THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 162 OF 2015

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru. M. Kibeedi, JJA)

1. NANSUBUGA SAIDA
2. MUWANGA ABDUL ::**APPELLANTS**

VERSUS

ADMINISTRATOR GENERAL
(THROUGH HIS ATTORNEY BABIRYE SARAH ::::::::::::::::::**RESPONDENT**

(Appeal from the judgment and orders of the High Court of Uganda delivered on 18th September, 2013 in Civil Suit No. 21 of 2003 by Lawrence Gidudu, J)

JUDGMENT OF BARISHAKI CHEBORION, JA

I have had the benefit of reading the draft judgment in this appeal prepared by my learned brother Muzamiru. M. Kibeedi, JA and I agree with him that this appeal ought to be dismissed with costs.

Dated at Kampala this 2nd day of July 2020.

Barishaki Cheborion

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA*]

Civil Appeal No. 162 of 2015

(Arising from High Court Civil Appeal No. 21 of 2003 at Masaka)

BETWEEN

Nansubuga Saida ========== Appellant No.1
Muwanga Abdul ========== Appellant No.2

AND

Administrator General ========== Respondent

(*On appeal from the Judgment of the High Court of Uganda (Gidudu, J.), sitting at Masaka and delivered on the 19th day of September 2013.*)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity to read in draft the judgment of my brother, Muzamiru Kibeedi, JA. I agree with it and have nothing useful to add.

[2] As my brother, Barishaki Cheborion, JA, agrees, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this 2nd day of July 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Egonda Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA]

CIVIL APPEAL NO.162 0F 2015

BETWEEN

1. NANSUBUGA SAIDA }
2. MUWANGA ABDUL } :: APPELLANTS

VERSUS

ADMINISTRATOR GENERAL

(Through his Attorney, **BABIRYE SARAH) :::::::::::::::::::::::::::: RESPONDENT**

(Appeal from the Judgment and Orders of the High Court of Uganda at Masaka [Hon. Mr. Justice Lawrence Gidudu] delivered on the 19th September 2013 in Civil Suit.No.21 of 2003)

JUDGMENT OF MUZAMIRU KIBEEDI, JA

INTRODUCTION:

This is an appeal from the Judgment and Orders of the High Court of Uganda at Masaka (Hon. Mr. Justice Lawrence Gidudu) dated the 18th of September 2013 and delivered by the Registrar of the High Court on 19th September 2013 in Civil Suit No. 21 of 2003

The dispute in this matter revolves around the title of the land comprised in Mailo Register Buddu Block 185 Plot No. 43 at Lukaya measuring approximately 0.20 acres (the suit land). In 1963 the Certificate of Title of the suit land was registered in the names of Paulo Ssaku of Lukaya. On 06.12.1977 the title of the suit land was transferred from the names of Paulo Ssaku into the

names of the Haji Zedi Semuyaga also of Lukaya. At the time of commencement of the suit in the High Court, both Paulo Ssaku and Zedi Semuyaga had long passed on - respectively in 1984 and 1979.

Upon the death of Semuyaga, the Letters of Administration to his estate were granted to Haji Yusuf Sematimba, Abdu Muwanga and Saida Nansubuga. On 07.12.1983 the title of the suit land was transferred from the names of the Late Haji Zedi Semuyaga into the names of the abovestated three administrators of his estate. On the other hand, the Letters of Administration to the estate of the Late Paulo Ssaku were granted to the Administrator General, the Respondent in this appeal. On 25th March 2003 the Respondent instituted Civil Suit No. 21 of 2003 against the three administrators of the estate of the Late Haji Zedi Semuyaga in Masaka High Court seeking recovery of the suit land on the ground that its transfer from the names of Paulo Ssaku into the names of Haji Zedi Semuyaga had been done fraudulently by the Late Haji Zedi Semuyaga. The alleged fraud had been discovered by the respondent in 1994.

The Administrators of the estate of the Late Haji Zedi Semuyaga denied the alleged fraud.

The case was heard inter parties by the High Court. In the course of the trial, one of the administrators of the estate of the Late Haji Zedi Semuyaga namely: Sematimba Yusuf, passed on. The case thereafter proceeded against the two surviving administrators who are the appellants in this matter.

