days which is shorter than the 30 day mandatory period required by the law.

Counsel also contended that the learned trial Judge erred in law by declining to nullify this illegal sale when the first respondent's application for execution at the High Court, only contained a request for the attachment of movable and not immovable properties as the subsequent warrant of attachment showed. Counsel further argued that it is not in doubt that the public auction was carried out on the 19th February 1999 at 10:00am as detailed in the advertisement of sale in the New Vision newspaper of 30th January 1999 and the return of execution was made by the court bailiff.

Counsel relied on the case of **Uganda Railways Corporation vs Ekwaru D.O and 5104 Others, Court of Appeal Civil Application No. 185 of 2007** where Court held it is settled law that higher appellate courts would not allow an illegality that escaped the eyes of the trial court to cause undesirable consequences. Counsel then submitted that the sale of the suit property was a material illegality and should be set aside and not be allowed to stand.

Counsel further submitted that at the fall of the hammer on the 19th February 1999, the sale by auction was concluded. Further, that according to the law, the payment of the purchase price need not be contemporaneous with the sale as the parties can agree for a payment in the future but this would not negate the fact that there was, in the first place, an invalid sale of the suit property. In support of this submission,

counsel relied on the High Court case of **Moses Kamya & Liberty Construction Ltd (Miscellaneous Application No. 271 of 2010)** which held that an auction sale is concluded at the fall of the hammer and payment of the purchase price can come at a future time.

It is the case of the appellants that the entire execution process was marred with illegalities which the learned trial Judge unfortunately condoned. Counsel relied on the authority of **Makula International Ltd vs His Eminence Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, Court of Appeal Civil Appeal No. 4 of 1981** in which it was held that a Court of law cannot sanction what is illegal and illegality once brought to the attention of the court will over ride all questions of pleadings including admissions made thereon.

Accordingly, counsel invited this Court to hold that the learned trial Judge erred in law in failing to rectify an illegal sale by nullifying the sale and that grounds one and four be allowed.

Arguments for the First Respondent

Counsel submitted that for these grounds to succeed, the appellants must show that the sale was contrary to law which the learned trial Judge correctly considered and found that the suit property attached was a kibanja found on plot M.11 and M.12 in Hoima Town at Kikwite with developments thereon.

Counsel submitted that the law relating to immovable property is

inapplicable in this case since the attachment was of a kibanja which is not and cannot be regarded as immovable property. Counsel relied on the cases of **Lukwago versus Bawa Singh & another [1959] E.A 282; Marko Matovu vs Mohamed Seviri [1979] HCB 174 and Tifu Lukwago vs Kizza and another [1999] EA 142** which held customary rights to consist of usufructuary rights like cultivation of seasonal crops or the grazing of cattle and related construction of wells to water the cattle.

Counsel submitted that there were no illegalities or irregularities in the execution proceedings since the disputed sale was not of immovable property as already argued. Counsel also submitted that the appellants had nonetheless entered into an agreement with the court bailiff to pay the decretal sum in installments with the first payment due by 27th January 1999 and the second payment by 27th February 1999 but they defaulted in the said payments.

Counsel then submitted that the appellants are only trying to deny the respondents the sum due to them of about Ug. shs. 7,000,000/= after waiting thirty (30) years from the date the original suit was filed; yet the appellants have plenty of money at their disposal (in the suit property which was valued at the sum of Ug. Shs. 279,000,000= based on the surveyor's valuation report). Counsel pointed out that the appellant is not in Court with clean hands according to the dictates of equity and that the grounds be dismissed.

Arguments for the Second Respondent

In response to the appellant's submissions, the second respondent

contended that the appellants failed to sustain any of their grounds of appeal and prayed that the appeal be dismissed with costs.

Counsel for the second respondent wholly concurred with the submissions of the first respondent and adopted them as being correct both in law and in fact. The second respondent also referred to and adopted their submissions made in the High Court of Uganda where it was submitted first, that the second respondent was a bona fide purchaser of the property sold at a public auction ordered by Court and that if there were any irregularities, which are denied and not proved, the irregularities did not affect the bona fide nature of the sale. Secondly, that there was no proof of any substantial injury to the appellants by the alleged irregularities.

