IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 063 of 2012

In the matter between

IWA RICHARD OKENY **APPLICANT**

VERSUS

OBOL GEORGE OKOT **RESPONDENT**

Heard: 16 April 2019.
Delivered: 9 May 2019.

Civil Procedure *—Judgments —default judgments for un-liquidated claims — suit continues "as if the defendant filed a defence" — where a magistrate is prevented by death, transfer or other cause from concluding the trial of a suit — successor dealing with evidence taken down.*

Evidence *— Expert evidence — an expert is not a witness of fact and his or her evidence is only of advisory character- any document being offered in evidence must be authenticated.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] The respondent sued the applicant for recovery of land measuring approximately 0.364 hectares comprised in plot 5-7 Lagoro Road, Gangdyang, Kitgum Town Council. He sought a declaration that he is the rightful owner of the land, general damages for trespass to land, a permanent injunction, interest on the decretal amount and the costs of the suit. His claim was that he bought the land in dispute on or about 10th April, 1981 from a one Okeny Ceasario and later obtained a 49 year leasehold certificate of title to the land on 1st July, 2004 constituted in LRV 3351 Folio 22. With the permission of the Town Council authorities, he

established a market on the land from which he collects rent. Without any claim of right, the defendant on or about 5th June, 2005 issued a notice stopping the respondent from collecting dues from occupants of the land, claiming that the land belonged to him on basis of the fact that he is the son of the late Okeny Ceasario.

[2] In his written statement of defence, the defendant contended that the land belongs to the estate of his late father, Okeny Ceasario. Upon the death of his father, he was granted letters of administration on basis of which he has a right to claim the land. The respondent took possession of the land in 1987 under the pretext of protecting it for the benefit of the late Okeny Ceasario and the children of the late Okeny Ceasario who by then were minors, when their said father was sentenced to serve a four year term of imprisonment. He therefore counterclaimed for a declaration that he is the rightful owner of the land, that the respondent obtained title to the land fraudulently based on a forged agreement of purchase purportedly signed by the late Okeny Ceasario, an order of cancellation of the title, general damages for trespass to land, a permanent injunction, and the costs of the counterclaim.

The plaintiff's evidence:

[3] P.W.1 Obol George Okot testified that he had occupied the land in dispute for over twenty five years, having purchased it on 10th April 1981 from a one Ceasario Okeny who later died during the year 2005. He proceeded to the Town Council to cause the transfer of registration of that plot from the vendor into his own name. He subsequently applied foe and was granted a leasehold title running for 49 years over the land. He then executed an agreement with the Town Council for operation of a public market on the land. He began collecting rent from tenants in that market, earning shs. 850,000/= per month until 17th June 2005 when he was stopped by an order of the L.C.II Court at the instance of the applicant. The applicant claimed to be the son of Ceasario Okeny.

[4] P.W.2 Odano Sem, testified that in 1981 he drafted the sale agreement between P.W.1 Obol George Okot and the late Ceasario Okeny. He also witnessed its execution in his capacity as Hoe Chief. The agreement was also witnessed by the neighbours of Ceasario Okeny. The wife of Ceasario Okeny, Akidi, affixed her thumb mark on the agreement. P.W.3 Olanya Donasiano testified that he witnessed the execution of the agreement between P.W.1 Obol George Okot and the late Ceasario Okeny. That was the close of the respondent's case.

The defendant's case:

[5] D.W.1 Akidi Carolina Okeny, widow of the deceased Okeny Ceasario testified that sometime in 1978 her late husband authorised the respondent P.W.1 Obol George Okot to be caretaker on his behalf, of the land in dispute to prevent encroachers from occupying it. She was not aware of any transaction of sale of that land between her late husband and P.W.1. She did not witness any such agreement. Two weeks following the death of her husband, she began the process of recovery of the land from the respondent by suing him before the L.C.II Court. D.W.2; Okot Ronald testified that he came to know of the respondent's presence on the land in 1999 when he saw him construct a Church on the land. The suit before the L.C.II Court was decided against the respondent. He was not aware of any survey of the land.