The High Court found that indeed there was fraud in the transfer of the suit land from the names of Paulo Ssaku into the names of the Late Haji Zedi Semuyaga attributable to Haji Zedi Semuyaga. Court accordingly entered judgment against the Appellants and ordered the Registrar of Titles to cancel the names of the Appellants and the Late Haji Zedi Semuyaga from the title of the suit land

and replace them with the original names of Paulo Ssaku. Court further ordered the Appellants to pay the respondent Ugx 30,000,000/= (Thirty Million Uganda Shillings Only) as damages for deprivation of the suit land. Lastly, the Court ordered the appellants to pay the costs of the suit to the respondent.

The Appellants were aggrieved by the decision of the Trial Judge and they appealed to this Court.

REPRESENTATIONS:

During the hearing, the Appellants were represented by Mrs. Zawedde Lukwago while the Respondent was represented by Mr. Mulindwa Ian.

GROUNDS OF APPEAL:

In the Memorandum of Appeal filed by the Appellants in this Court on 21st August 2015, they set out 6 grounds of appeal which were couched as follows:

1. "The learned Trial Judge erred in law by failing to properly evaluate the evidence on record and made erroneous decision to attribute fraud to Haji Zedi Semuyaga and consequently depriving the Appellants from ownership of the suit land comprised in block 185 plot 43.
2. The learned Trial Judge erred in law and in fact when he attributed failure to produce a transfer form on the Defendant yet the Plaintiff opted to withdraw witness summons against the Registrar of the titles who had the custody of the transfer document thus arriving at a wrong decision.
3. The learned Trial Judge erred in law when he relied on circumstantial evidence to shift the burden of proof to the Appellants to prove their case with regards to the existence of the transfer forms.
4. The learned Trial Judge erred in law and in fact when he awarded general damages of Ugx. 30,000,000= to the Respondent basing on a prayer for damages of Ugx. 250,000,000/= when no evidence of loss of such damages of Ugx. 250,000,000= was ever led in Court.
5. The learned Trial Judge failed to properly evaluate the evidence on record and made erroneous decision that the Respondent properly conducted a search at the land office and failed to find a Transfer Form

when no search certificate or evidence for the said search was ever presented to the honourable court.

6. The learned Trial Judge erred in law and in fact when he failed to evaluate that a transfer existed when there was an instrument of transfer on the land title."

APPELLANTS' SUBMISSIONS:

During the hearing of the appeal, the appellants' Counsel adopted, as their submissions in the appeal, the Conferencing Notes which they had filed as part of the Scheduling Procedure of this Court.

In the said Conferencing Notes which were filed in this Court on 28th June 2016, the Appellants raised four issues/complaints about the decision of the lower court which they wanted resolved in the appeal. They were couched as follows:

1. "Whether there was failure to properly evaluate the evidence on record and making an erroneous decision to attribute fraud to Haji Zedi Semuyaga.
2. Whether the learned trial judge could attribute failure to produce a transfer form on the defendants (now appellants) yet the Plaintiff (now respondent) had opted to withdraw witness summons against the Registrar of titles who had the custody of the transfer forms.
3. Whether the Learned Trial Judge could rely on circumstantial evidence to shift the burden of proof to the appellants to prove their case with regards to the existence of the transfer forms.
4. Whether the Learned Trial Judge erroneously assessed and wrongly arrived at the general damages he awarded to the Plaintiff/Respondent"

As far as the 1st issue/complaint is concerned, the Appellants submitted that the Respondent/Plaintiff was bound to prove the existence of the alleged fraud. That without the Plaintiff availing to court the original Transfer Form of the suit land title from Paulo Ssaku to Zedi Ssemuyaga and calling the Registrar of Titles, Ministry of lands, Masaka for questioning in relation to the registration of the Appellants/Defendants on the certificate of the suit land, or even the

registration of the late Zedi Ssemuyaga on the same, the Plaintiff did not discharge the burden of proof to the required standard.

With regard to the 2nd issue/complaint, the Appellants submitted that the Learned Trial Judge was wrong to attribute the failure to produce the Transfer Form onto the Defendants as a basis to decide the suit against them. According to the Appellants, the Plaintiff had both the legal and evidential burden of proof of his allegations. That in law the Defendant does not have any burden to prove anything. That production of evidence by the Defendant is optional. That all that the Defendants in this case needed to do was to discredit the Plaintiff's case through either cross-examining or discrediting the Plaintiff's witnesses. And for this position the Appellants relied on the case of Anti-corrosion Pte Ltd vs Berger Paints Singapore ltd [2012] 1 SLR 427 at 437. The Appellants concluded this issue by submitting that it was wrong for the learned Trial Judge to attribute the failure to produce the Transfer Form onto the Defendants as a basis to decide the suit against them.