Relying on the **Indian Code of Civil Procedure** which legal position is re-stated in **Order 22 Rule 71** of **Uganda's Civil Procedure Rules**, counsel for the second respondent submitted that it is trite and established law that;

"Material irregularity or fraud standing by itself is no ground for setting aside a sale. There must be ***substantial injury occasioned by*** *the irregularity or the fraud. Where there is no allegation of substantial injury, the application is not maintainable. If the Court fails to find* ***both*** *irregularity and injury occasioned thereby, it is bound to dismiss the application. In other words, if there be material irregularity or fraud in publishing or conducting the sale, but no substantial loss is occasioned by the irregularity or fraud, the applicant is not entitled to have the sale set aside. The substantial injury alleged by the applicant must be* ***proved****: it cannot be assumed from the mere fact that there was a material irregularity or fraud in*

publishing or conducting the sale. This will not justify the Court in assuming that substantial injury has thereby been caused. Hence, although an application under this rule may prove material irregularity, such as non-specification of Government revenue in the proclamation of sale or inadequate description of the property sold, or the holding of the sale before the expiry of the period prescribed...the sale will not be set aside, unless it is proved that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale. The same rule applies where the sale is impeached on the ground of fraud in publishing or conducting the sale."

Counsel for the second respondent also concurred with the first respondent's counsel that the property in issue which is a kibanja is not immovable property but merely a usufructuary interest or right over the usage of land. Counsel further submitted that the sale was of a kibanja not a sale of land over which the kibanja relates and that the only remedy is a suit for compensation against the person committing the irregularity.

It was also the second respondent's case that the appellants failed to prove that they suffered any injury let alone a substantial one. The only way to have legally prevented the sale was by the appellants satisfying the decree which they did not do and the law had to take its course. It was the second respondent's prayer that this appeal is without merit and should be dismissed with costs.

Duty of Court

This is a first appeal. **Rule 30 (1) (a) of the Judicature (Court of Appeal**

Rules) Directions, S.I. 13-10 (hereinafter referred to as "the Rules of this Court") provides:

"... (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) *reappraise the evidence and draw inferences of fact; and in its discretion, for sufficient reason, take additional evidence..."*

This position has also been well adjudicated on by the Supreme Court which confirmed the holding of the Court of Appeal by **Justice Amos Twinomujuni** in the case of **Frederick J.K Zaabwe V Orient Bank** Civil Appeal No. 04 of 2006 where he held:

"The duty of this court as the first appellate court is well settled. It is to evaluate all the evidence which was adduced before the trial court and to arrive at its own conclusions as to whether the finding of the trial court can be supported .....".

We shall now proceed to address the appeal.

Resolution of Court

We are grateful to all counsel for the submissions and authorities rendered to the Court.

The basis of the appellants' submissions in the High Court and in this appeal is that the execution of the decree obtained by the first respondent was in respect of immovable property and that the said sale was conducted contrary to the law in a period less than the statutory 30 days from the date of advertisement of the sale, and therefore the said sale was illegal. In the ruling of the High Court, the learned trial Judge held

that:

"Premature sale of the property:

The above ground should have been raised before the Registrar. Besides, there was an advert the essence of which was to allow the Applicants salvage their situation which they failed. In fact, the fact that the same was done prematurely could not be blamed on the 1st and 3rd Respondents.

The advert was done by the 2nd Respondent ***(i.e. the bailiff)*** *who is not a party to the proceedings. If there is any blame here it should be on the bailiff. But unfortunately he was struck off from these proceedings. This ground accordingly fails miserably for the above reasons."*

Order 19 (now O.22) Rule 64 of the Civil Procedure Rules, SI 71-1 which was relied on by counsel for the appellant provides as follows:

"64. Time of sale.

