IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 0012 of 2019

In the matter between

AUMA LILLIAN **APPELLANT**

And

DAVID LIVINGSTONE LAKONY **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Land law *— Joint tenancy — unlike joint tenancies where each co-owner is equally and "wholly entitled on the whole" to the estate in tenancies in common the co-ownership arrangements are such that each of the co-owners holds a distinct share, or proportion of the property. — While a joint tenancy requires the presence of the so-called "four unities" in order to exist; that of possession, interest and time while the only unity which exists between tenants in common is the unity of possession. The unity of possession in a tenancy in common may be divided between co-owners, meaning that each co-owner has a separate ownership share in the property — unlike joint tenants, with tenancies in common ownership interests do not have to arise at the same time. One person may own the property to begin with and then transfer or sell an ownership interest in the property at a later date.*

Evidence*— Expert witnesses — 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 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. The court must explore whether or not the examination*

procedure used complies with the relevant protocols and whether there is a contradiction between the report and the testimony in court.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued the respondent for trespass onto land comprised in LRV 208 Folio 20 Plot 7 "B" Nehru Road Gulu District, a declaration that the property belongs to the appellant, an order of eviction, permanent injunction, general damages for trespass to land, *mesne* profits, interest and costs. The appellant's claim was that during or around October, 1995, the appellant and the respondent agreed to jointly purchase the property in dispute as tenants in common. By their agreement, the appellant was to take part "B" while the respondent was to take Part "A" of the said property. On basis of that agreement, the appellant contributed shs. 7,500,000/= to the purchase price. Following the purchase, the appellant during the year 2011 permitted the respondent to collect rent from the property but has since then fraudulently retained the rent collected from the appellant's part of the property. Without her authority, the respondent held out as owner of the entire property and let out the appellant's side of the property to his co-defendants. As a result the appellant incurred loss of rental income amounting to shs. 16,600,000/= at the time of filing the suit.

[2] By his written statement of defence, the respondent refuted the appellant's claim. The respondent denied existence of the alleged agreement of joint purchase. He averred that he was a sitting tenant of the property when on 28th March, 1995 he applied to the Departed Asians Property Custodian Board for its purchase in his sole name. It is on that basis that on 6th April, 1995 he executed an agreement of purchase with the Departed Asians Property Custodian Board. He has since then been paying all taxes, rates and other property dues. He has been undertaking repairs of the building as well. The appellant only came to the premises during the period of insurgency when the responded house her parents on part "B" of

the premises. The respondent did not commit any fraud in letting out the premises as sole owner thereof. It is the appellant's actions which are fraudulent in that the documents she relied upon to support her claim are forgeries.

The appellant's evidence in the court below:

[3] P.W.1 Auma Lillian testified that the respondent is her Aunt's son. The building on the land in dispute has two doors; "A" and "B." While she purchased that identified as "B" the respondent purchased the other identified as "A." She purchased hers' in 1998 from the Departed Asians Property Custodian Board. This was after the respondent's wife had showed her a letter dated 8th September, 1995 (exhibit P. Ex.1(a) – requiring the respondent to pay the outstanding balance of approximately shs. 10,000,000/= of the purchase price by 22nd December, 1995 by monthly instalments of not less than shs. 2,500,000/=) indicating that she had up to December to clear the outstanding balance of the purchase price. She gave the respondent's wife shs. 3,000,000/= and later handed shs. 7,500,000/= on 1st October, 1995 while in Kampala (exhibit P. Ex.1). It was agreed that by that contribution, she would take part "B" while the respondent would take part "A" of the property and that the title deed was to be registered in both their names. The respondent then wrote a letter dated 7th May, 1998 to the Departed Asians Property Custodian Board (exhibit P. Ex.2) requesting it to prepare an agreement of sale in their joint names. It was received by the Departed Asians Property Custodian Board on 11th May, 1998. The Board issued a certificate of purchase in their joint names on 4th May, 1998 (exhibit P. Ex.3).

[4] During the year 1996 she had undertaken renovation of her side of the building; replacing the roof and windows and repairing the compound. She occupied the rear part of the building and let out the front part to a tenant at shs. 400,000/= per month. Sometimes the respondent would collect the rent on her behalf and hand it over to her. He sopped remitting the rent collected in August, 2010 and had not

done so to-date. She was due to increase the rent payable to shs. 600,000/= per month as from January 2011. During the year 2012 is when the respondent eventually declared that she did not own the building. He built a wall blocking her aces to the front part of the building and has been collecting rent therefrom ever since. At one time the front of the building had been damaged by a vehicle and she repaired it. She did not participate in processing documentation with the Departed Asians Property Custodian Board because she trusted the respondent.