As far as the 3rd issue /complaint is concerned, the Appellants invited this Court to look into the evidence and determine whether the learned Trial Judge could rely on circumstantial evidence to shift the burden of proof to the Appellants to prove their case.

When it came to the 4th issue/complaint, the Appellants submitted that the Trial Judge erred to award the respondents general damages of Ugx. 30 Million plus the costs of the suit when there was no evidence or indication as to how much the Defendants were getting from the property.

The appellants concluded their submissions by inviting this court to allow their appeal and set aside the decision of the learned Trial Judge with costs.

RESPONDENT'S SUBMISSIONS:

The Respondent likewise adopted his Conferencing Notes as his Submissions in opposition to the appeal.

As far as the Respondent is concerned, the appeal raised three issues/complaints for determination by the appellate court which he framed as follows:

1. "Whether the trial court failed to properly evaluate the evidence on record thereby reaching a wrong decision attributing fraud to Haji Zedi Semuyaga.
2. Whether the trial court shifted the burden of proof to the Appellants.
3. Whether the trial court made proper assessment of the damages awarded."

As regards the Respondent's first issue, Counsel submitted that the finding by the trial court in the matter to the effect that Hajji Semuyaga was guilty of fraud was a correct decision and was arrived at after properly weighing and evaluating the evidence.

As far as the Respondent's 2nd issue is concerned, the Respondent submitted that the Trial Judge knew very well who had the burden to prove fraud and that he did not at all attempt to shift the burden to the Appellants.

When it came to the Respondent's 3rd issue, Counsel submitted that assessment and award of general damages was within the discretion of the trial court. That the sum awarded of Ugx. 30 Million was a moderate figure which the Trial Judge arrived at after considering the figure prayed for by the plaintiff of Ugx 250 Million and the long period the appellants had had advantage over the suit property. In the respondent's assessment, she believes that the sum awarded of Ugx. 30 Million instead favoured the Appellants.

The Respondent's Counsel ended his Submissions by inviting this Court to dismiss the appeal with costs.

ANALYSIS BY COURT:

The gist of the complaints as raised by both the Appellant and Respondent can be summarised under three issues namely:

1. Whether the learned Trial Judge erroneously shifted to the Appellants the burden of proof of the impugned Transform Form that had been used by the Registrar of Titles to transfer the suit land from Paulo Ssaku to Haji Zedi Semuyaga.

2. Whether, on a proper evaluation of the evidence and application of the law, the learned Trial Judge was not justified in holding that there was fraud in the transfer of the title to the suit land from Paulo Ssaku to Haji Zedi Semuyaga attributable to Haji Zedi Semuyaga.

3. Whether the learned Trial Judge erroneously assessed and awarded the sum of Ugx. 30 Million as nominal damages to the Respondent.

As a First Appellate Court, the duty of this court in an appeal of this nature is to re-evaluate the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10, Pandya Vs R [1957] EA 336, The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015(unreported).**

It is with the above principles in mind that I now proceed to discuss the three issues raised in this appeal as identified by court.

ISSUE NO. 1: BURDEN OF PROOF OF THE IMPUGNED TRANSFER FORM

The first issue was framed as follows: ***Whether the learned Trial Judge erroneously shifted to the Appellants the burden of proof of the impugned Transform Form that had been used to transfer the suit land from Paulo Ssaku to Haji Zedi Semuyaga.***

The Appellants' complaint under this issue appears to be that the Respondent/Plaintiff had the burden to prove the fraud which she alleged. That to discharge that burden, she needed to produce in court the original Transfer Form that had been used by the Registrar of Titles to transfer the suit title from the names of Paulo Ssaku to Haji Zedi Semuyaga. But the Plaintiff did not do so. And neither did she produce in Court the Registrar of Titles for questioning in relation to the registration of the Appellants or Zedi Semuyaga on the Certificate of Title to the suit land. That instead of the Trial Judge finding that by the said omissions the Plaintiff had failed to discharge her burden of proof, the Judge shifted the burden of proof to the Appellants.

The Respondent disagreed with the Appellants' Submissions. She contended that the Trial Judge knew very well who had the burden to prove the fraud and did not at all attempt to shift the burden to the Appellants.