No sale hereunder shall take place until after the expiration of at least thirty days in the case of immovable property, and, except in the case of property of the nature described in rule 40(2) of this Order, of at least fifteen days in the case of movable property, calculated from the date on which the public notice of sale has been advertised as provided in these Rules; except that in the case of movable property the judgment debtor may consent in writing to a less period." (Emphasis added)

The learned trial Judge in his decision held that the appellants did not salvage their situation following the notice/ advert of public auction and sale of property. However, considering that the court bailiff was not a party to the proceedings, the learned Judge dismissed this complaint. A

review of the record shows that the bailiff was struck off the proceedings at the High Court before another Judge, the Hon. Justice E. S. Lugayizi following preliminary objections raised by counsel for the bailiffs mainly on the grounds that the said application was brought under Section 35 of the Civil Procedure Act which required that the bailiff be party to the main suit or in the alternative, be a representative of any of the parties to the suit both of which the bailiff was not in this case. Justice Lugayizi found:

> *"...The crucial question to answer is whether the 2nd respondent (a court bailiff) is a party to HCCS 131 of 1989 or a representative of any of the parties to the suit who qualifies to be sued under section 35 of the CPA. Both the Hannington Wasswa (supra) and Francis Nansio Micah (supra) confirm that a court bailiff can neither be referred to as a party to such a suitor, a representative of any of the parties to that suit. In fact those decisions point out that it is improper to join a court bailiff in proceedings brought under section 35 of the CPA. Those decisions further say that it is advisable to sue a court bailiff in a separate suit from the one brought under section 35 of the CPA..."*

The full citations of the cases referred to in that passage of the decision are:

- **Hannington Wasswa & anor V Maria Onyango Ochola & 3 ors Supreme Court Civil Appeal No. 22 of 1993; and**
- **Francis Nansio Micah V Nuwa Walakira Supreme Court Civil Appeal No. 23 of 1994.**

The main thrust of the appeal of the applicant and this ground is that there was noncompliance with the law. That is what the bulk of the

submissions were about. However, a closer look at the proceedings and Judgment at the High Court shows a significant allegation relating to over attachment in that the suit property (a school valued at Ug shs 127,000,000/=) ended up being attached and sold for a decretal amount of just Ug shs 7,982,379/=. The claim relating to over attachment if true is as alarming as it is incredible. It is true that the bailiff was struck out, and we find rightly so, because for purposes of section 35 of the CPA he was not a party to the suit. But like the learned trial Judge Justice Opio Aweri (as he then was) observed that it is trite law that a bailiff is supposed to only attach the property that satisfies the debt. He later found in his Judgment (in substance agreeing with the earlier Ruling of Justice E. Lugayizi in the same matter) that:

"... It is apparent from the application that there could have been excess attachment if it is true that the kibanja has a primary and secondary school, classrooms, dormitories and offices. Unfortunately, the bailiff who did the execution is no longer a party to this application. In the premises ***the remedy available*** *to the applicants would be to file a suit against the bailiff to account for the excess proceeds or undervaluation of the property or any other remedy the applicant would deem fit..."* *(Emphasis ours).*

This is in line with the Supreme Court decision in the **Francis Micah** appeal (Supra). The supporting decision of Justice B. Odoki, JSC (as he then was) is on all fours with this application when he held [while referring to the **Hannington Wasswa Appeal** (Supra)] that:

"...one of the main points decided in that case was that where it is sought to challenge an alleged wrongful or fraudulent execution against a court bailiff, the practice is not to bring an application under section 35 of the Civil Procedure Act but to file a separate suit..."

It is not clear in our mind why the present appellant did not take cue from all these authorities and guidance from the Court when the same were made available to him. This was a missed opportunity.