[6] D.W.3 Okeny Iwa Richard testified that in 1981 he was resident in South Sudan. The land in dispute belonged to his late father Okeny Ceasario. When he returned from South Sudan he came to know the respondent as a friend of his late father. He did not know him as a caretaker of the land in dispute and following the death of his late father in the year 2005 he sued the respondent for trespass to that land. He secured a decision in his favour from the L.C.II Court. The Town Council operates a market on that land. He prayed that the land be declared as the property of the family of his late father. The applicant to closed his case. The Court then directed that since D.W.1 Akidi Carolina Okeny

disputed the agreement, the thumb mark on the sale agreement should be forensically analysed and a report submitted to court.

Judgment of the Court below;

[7] In his judgment, the trial magistrate held that the alleged forgery was not proved hence based on the agreement of sale, the respondent lawfully purchased the land in dispute during the year 1981. He lawfully secured a title deed to the land and developed it without any challenge from the father of the applicant. A certificate is conclusive evidence of ownership unless proved to have been obtained illegally, by fraud or in error. None of this was proved to the required standard nor is there evidence attributing any of the vitiating factors to the respondent. The applicant interfered with the respondent's ownership rights when he caused the tenants on the land to stop remitting rent to the respondent. As a result the respondent lost income for six years amounting to shs. 40,760,000/= The counterclaim was dismissed and Judgment was entered in favour of the respondent; he was declared to be the rightful owner of the land, accumulated rent from August 2005 to the date of judgment, general damages of shs. 3,000,000/=, a permanent injunction, and the costs of the suit.

Grounds for seeking revision of the decision;

[8] The applicant was dissatisfied with the decision and sought its revision on the following grounds, namely

1. The learned trial magistrate failed to exercise a jurisdiction vested in him when he failed to enter judgment in favour of the applicant on his counterclaim and dismissed it instead, yet the respondent did not file a defence to it.
2. The learned trial magistrate failed to exercise a jurisdiction vested in him when he did not analyse evidence of a handwriting expert that was

submitted to him, thereby failing to enter judgment in favour of the applicant.

3. The learned trial magistrate acted in exercise of his jurisdiction illegally, or with material irregularity or injustice when he rejected evidence of a handwriting expert that had been received on record by his predecessor magistrate.

The affidavit in reply;

[9] The respondent opposed the application and contended in his affidavit in reply that the written statement of defence was filed out of time. The respondent is the registered owner of the land in dispute and the applicant did not prove a better title to the land. The applicant never sought an interlocutory judgment to be entered on the counterclaim. The evidence relating to the forensic analysis of the fingerprint on the agreement was erroneously received on record after closure of the defence case and the trial magistrate was right to reject it. The decision of the court below is correct and there are no grounds for revising it.

Submissions in support of the application;

[10] Submitting in support of the application for revision, counsel for the applicant argued that the trial court failed in its duty when it did not realise that the respondent had not filed a defence to the counterclaim. Order 8 rule 18 (5) of *The Civil Procedure Rules* provides that in the event of failure to file a defence to a counterclaim, the statement of facts contained therein are deemed to be admitted. The trial magistrate should on that account have entered a default judgment on the counterclaim. Furthermore, the predecessor trial Magistrate had directed for forensic examination of the finger print attributed to D.W.1; Akidi Carolina, widow of the deceased Okeny Ceasario on the agreement of purchase presented by the respondent. A report was furnished to court but the successor trial Magistrate erroneously rejected it, since he did not have jurisdiction to do so.

The trial Magistrate erred when he shifted the burden of proof of the authenticity of that agreement to the applicant since the applicant had refuted its validity.

Submissions opposing the application;

[11] In response, counsel for the respondent submitted that the application is wrongly titled as "The High Court of Gulu at Gulu." There was no need to respond to the counterclaim since it was not accompanied by the particulars required by Order 8 rule 2 (2) of *The Civil Procedure Rules*, i.e. a summary of evidence, lists of witnesses, documents and authorities. The applicant did not apply for a judgment in default. The evidence of the handwriting expert was irregularly received on record after closure of the defence and was rightly rejected by the trial magistrate after an exhaustive evaluation. He prayed that the application be dismissed with costs to the applicant.