As far as the production in Court of the impugned Transfer Form was concerned, the Respondent submitted that she had no obligation to produce it since it did not exist. That on the contrary, counsel for the Appellants had undertaken before the Trial Court to produce the Transfer Form.

As far as the failure to produce the Registrar of Titles to testify in Court was concerned, counsel for the Respondent submitted that the Appellants were not precluded from re-summoning the Registrar of Titles to testify on their side and to produce the Transfer Forms.

The learned Trial Judge addressed the issue of burden of proof at pages 9-12 of his judgment thus:

> *"In a suit founded on fraud, the Plaintiff has the burden of proof that is beyond the ordinary standard. It is beyond the balance of probabilities. The question I ask, has the Plaintiff discharged this burden? The defence asked me to find that it has not been discharged. Learned counsel for the defence argued that the plaintiff did not avail originals from which the hand writing expert could properly determine whether the signature is forged or not...*
>
> *The importance of transfer forms is found in Section 92 [of the Registration of Titles Act, Cap 230] which provides thus in sub section (1):*
>
> > *92. Form of transfer.*
> >
> > *(1) The proprietor of land or of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act; but where the consideration for a transfer does not consist of money, the words "the sum of" in the forms of transfer in that Schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated.*
>
> *The plaintiff has the onus of proving the fact that there was no transfer form similar to the one in schedule 7 to effect the change in names on the title from Ssaku to Semuyaga. However, her evidence is that the search she made did not yield those results. She only got the application to transfer form plus the title and the lease agreement. Her evidence is corroborated by DW2 who also did a search but only got the same documents that the plaintiff had.*
>
> *What do I infer from this? That the transfer forms never existed meaning there was no legal transfer of land from Ssaku to Semuyaga.*
>
> *During the scheduling conference on 27th March 2006, Mr. Rwalinda, counsel for the defendants informed court that he would produce the transfer forms with leave of court. The trial was held in 2013 and no such transfer forms were tendered in court. No leave was sought to*

tender such forms. Again the irresistible inference here is that such forms did not exist. Am fully aware that the defendant had no duty to prove the case since the onus was on the plaintiff but where a party offers to adduce evidence at the conferencing stage and abandons it without explanation, the court is entitled to conclude that the production of that evidence would be adverse to the defendant.

PW2 was emphatic that he nursed the [Late] Ssaku for 12 years. He was paralysed and could not hold anything. He was an invalid who could not independently go out to sell land to another person. Both Ssaku and Semuyaga lived in Lukaya town and were known to each other. They could not have transacted quietly without the knowledge of Ssaku's handlers.

On the basis of the technical evidence and findings of the two expert witnesses (PW2 and DW2) and further, on the basis of the purported transfer being effected without duly signed transfer forms, and on the basis of the plaintiff's evidence that Ssaku was indisposed and could not have transacted in the land without knowledge or assistance of his handlers, I am inclined to conclude that the transaction that lead to the transfer of land to the benefit of the late Ssaku could only have been obtained by fraud. This evidence is strong enough to prove and has proved the case beyond mere balance of probabilities."

The learned Trial Judge cannot be faulted about how he handled the question of burden of proof of fraud in the instant case. The critical document needed to prove how the transfer of the title of the Suit Land had been made from the names of Paulo Ssaku to Haji Zedi Semuyaga was the Transfer Form. Analysis of the "Ownership Page" of the Certificate of Title which was tendered into Court as Exhibit "PE1" indicates that the impugned Transfer Form had been entered on the Certificate of Title of the Suit Land on 06th December 1977 as Instrument No. Msk 53333. The Plaintiff's claim of fraud in respect of the said Transfer Form was set out in paragraph 11(c) thus:

"11. The Plaintiff will aver that the said transfer of the land from PAULO SSAKU to ZEDI SEMUYAGA was done fraudulently and without the consent of the rightful owner thereof.

PARTICULARS OF FRAUD

(a) ... (Not applicable)

(b) ... (Not applicable)

(c) Obtaining transfer of the Certificate of Title into their names without a transfer executed by the Late Paul SSaku ..." [Emphasis Added]

From the Plaint, the Respondent/Plaintiff had the burden to prove that there was **NO** Transfer Form executed by the Late Paulo Ssaku transferring the Certificate of title of the Suit Land into the names of Haji Zedi Semuyaga. Technically speaking, this is termed as proof of a "negative allegation".