As to the issue of noncompliance with the law (Order 22, r 64 of the CPR) by the present respondents with regard to premature sale of the suit property the facts and law are clear. The facts of the instant case are that the appellant's kibanja were sold before the expiration of the 30 days required by law. We disagree with the respondent that the kibanja does not comprise immovable property and that there was thus no need to comply with O. 22, r. 64 of the CPR. According to the court bailiff's report, there was even a payment schedule agreed upon between the appellant and the bailiff which was consequently not followed allegedly due to the interference of the Resident District Commissioner of Hoima district.

On this matter the learned trial Judge found that:

> *"The advert was done by the 2nd Respondent (i.e. the bailiff) who is not party to the proceedings. If there is any blame here it should be on the bailiff..."*

He then dismissed the ground in the Motion against the present respondents.

We agree with this finding of the learned trial Judge because the main actor throughout the evidence with regard to noncompliance was the bailiff.

Accordingly Grounds 1 and 4 are dismissed.

Ground Two:

The learned trial Judge erred in law and fact when he failed to hold the first respondent liable for the excessive attachment in execution of the decree in Civil Suit No. 131 of 1989

Arguments for the Appellants

Counsel submitted that although the learned trial Judge rightly cited the law in relation to the issue of excessive attachment, he arrived at an erroneous finding on the facts presented to Court. Further, that the learned trial Judge rightly relied on the authority of **Abdillah Shrwa vs Sheikh Mohamed Hay Ahmed CA No. 1 of 1976 (Court of Appeal of East Africa)** where it was held that only property as appears sufficient to satisfy any decree which may be passed in the suit can be attached, and that the order should have been limited to property to the value of the amount claimed in the suit.

Counsel further submitted that much as the learned trial Judge held that there could have been excess attachment if it is true that the kibanja has a primary and secondary school, classrooms, dormitories and offices, he should, at the least, have called for additional evidence to establish the correct value of the said property. Counsel stressed that there was evidence available to the learned trial Judge like evaluation reports and photographs to prove that those structures were on the kibanja.

Counsel argued that much as the court bailiff had been cut out by Court from being a party, it did not stop the honorable trial Court from doing

what is right by holding the first respondent liable for the excessive attachment in execution of the decree in Civil Suit No. 131 of 1989. To buttress this point, counsel relied on the case of **Francis Nansio Micah vs Nuwa Walakira SCCA No. 24 of 1994** (relying on the Kenyan case of *Blasio Simiyu vs Wanyala Sinion (1982 - 1988) 1 KAB 630* and the case of *H. Wasswa & anor vs M. Onyango Ochola & anor, C.A 22 of 1993*) which is to the effect that the applicant for execution puts the execution process in motion and where the applicant points out property to the court bailiff his responsibility of liability is even greater. Counsel faulted the learned trial Judge for ignoring this decision and yet it was made available in the trial court which caused a miscarriage of justice to the appellants who thus contend that this ground ought to succeed.

Arguments for the First Respondent

Counsel contended that the learned Judge did not err in declining to hold that there was excess attachment and invited this Court to review the affidavit of the bailiff in the supplementary record of appeal. Counsel submitted that the bailiff described the property and the Survey Group and Associates valuation report applied to it which gives the value of Ug. Shs. 10,000,000= for the non-titled land (kibanja).

Counsel also submitted that in the application for execution, the first respondent described the property as kibanja on plots with expired leases and derelict, delegated buildings according to his personal impression and visual identification since he was not the one who valued the land. Counsel further submitted that the learned trial Judge correctly pointed out that the remedy to the first respondent was to file a suit

against the bailiff for undervaluation of the property. Counsel submitted that the evidence on record shows that there was no excessive attachment and that the learned trial Judge rightly held that there could have been excessive attachment if the kibanja had schools, offices and dormitories. Counsel argued though that these properties remained with the local authorities and ownership in the land was left intact so only the right to use the land was acquired.

Counsel submitted that this ground also fails.

Arguments for the Second Respondent

The submissions of the second respondent did not directly address this issue of excessive attachment but counsel concurred with the first respondent's submissions on the same.