The Court's jurisdiction on revision;

[12] Section 83 of the *Civil Procedure Act*, *Cap 71* empowers this court to revise decisions of magistrates' courts where the magistrate's court appears to have; (a) exercised a jurisdiction not vested in it in law; (b) failed to exercise a jurisdiction so vested; or (c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. It entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court, after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case or involving a miscarriage of justice occurred, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

A revision therefore is not a substitute for an appeal;

[13] As a preliminary observation, I note that the judgment sought to be revised was delivered on 31st May, 2012. The applicant filed a notice of appeal on 1st June, 2012 but to-date has never filed a memorandum of appeal. The applicant instead has sought revision by way of the instant application which he filed on 9th July, 2012.

[14] Frequently a litigant is confronted with two or more courses of procedure to obtain the desired result. In some cases the choice of the procedure involves an election of one remedy to the exclusion of the other; while in other cases the litigant can pursue either or both to judgment, but have only one satisfaction of the claim. It is trite that litigants are at liberty to choose one out of several means afforded by law for the redress of an injury, or one out of several available forms of action. An election of remedies arises when one having two coexistent but inconsistent remedies chooses to exercise one, in which event he or she loses the right to thereafter exercise the other. The doctrine provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has chosen one of them. The doctrine of election of remedies is only applicable when a choice is exercised between remedies which proceed upon irreconcilable claims of right.

[15] Recourse given to litigants of revision and appeal is not the same. While an appeal arises as of right as conferred by statute, the power of revision is discretionary to the court. A right of appeal means that a rehearing will be made as on fact as well as law where the appellate Court functions and powers are similar to those of the Court of first instance, while revision on the other hand is supervisory and discretionary in nature limited to the determination of the legality or propriety of any finding, sentence or order recorded, imposed or passed by a magistrate's court, on grounds of a failure to exercise a jurisdiction vested, wrongful or illegal exercise of jurisdiction i.e. in breach of some provision of law,

or exercise of jurisdiction with material irregularity i.e. by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.

[16] The power of revision may be invoked by a court on its own, but an appeal can only be initiated by a litigant. Unless there is a failure to exercise jurisdiction, or exercise of a jurisdiction not vested in the court, or unless there is illegality or irregularity in the exercise of a court's jurisdiction, an appeal would be the more appropriate remedy to challenge a wrong decision. It is only if an erroneous decision of a magistrate's court resulted from its exercise of a jurisdiction not vested in it by law, or of failure to exercise the jurisdiction so vested, or of acting with material irregularity or illegality in the exercise of its jurisdiction, that a case for invoking the powers of revision by the High Court is made out. Revision arises from a complaint relating only to the illegal, irregular or improper exercise of, or failure to exercise jurisdiction (see *Matemba v. Yamulinga [1968] EA 643*). The section is not directed against conclusions of the law or fact in which the question of jurisdiction is not involved. An appeal should be preferred instead in cases where the argument merely is that the decision was an erroneous determination of questions of law and / or fact.

[17] A revision therefore is not a substitute for an appeal. The High Court revisional power under section 83 of *The Civil Procedure Act* is limited to cases where no appeal lies (see *Abdal Hassan v. Mohamed Ahmed [1989] TLR 181*). In any event, the advantages of one remedy over the other depend on the facts in each particular case and the circumstances of the parties. The two courses are different and inconsistent and the election of one bars the right to pursue the other. It is for that treason that the applicant's notice of appeal filed on 1st June, 2012 but to-date has never been followed up with a memorandum of appeal is hereby struck out with costs to the respondent.

First Issue; whether failure to enter a default judgment was an error.

[18] The first ground of argument raised by counsel for the applicant is that the trial magistrate failed to exercise a jurisdiction vested in him when he failed to enter judgment in favour of the applicant on his counterclaim and dismissed the suit instead, yet the respondent did not file a defence to the suit. While it is correct that Order 8 rule 18 (5) of *The Civil Procedure Rules* provides that in the event of failure to file a defence to a counterclaim, the statement of facts contained therein are deemed to be admitted, Order 13 rule 6 of *The Civil Procedure Rules*, provides that any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just. Upon such application, the trial court has the option of entering a partial or default judgment and thereafter proceed with the trial with a view to pass a final decree. The applicant though did not move the trial to take that course. The court therefore cannot be faulted for having continued with the trial to its conclusion, without first entering a partial or default judgment on the counterclaim.