[5] P.W.2 Lamony Apollo Michael testified that the appellant owns part "B" of the building located on plot 17 Nehru Road while the respondent owns part "A" the other the other part of the building. A brick wall separates the two sides of the building. Each side has a front for shops and a rear for residential quarters. The two parties pooled funds for its purchase. On 1st October, 1995 the appellant contributed shs. 7,500,000/= to the purchase price, paid to the respondent in his presence at Nsambya Police Barracks, at the home of the respondent's brother, Oyo Wilson. It is this witness who wrote down the acknowledgement (exhibit P. Ex.1) which all the parties present signed. The custodian Board issued a document indicating that the two of them were joint purchasers of the building. During the year 2011, the respondent took over the front part of the appellant's side of the building and blocked her access.

[6] P.W.3 Obali Godfrey testified that both parties have occupied different parts of the building in dispute since the year 2000. The problem arose when the respondent constructed a wall denying the appellant access to the front of her side of the building. He used to collect rent from tenants on the appellant's side of the building and deposit it onto her bank account.

[7] P.W.4 Bizibu George testified that before the Departed Asians Property Custodian Board took over management of the building, it was registered in the names of Ranjis as tenants in common. According to the certificate of purchase dated 4th May, 1998 (exhibit P. Ex.3), the building belongs to both the appellant

and the respondent who are named as purchasers. The building was occupied by the applicant and the respondent following the departure of the Asians. The appellant's name does not appear in documents which initiated the purchase of the property. Her name was neither included in the purchase agreement. The property has a partition wall separating it into two parts; side "A" and "B" each has a commercial part at the front and residential quarters at the back. On side "B" there is now another partition blocking access to the front part.

The respondent's evidence in the court below:

[8] In his defence as D.W.1, the respondent, Lakony David Livingstone, testified that during the year 1989 he entered into a tenancy agreement with the Departed Asians Property Custodian Board over plot 7A of the property in dispute (exhibit D. Ex.1). He set up wholesale business. When in February, 1995 the property was advertised for sale, he picked up bid forms (exhibit D. Ex.3). He was the successful bidder for the entire plot. He was offered the building at a price of shs. 15,002,191/= which he paid in instalments. Upon payment of the 1st instalment, possession was handed over to him (exhibit D.Ex.15 a letter dated 26th March, 1995). The respondent forged a letter dated 7th May, 1998 claiming that she was a joint purchaser with him, yet he had already signed the purchase agreement three years earlier on 6th April, 1995 (exhibit D. Ex.4).

[9] He was operating multiple business at the time from which he was generating a good income. He was able to purchase the building from his own business and employment income as illustrated by his Co-operative Bank statement (exhibit D. Ex.F4 / D. Ex.11). There was no need to borrow money from the appellant. By mid-1996 he had paid over shs. 11,000,000/= of the purchase price. The final payment was by way of offset for his claim for improvements undertaken on the property (exhibit D.Ex.16 a letter dated 30th May, 1997). He rejected the certificate of purchase issued in both his and the appellant's name (exhibit D.Ex.19 a letter dated 10th June, 1998). He has since the purchase been paying

the municipal rates in his name (exhibits D.Ex.21 - D.Ex.24). In 1997, he gave the appellant's father temporary refuge on one part of the building during the period of insurgency. It is in the year 2012 that the appellant brought her daughter to occupy that part of the building after her father had vacated and she began claiming it as her property.

[10] He testified further that a handwriting expert certified that the respondent neither signed the purported agreement of 1st October, 1995 and the letter of 7th May, 1998 (exhibit D.Ex.25). The documents are a forgery. He sought extension of the period of payment because insurgency had adversely affected some of his businesses (exhibit D. Ex.12 and 13 letters dated 8th September, 1995 and 8th February, 1996). Plot 7 Nehru road was renamed Plot 17 Gulu Road by the Municipal Authorities during the year 2010. He was a sitting tenant on Plot 7A Nehru Road and not Plot 7B Nehru Road. The two parts were separated by a temporary partition wall made by the Departed Asians Property Custodian Board during the year 1988. He never sent his wife to the appellant in Kampala asking her to make contributions. The advertisement inviting bids for the property was for the entire plot 7 without distinguishing the two parts. The certificate of purchase was issued to the appellant. The appellant's name is no on the list of purchaser made by the Ministry of Finance on 27th April, 1998.