Resolution of Court

The ground for determination here is that there was excessive attachment of the appellant's immovable property comprised in plot M.11 and M.12 in Hoima Town at Kikwite with developments thereon like a primary and secondary school, classroom blocks, dormitories and offices.

We have already dealt with the bulk this Ground while resolving Grounds 1 and 4 of this appeal. It is for the bailiff to account for the proceeds of any excessive execution and in our view not the judgment creditor who can only receive what is due to him or her in decree of court.

That being the case this Ground also stands dismissed.

Ground 3:

The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record that clearly implicated the respondents as parties to the fraudulent sale of the attached property in Civil Suit No. 131 of 1989.

Arguments for the Appellant

Counsel contended that had the learned trial Judge properly addressed his mind to the evidence on record, he would have found that the appellants had discharged the required standard of balance of probability and that the warrant issued was faulty having not been applied for.

Counsel submitted that the first respondent applied to execute a decree in HCCS No. 131 of 1989 by way of attachment and sale of the appellants' movable property to recover a decretal sum of Ug shs. 7,682,739/= plus further costs of ug shs 50,000/=, and that the application was granted in favour of M/s Mugenyi & Co. Advocates.

Counsel further contended that the learned Registrar instead granted the order of attachment and sale of immovable property whereas the judgment creditor's application for attachment was in respect of movable property. That consequently, whatever emanated from the said illegality was a grave error which nullified the attachment and sale of the appellants' immovable property conducted by Corridor Agencies & Court Bailiffs.

It was also submitted that the learned trial Judge ignored logical

evidence presented that the second respondent (a company) was formed to enable the first respondent acquire the immovable property which pointed to apparent fraud thus leading to a miscarriage of justice. Secondly, the learned trial Judge was also faulted for ignoring the fact that the learned Registrar had issued a stop order against the illegal sale of the excess attachment but turned around after the order was ignored to again give a contradictory order that the property be delivered to the 2nd respondent. To support this submission, counsel relied on the case of **Amrit Goyal vs Harichand Goyal & 3 ors, Court of Appeal (Civil Application No. 109 of 2004)** that a court order must be obeyed unless set aside or varied, as to allow its disobedience would lead to destruction of authority of judicial orders.

Thirdly, counsel contended that the learned trial Judge erred in ignoring valuation reports concerning the value of the land submitted by Corridor Agencies & Court Bailiffs and the appellants showing material discrepancies between the value affixed to the suit property and the value declared by the respondents.

Fourthly, counsel submitted that the learned trial Judge failed to consider the consent entered into by the appellants and the first respondent's agent, the court bailiff regarding the modalities of payment. That even before the due date of the first installment on 27th February 1999, the property was sold on 19th February 1999 in order to unjustly enrich themselves to the detriment of the appellants.

Counsel prayed that this ground be allowed.

Arguments for the First Respondent

In reply, counsel re-emphasized that the facts do not disclose any illegality in the sale because this was not a sale of immovable property.

Concerning proof of fraud, counsel contended that the appellant's production of registration documents bearing the signature of the first respondent as a witness to the signatures of promoters of the company was no proof of fraud considering that a witness is not a member of a company by virtue of just witnessing signatures of promoters of any given company.

Counsel submitted that the learned trial Judge properly and correctly addressed the law and facts in relation to the allegation of fraud from pages 105 to 106 and found no proof of actual fraud or evidence to pin the current second respondent of dishonesty or adverse conduct in the transaction.

Counsel further submitted that in matters of this nature where fraud is alleged in proceedings under Section 34 of the Civil Procedure Act, it is incumbent upon the appellant to prove fraud to the required standard and subject the deponent of affidavits contesting claim to cross-examination. Counsel relied on the case of **Haba Group (U) Ltd, Deo & Sons Properties Ltd, Twinamatsiko Gordon t/a Tropical General Auctioneers and Margaret Muhanga Mugisa vs Uganda Broadcasting Corporation, (SC) Civil Appeal No. 03 of 2014** which is to the effect that where an appellant fails to apply to Court to treat the application as a suit under S. 34(2) of the Civil Procedure Act to be

allowed to adduce oral evidence and to cross-examine the respondent's witnesses on the supporting affidavit, they consequently cannot blame the Court.