[19] Secondly, although it is true that an allegation of fact not specifically traversed will be taken to have been admitted, whether this was intended or not, and that once treated as admitted, the party who makes it need not prove it, and that a party who makes an allegation of fact admitted expressly or constructively need not prove the fact admitted by his or her opponent (see *Pioneer Plastic Containers Ltd v. Commissioner of Customs and Excise [1967] 1 All E R 1053*), under Order 9 rule 10 of *The Civil Procedure Rules,* where a suit is not for a liquidated demand, in case a party does not file a defence on or before the day fixed therein, the suit has to proceed as if that party had filed a defence. The implication is that in a suit such as this where the claim was not for a liquidated

claim, the applicant bore the burden of proof of all allegations made in the counterclaim, as if the respondent had filed a defence to it.

[20] Lastly, although allegations of fact admitted constructively need not be proved, by reason of the fact that fraud requires a heightened standard of proof, unless it is expressly admitted it should be proved by evidence that can be tested under cross examination. Fraud consists of; (i) a material representation of a presently existing or past fact, (ii) made with knowledge of its falsity and (iii) with the intention that the other party rely thereon, (iv) resulting in reliance by that party (v) to his or her detriment. It requires more than a mere balancing of doubts or probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation (see *Busuulwa Sebuliba v. Cooperarive Bank Ltd. [1982] HCB 129*; *Hannington Wasswa v. Maria Onyango Ochola ans others, S. C. Civil Appeal No. 22 of1993; [1994] IV KALR 98* and *Kampala Bottlers Ltd v. Daminico Ltd, S. C. civil Appeal No.22 of 1992*). The applicant did not adduce evidence of that nature. Consequently the first ground fails

Second issue; Whether the court misdirected itself regarding the handwriting expert's report.

[21] The second ground of argument raised by counsel for the applicant is that the learned trial magistrate failed to exercise a jurisdiction vested in him when he did not analyse evidence of a handwriting expert that was submitted to him thereby failing to enter judgment in favour of the applicant. He argues further in the third ground that the learned trial magistrate acted in exercise of his jurisdiction illegally, or with material irregularity or injustice when he rejected evidence of a handwriting expert that had been received on record by his predecessor magistrate. This occurred after the predecessor magistrate had on his own volition after closure of the defence case, directed the thumb print attributed to

the applicant on the disputed sale agreement to be subjected to forensic analysis by a thumb print expert.

[22] Under Order 18 rule 11 (1) of *The Civil Procedure Rules*, where a magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his or her successor may deal with any evidence taken down as if the evidence had been taken down by him or her or under his or her direction under those rules, and may proceed with the suit from the stage at which his or her predecessor left it. It is in that account that the trial magistrate evaluated and rejected the evidence. I find that the trial magistrate did not err in the way he dealt with that evidence for the reasons stated hereinafter.

[23] Firstly, the judicial system in Uganda uses the adversary system of trial when resolving disputes. It is a system based on the notion of two adversaries battling in an arena before an impartial third party, with the emphasis on winning. Under the guidance of court, which ensures that rules of evidence and procedure are followed, the two adversarial parties have full control over their respective cases. This means that they are responsible for pre-trial procedures, and preparation and presentation of their respective cases during the trial. It is their duty to gather evidence, to organise and present witnesses. The role of the judicial officer is to decide which evidence is admissible, and what evidence is inadmissible, and therefore to be excluded from the trial. Under Order 18 rule 13 of *The Civil Procedure Rules*, the court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him or her as the court thinks fit. Similarly under section 164 of *The Evidence Act*, a judicial officer may, in order to discover or to obtain proper proof of relevant facts, ask any question he or she pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant.