The law as to the burden of proving the negatives is set out in **Sarkar's Law of Evidence** 14th Edition page 1335 which was quoted with approval in the leading Judgment of Hon. Twinomujuni, J.A (RIP) in **Constitutional Petition No. 3 of 1999 Paul K. Ssemwogerere & Another Vs The Attorney General**. It states as follows:

> *"Where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the Onus Probandi by reason of the form of the allegation or the inconvenience of proving a negative. But in such cases a less amount of proof than is usually required may avail. Such evidence as renders the existence of negative probable, may change the burden to the other party. When a negative fact has to be proved, a plaintiff can be expected to do nothing more than to substantiate his action prima facie"*

Said differently, after the plaintiff had pleaded in her Plaint that there was no Transfer Form executed by the Late Paulo Ssaku in favour of the Late Haji Zedi Semuyaba, all that she had to do in order to discharge her burden of proof of the non-existence of the impugned Transfer Form was simply to substantiate her claim and establish a prima facie case that the Transfer Form did not exist. The Trial Judge found that the evidence of the plaintiff was sufficient to discharge the burden of proof thus:

- PW1 Babirye, had searched the Register and did not find the Transfer Form in existence. All that she had got was the Application to Transfer Form which

she had subjected to the Handwriting Expert, PW3 Apollo Ntarirwa for analysis.

- PW2 Vincent Kiribaggwa, who had nursed Ssaku for 12 years while paralyzed and could neither hold anything nor independently go out to sell the Suit Land to another person without the knowledge of his handlers.
- PW3 Ntarirwa, the Handwriting Expert who confirmed that even the Application to Transfer Form that existed in the Lands Registry was not signed by the Late Ssaku.

The learned Trial Judge cannot be faulted in finding that the Plaintiff had discharged her burden proof.

In their Submissions, the Appellants complained that the Trial Judge had erroneously shifted to the Appellants the burden of proof of the fraud alleged by the Respondent/Plaintiff. They further contended that the Appellants/Defendants did not have any burden to prove anything. That all that they had to do was to discredit the Plaintiff's case through either cross-examination or discrediting the Plaintiff's witnesses.

The Appellants' Submissions seem to suggest a misunderstanding of the phrase "burden of proof". The definition of the phrase as set out in **Sarkar's Law of Evidence** 14th Edition at P.1338 which was quoted with approval by Supreme Court in **Election Petition No. 1 of 2001 Dr. Besigye Kizza Vs Museveni Yoweri & Electoral Commission** by Mulenga, JSC, reported in Volume 2 of the Certified Edition of the Judgment at page 380 – 381. It is as follows:

> *"The phrase "burden of proof" ... has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading – the burden, as it has been called of establishing a case. This burden rests upon the party, whether plaintiff or defendant, who*

*substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, or their equivalent, and it is settled as a question of law, remaining unchanged under any circumstances whatever ... (2) The burden of proof as a matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly, throughout the trial, accordingly, as one scale of evidence or the other preponderates ..." (**see Sarkar's Law of Evidence**, 14th Edition, page 1338)."*

The question that arises from the above definition is that in case of the 2nd burden of proof (otherwise commonly termed as the "evidential burden") which may shift during the trial, how does one determine that it has indeed shifted and what is the consequence of its shifting?

The test was put by Lord Hanworth MR. in **Stoney Vs Eastbourne RD Council, 1927, 1 Ch 367 at 397** thus:

"It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence" (see Sarkar ibid at page 1340)"

Commenting further on the consequence of the shifting of the burden of proof, the learned author of Sarkar's Law on Evidence states at page 1340 thus:

"... If the prima facie case is not rebutted by cogent evidence and remains unanswered or the answer given does not create serious doubt in the mind of court, then the burden of proof on the pleadings should be deemed to have been discharged."

Applying the above test to the instant matter, it becomes clear that the moment the Respondent/Plaintiff through the evidence of PW1 Babirye, PW2 Vincent Kiribaggwa and PW3 Apollo Ntarirwa established a prima facie case of non-existence of the Transfer Form duly executed by Paulo Ssaku in favour of Haji

Zedi Semuyaga, the evidential burden shifted to the Appellants/Defendants to rebut the Respondent's evidence by cogent evidence. So the logical question is, what evidence was offered by the Appellants/Defendants in rebuttal?