Counsel contended that the appellants' valuation report was contradicted by the court bailiff producing a report of the Valuer engaged just before the sale, which evidence was never challenged or contradicted in cross examination. Accordingly, counsel prayed that this ground also fails.

Arguments for the Second Respondent

Counsel associated themselves with the first respondent's submissions on this ground and made similar prayers.

Resolution of Court

In determining this ground, we find that the learned trial Judge did consider the elements of fraud in accordance with the case of **Frederick J. K Zaabwe vs Orient Bank Ltd & 5 others, SCCA No. 4 of 2006** where it was held that fraud must be actual fraud and attributed to the transferee.

In the book, **Equity & Trusts (Law Africa, 2011)** by **D.J Bakibinga**, at pages 232 and 233, the case of **Ajani v Okusaga (Keaton & Sheridan)** at page 119 is instructive in distinguishing fraud at common law and at equity. **Fakayode, J** held thus:

> *"Fraud or deceit at common law is a misrepresentation of fact made either knowingly, or without belief in its truth, or reckless not caring whether it was*

true or false. Fraud at common law is often referred to as actual fraud but fraud in equity is referred to as constructive fraud. Whilst actual fraud or common law fraud relates to statements or misrepresentation of fact, ***constructive fraud or fraud in equity relates to conduct or transactions in respect of which the court is of the opinion that it is unconscientious of a person to avail himself of the legal advantage he has obtained.***" *(Emphasis added)*

Furthermore, **Halsbury's Laws of England, Vol. 16, para 666** at page 618 states that:

> ""*Fraud" in its equitable context does not mean, or is not confined to deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties. It is victimization, which can consist either of the active extortion of a benefit or* ***of the passive acceptance of a benefit in unconscionable circumstances.*** *The general principle is that if a party is in a situation in which he is not a free agent and is not equal to protecting himself, a court of equity will protect him. In all these cases, there might also be circumstances of contrivance or* ***undue advantage implying actual fraud***" *(Emphasis added)*

In this regard the learned trial Judge found (at page 106 of the record) that the fact that the first respondent witnessed the registration of the second respondent company does not mean that the first respondent had an interest in it beyond professional instructions to do so. He therefore was unable to attribute any fraud on the first respondent. We agree. Indeed there is nothing on the record that would point to fraud by the first respondent. All we see is an old and bitter dispute with regard to an access road.

As to the second respondent the learned trial Judge found:

"....The applicants have not adduced any evidence to pin the 3rd Respondent of dishonesty, infidelity or adverse conduct in the transaction..."

We also agree with this finding as a reevaluation of the evidence at the hearing indeed shows no evidence of fraud.

This Ground too fails for those reasons.

Final result

All Grounds having been dismissed this appeal fails and is dismissed. Before we take leave of this old and acrimonious dispute we need to observe that the appellant could have saved himself a lot of agony by paying what, in light of his assets, was a small judgment award to the first respondent given that he even signed a payment schedule with the bailiff. That however is not to find that the bailiff acted correctly.

Given the age of this dispute and the apparent unresolved issues about the conduct of the bailiff who was struck out of this matter on a technicality, we order that each party bear its own costs.

We so Order.

Dated at Kampala, this ....01st.... day of ....June....2018.

HON. JUSTICE REMMY KASULE

Justice of Appeal

HON. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

HON. JUSTICE ELIZABETH MUSOKE

Justice of Appeal

2

4/6/18

Kagwa Daniel for the Appellant

Appellant is absent

Gideon Baronda standing in for

Peter Nkurunziza for Resp 1 & 2

Respondent

1st Respondent is absent

Clerk Mellisa Mutesi.

Kagwa: For Ruling

Court: Ruling read out to the

pending in court by D/R

Esta Nambayo

4/6/18