[24] The court is given wide discretionary powers under both Order 18 rule 13 of *The Civil Procedure Rules* and section 164 of *The Evidence Act* to recall witnesses. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice either party. Once the court decides that certain evidence is essential for the just determination of the case, then it may recall a witness or witnesses to give that evidence whatever its effect is likely to be, provided that the parties are allowed to exercise their right to cross-examine any such person, and the court should adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness. This provision is not a license to a court to summon witnesses at its own, motion who have not been summoned by either party. A judicial officer should not *proprio motu* summon witnesses not called by either party. The power must be exercised sparingly and only in suitable cases where the just decision of the case demands it. Essential to an active and alert mind and not to one which is bent to abandon or abdicate.

[25] There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts. Whereas the court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed, that jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safeguards.

[26] Whether the requirements of justice command the examination of any person will depend on the facts and circumstances of each case. The Court must examine the facts and circumstances of the case before it, and if it comes to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a

failure of justice without such evidence being considered, such that action on its part is justified, then the Court must exercise such power. The compelling reason for the court to "to act in aid of justice" in the particular case ought to be stated on record. It may for example be resorted to where there has been negligence, laches or mistakes by a party not examining material witnesses. The court's function to render just decision by examining such witnesses would be an appropriate justification. "After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better" (see the decision of the Supreme Court of India in *Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110*).

[27] In the instant case, the trial magistrate did not on record, justify his decision to act in aid of justice by calling additional evidence of an expert. There may not necessarily be a failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The court is not empowered to compel either party to examine any particular witness. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. When a court *proprio motu* summons an additional witness, not because the just decision of the case requires it, but only for purposes of filling up a gap or lacuna in either party's case or for corroboration of the evidence, it descends into the arena. That report was not essential to the just decision of the case.

[28] On the other hand, according to Order 18 rule 5 of *The Civil Procedure Rules*, the evidence of each witness has to be taken down in writing by or in the presence and under the personal direction and superintendence of the judge (or magistrate), not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge (or magistrate). The provision envisages recording of evidence of a witness present in open Court. The implication is that unless admitted by the consent of both parties, or by

affidavit or upon return of evidence recorded on a commission issued by court, a document cannot be ordered to form part of evidence unless the author thereof, or a person competent to tender it in evidence, enters the witness box and confirms that the contents of the document are as per his or her testimony and that statement is made on oath to be recorded by following the procedure prescribed under this rule. The author of the report never testified in court.

[29] Secondly, documentary evidence, like any other kind of evidence, is subject to fabrication and falsification. Documents can be altered to misrepresent the facts. For a document to be admitted into evidence there should be evidence that the document tendered is the one that was signed and that it has not been altered. It should be free from distortion and misrepresentation which could affect the admissibility and weight afforded to it. There must be evidence from a witness to establish that it accurately and fairly depicts what it purports to show. It is best if the evidence is sought to be introduced through a witnesses who is the primary source for all of the facts depicted or conveyed in it. Consequently, any document being offered in evidence must be authenticated: a witness must offer evidence establishing that the document is what that witness claims it is.

[30] Thirdly, an opinion given of analysis of finger impression requires proof that the person who undertook the analysis was specially skilled in that field. No one may be allowed to give evidence as an expert unless his or her profession or course of study gives him or her more opportunity of judging than other people (see *R v. Silverlock [1894] 2 Q.B. 766*). Unless his or her attendance is waived by the opposing party, the expert witness must be subjected to cross-examination in court. Mere submission of opinion by an expert through any certificate or any other document is not sufficient. Although expertise could be gained from either a field of study or as a result of practical experience, before a court admits evidence of an expert it must be satisfied that the witness has the appropriate expertise. The court is expected to rule on the qualifications of an expert witness,

relying mainly on what the expert himself or herself explains. In the instant case that expertise was not established by evidence.

[31] It is now accepted that an opinion of an expert witness will not be admitted as evidence unless that evidence relates to a field of expertise. It was not explained whether a person described as a handwriting expert also had expertise in finger print analysis. Moreover an expert is not a witness of fact and his or her evidence is only of advisory character. An expert therefore deposes and does not decide. It is incumbent upon an expert witness to furnish the court with the necessary scientific criteria for testing the accuracy of his or her conclusion so as to enable the court to form its independent judgment by application of the criteria to the facts proved by the evidence. The court will not take opinion of fingerprint expert as conclusive proof but must examine his or her evidence in the light of surrounding circumstances in order to satisfy itself about the findings made.