As far as is relevant to the issue of the Transfer Form, the Appellant's witness produced DW2 Joseph Olanya Okwanga, a Handwriting Expert. As the Trial Judge rightly observed, the evidence of DW2 simply corroborated that of PW1 to the effect that there was no transfer form in the Lands Registry and that the signature attributed to the Late Paulo Ssaku on the Application for Consent to Transfer the Suit Land was forged.

In the premises, I would find that the criticisms against the learned Trial Judge under Issue 1 have no merit.

ISSUE NO. 2: ATTRIBUTION OF FRAUD ONTO HAJI ZEDI SEMUYAGA

The 2nd issue for consideration by this court is: ***Whether on a proper evaluation of the evidence and application of the law, the learned Trial Judge was not justified in holding that there was fraud in the transfer of the title to the suit land from Paulo Ssaku to Haji Zedi Semuyaga attributable to Haji Zedi Semuyaga.***

The complaint of the Appellants under this issue is that the learned Trial Judge erred in attributing the fraud to Haji Zedi Semuyaga when the required degree of proof of fraud was not met by the Plaintiff. Counsel contended that the Plaintiff did not fully prove the alleged fraud on Haji Zedi Semuyaga.

The Respondent disagreed. She submitted that the Trial Court reached a correct decision in finding Haji Zedi Semuyaga guilty of fraud after properly weighing and evaluating the evidence.

The learned Trial Judge correctly set out the law on standard of proof of fraud and attribution of the fraud to the transferee right from the very outset on page 8 of his judgment thus:

> *"It is trite law that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. R.G. Patel Vs Lalji Makanji (1957) E A 314, followed.*
>
> *Fraud must be attributable to the transferee directly or by implication. The transferee must be guilty of some fraudulent act or must have known of such acts by somebody else and taken advantage of such act. See Wambuzi C.J (as he then was) in Kampala Bottlers Vs Damanico (U) Ltd Civil Appeal No. 22/92 (Supreme Court) ..."*

After evaluating the evidence before him, the learned Trial Judge concluded thus:

> *"... on the basis of the technical evidence and findings of the two expert witnesses (PW2 & DW2) and further, on the basis of the purported transfer being effected without duly signed transfer forms, and on the basis of the plaintiff's evidence that Ssaku was indisposed and could not have transacted in the land without knowledge or assistance of his handlers, I am inclined to conclude that the transaction that led to the transfer of land to the benefit of the Late Ssaku could only have been obtained by fraud. The evidence is strong enough and has proved the case beyond mere balance of probabilities.*
>
> *Semuyaga could not have got his name to the title without his participation. His name was registered on the title that belonged to Ssaku and though both are dead, there is no trace of the legal papers to legalise that transaction. I attribute the fraud to Semuyaga as a beneficiary of the registration. It is illogical to say that somebody else committed the fraud but Semuyaga took full benefit of it."*

There is no basis for me to fault the findings and conclusion of the learned Trial Judge. The re-evaluaiton of the evidence of fraud which I did while discussing Issue No. 1 could lead to no other logical conclusion than that the fraud in this case had been proved to the required standard of the law and that it was attributable to the late Haji Zedi Semuyaga.

In many land fraud cases, direct evidence connecting the transferee to the fraud may not be readily available. And this is where the "benefit" principle becomes relevant to resolve the paradox – that is, ***"who is the ultimate beneficiary of the fraud?"***.

In the case of **Fam International Limited & Ahmed Farah Vs Mohamed Hamid El-Fatih, Supreme Court Civil Appeal No. 16 of 1993** the dispute was about the fraudulent incorporation of 1st Appellant company by the 2nd Appellant through backdating its Certificate of Incorporation and baptizing it a name that was identical with that of an already existing company, Fam International Limited.

The actual backdating of the Certificate of Incorporation had been done by one of the Assistant Registrars of Companies and not the 2nd Appellant. Even the other acts of fraud in the incorporation of the 1st Appellant company had been done by officials in the office of the Registrar of Companies. These acts included issuing a General Receipt for the incorporation fees and taxes allegedly made to the Company Registry which was not in use at the time of the fraudulent incorporation; use of a rubber stamp on the Memorandum and Articles of Association of the 1st Appellant company which was not in use at the time of its alleged incorporation and squeezing of the name of the 1st Appellant company in the Company Register in a space that was supposed to be left blank which enabled the 1st Appellant company to be given a serial number of an already existing company.