[32] For that reason an expert opinion can be rejected if it is inconsistent with the rest of the evidence available to court, where the inconsistency between the two is so great as to falsify the opinion. Expert evidence is opinion evidence and it cannot take the place of substantive evidence. On the question of the handwriting or fingerprint of a person, the opinion of a handwriting expert is relevant, but it is not conclusive and handwriting or finger print of a person can be proved by other means, for example by a person who saw someone writing or signing a document.

[33] The weight to be attached to an expert opinion depends on whether there is a demonstrably objective procedure that guided the expert to reach the opinion proffered. A court will not act on the opinion of the expert unless the facts upon which the opinion is based are proved in evidence. The report of an expert is not admissible unless the expert gives reasons for forming the opinion and his evidence is tested by cross-examination by the adverse party. Certain procedure and formalities must be followed when dispatching packed exhibits or physical

evidence to experts. It ensures identity and continuity and above all question of integrity of such exhibits. There is no evidence on record as to whether the standard protocols were followed. I have examined the trial record and found that the trial magistrate analysed the expert report at length and rightly found it to be inadmissible.

Third issue; Whether the decision against the applicant was erroneous.

[34] The trial magistrate was criticised for having decided against the applicant. Section 59 of *The Registration of Titles Act*, guarantees that a title deed is conclusive evidence of ownership of registered land. A title deed is indefeasible, indestructible or cannot be made invalid save for specific reasons listed in sections 64, 77, 136 and 176 of *The registration of Titles Act*, which essentially relate to fraud or illegality committed in procuring the registration. In the absence of fraud on the part of a transferee, or some other statutory ground of exception, a registered owner of land holds an indefeasible title. Accordingly, save for those reasons, a person who is registered as proprietor has a right to the land described in the title, good against the world, immune from attack by adverse claim to the land or interest in respect of which he or she is registered (see *Frazer v. Walker [1967] AC 569*).

[35] Fraud within the context of transactions in land has been defined to include dishonest dealings in land or sharp practices to get advantage over another by false suggestion or by suppression of truth and to include all surprise, trick, cunning, disenabling and any unfair way by which another is cheated or it is intended to deprive a person of an interest in land, including an unregistered interest (see *Kampala Bottlers Limited v. Damanico Limited, S.C. Civil Appeal No. 22 of 1992*; *Sejjaaka Nalima v. Rebecca Musoke, S. C. Civil Appeal No. 2 of 1985*; and *Uganda Posts and Telecommunications v. A. K. P. M. Lutaaya S.C. Civil Appeal No. 36 of 1995*).

[36] In seeking cancellation or rectification of title on account of fraud in the transaction, the alleged fraud must be attributable to the transferee. It must be brought home to the person whose registered title is impeached or to his or her agents (see *Fredrick J. K Zaabwe v. Orient Bank and 5 others, S.C. Civil Appeal No. 4 of 2006 and Kampala Bottlers Ltd v. Damanico (U) Ltd., S.C. Civil Appeal No. 22of 1992)*. The burden of pleading and proving that fraud lies on the person alleging it and the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*). The applicant was unable to provide evidence capable of impeaching the respondent's title.

[37] Finally, by virtue of section 5 (b) and Item One of the Second Schedule of *The Executive Committees (Judicial Powers) Act* then in force, Land disputes relating to customary tenure, governed only by customary law. Since the land in dispute was comprised in LRV 3351 Folio 22 plot 5-7 Lagoro Road, Gangdyang, Kitgum Town Council and the title deed having been issued on 17th March, 2005, the L.C.II decision of 3rd August, 2005 that decreed the land to the applicant was null and void. The applicant could not rely on it to justify his interference with the respondent's ownership rights..

Order :

[38] In the final result, there is no merit to the application. It is dismissed and the costs of the application and of the court below were awarded to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : Mr. Lloyd Ocorobiya.

For the respondent : Mr. Guma Davis.