On the face of it, all those misdeeds had been done by some officials in the office of the Registrar of Companies and not the Appellants. However using the "benefit" principle Justice Odoki (as then was) who wrote the leading Judgment had no difficulty in attributing onto the Appellants the fraud which prima facie

had been committed by the Registry of Companies. In his words, Justice Odoki JSC (as then was) stated:

> *"The officials in the Registry of Companies could not have engaged in these fraudulent actions unless they had been approached by someone outside who stood to benefit by those actions. The person who stood to benefit was the 2nd Appellant ... in the circumstances, it cannot be maintained that the 2nd Appellant was not a party to the fraud, and that the act of a 3rd party was merely imputed on him."*

In the instant case, the learned Trial Judge likewise used the "benefit" principle to attribute the fraud in the transfer of the Suit Land to Haji Zedi Semuyaga as the beneficiary of the registration. I find no reason to fault the learned Trial Judge in that regard. There is no logical reason whatsoever for the officials in the Land Registry to have registered the Late Haji Zedi Semuyaga on the land title of the suit land without a Transfer Form duly executed by the Late Paulo Sakku unless they were moved or compromised by the person who stood to benefit from such mischief namely, the Late Haji Zedi Semuyaga.

ISSUE NO. 3: AWARD OF NOMINAL DAMAGES OF UGX 30 MILLION

The 3rd issue for consideration by this court is whether the Learned Trial Judge erroneously assessed and awarded the respondent the sum of Ug.shs. 30,000,000/= (Thirty Million Uganda Shillings Only) by way of Nominal damages.

The complaint of the appellants under this issue is that the Learned Trial Judge went ahead to award the respondent nominal damages of Ugx. 30,000,000/= when there was no indication as to how much the defendants were getting from the property. The appellants contended that there was no evidence or assistance given to court by the respondents in the assessment of the damages. The appellants ended by inviting this court "to make a finding as to whether the Learned Trial Judge left out some irrelevant matters out of account

or took some irrelevant matters into consideration in awarding damages worth Ugx. 30,000,000/= or totally failed to abide by the principles governing assessment and determination of general damages".

The respondent did not agree. Counsel for the respondent submitted that the general assessment and award of general damages is a discretionary matter. That in the instant case, the trial court had considered the relevant factors before finally making an assessment of Ugx. 30,000,000/= which counsel termed as "a moderate figure" which he believed "was favoring the appellants".

When dealing with the respondent's/plaintiff's claim for general damages for the deprivation of the suit property, the Learned Trial Judge stated thus:

> *"I was asked to award damages of 250,000,000=. I must confess that no evidence was led to suggest this figure. PW1 stated that they have been deprived of the property but she did not indicate by how much she and others have lost. I take into account that this property is to go to the Administrator General who would then distribute it. I was not assisted to make an assessment of the damages and cannot award the wishes of the Plaintiff.*
>
> *Without some indication as to how much the Defendants have been getting from the property, I shall award* ***nominal damages*** *of 30,000,000= plus the costs of this suit."* [Emphasis mine]

It is settled law that for this court, as the first appellate court, to interfere with the trial judge's award of damages, the appellants have to show that the trial judge proceeded on a wrong principle of law or that he misapprehended the evidence in some material respect and thereby arrived at a figure which was inordinately high or low – **See Byabalema & 2 Others Vs UTC (1975) Ltd, Supreme Court Civil Appeal No. 10 of 1993 (unreported) and Administrator General Vs Bwanika James & 9 others, Supreme Court Civil Appeal No. 7 of 2003 (unreported).**

In the instant case, the trial judge carefully chose his words .He termed the damages "nominal damages " .One of the circumstances under which nominal damages can be awarded by court is where the Plaintiff establishes before court that his/her rights have been infringed but he/she fails to prove the actual damage sustained. *See* ***VOL.12 Halsbury's laws of England, 4th Edition, Paragraph 1114***.

And that is the exact the scenario the trial judge was faced with. The respondent/Plaintiff had established a legal right worthy redress namely, wrongful deprivation of the suit property by the appellants /defendants. But the respondent did not furnish court with evidence as to how much they had lost as a result of the deprivation. So the court had no choice but simply to acknowledge that the appellant's right had been infringed upon by way of the nominal damages awarded. I therefore find no reason to interfere with the award of the Learned Trial Judge.

CONCLUSION

In the final result, I would dismiss the appeal with costs to the respondent.

Dated at Kampala this 2nd day of July 2020.

.....

MUZAMIRU KIBEEDI
Justice of Appeal