[11] D.W.2 Ezati Samuel testified that he received a request to examine documents which had been exhibited in court. He was instructed by defence counsel to undertake forensic examination of the questioned documents. He was required to confirm the authenticity of signatures attributed to the respondent. His findings were that neither the respondent nor his brother Oyoo Wilson signed the questioned documents. When a Photostat copy is used for handwriting analysis the details cannot be seen when it is not clear. Photocopies are also susceptible to manipulation. For a credible analysis, he would need the originals. He never met the respondent to collect specimen handwriting from him. Admittedly, there

are variations every time a person signs, a person may have more than one signature and circumstances and conditions may cause variations in signature.

[12] D.W.3 Olanya Charles testified that from 1989 up to the year 2000, while he was a student, he lived at the home of Oyoo Wilson at Nsambya Police barracks until his death. It was a single bed-roomed house and the sitting room served as the bedroom for the witness on a double decker bed. During that time, there was never a meeting involving a transaction between the appellant and the respondent. The witness during the same period of time was managing a taxi belonging to the respondent from which he would collect a daily income of shs. 50,000/= and a minimum collection of shs. 1,500,000/= per month, which he would bank onto the respondent's account. The respondent would use some of that money to pay his school fees.

Proceedings at the *locus in quo*:

[13] The trial court then visited the *locus in quo* on 14th November, 2018 from where it observed that an old building is located on the land in dispute; the appellant occupies one part of the rear while the respondent occupies the other. The entire front part is in the respondent's possession and he has tenants therein undertaking commercial activities. Access between the rear part occupied by the respondent and its corresponding front part is blocked by an un-plastered brick wall built by the respondent. The two sides of the rear part of the building are partially separated by a brick wall and plywood. The court prepared a sketch map illustrating the features seen during the visit.

Judgment of the court below:

[14] In his judgement, the trial Magistrate found that it is a fact that the property in dispute belonged to the Departed Asians Property Custodian Board while the respondent was a sitting tenant. When the property was advertised for sale, the

respondent bid for it. The respondent bid for the property on 24th March, 1995 as a sole purchaser. An agreement of sale was executed on 6th April, 1995 identifying the respondent as sole purchaser and the purchase price was shs. 15,602,191/= The appellant relies on a document indicating that was to contribute shs. 7,500,000/= to the purchase price and take part "B" while the respondent was to take Part "A" of the said property. The respondent denied having authored that document and claimed it was a forgery. The respondent relied on the testimony of a handwriting expert. The forgery was established as a fact and moreover the document was made after the property had been sold to the respondent. There was no intended joint ownership at the time of the purchase. The appellant was not a sitting tenant as it was the respondent who invited her to the property. The appellant failed to prove her claim of ownership of part of the property. Having been in occupation of one wing of the premises did not confer upon her ownership rights. The respondent was a sitting tenant at the time of purchase and therefore cannot be a trespasser on the property. The suit was dismissed and the respondent was declared sole owner of the property. The respondent was awarded the costs of the suit.

The grounds of appeal:

[15] Being dissatisfied with the decision, the appellant appealed to this court on the following grounds namely;

1. The learned trial Magistrate erred in law and in fact when he failed to find that the appellant and the respondent are joint owners of the suit property.
2. The learned trial Magistrate erred in law and in fact when he declared the respondent the lawful sole owner of the suit land despite the respondent not having filed a counterclaim.
3. The learned trial Magistrate erred in law and in fact when he ignored the evidence of the appellant and only believed that of the respondent despite the inconsistencies therein.

Arguments of Counsel for the appellant:

[16] In their submissions, Counsel for the appellant, submitted that at the time it was advertised for sale, the appellant was a sitting tenant on the property. She occupied one wing of the property while the respondent occupied the other. The certificate of purchase dated 4th May, 1998 was issued in their names both. The purchase agreement executed by the respondent specifically stated that it was in respect of Plot 7A Nehru Road. Omission of Plot 7B Nehru Road was deliberate. It was fraudulent for the respondent to have gone ahead to secure registration of the entire plot in his sole name. The handwriting expert was not neutral and the court should not have accorded much weight to his testimony. They prayed that the appeal be allowed.

Arguments of Counsel for the respondents:

[17] In response, counsel for the respondent, submitted that the trial court came to the correct conclusion. Whereas the appellant claimed to have contributed a sum of shs. 7,500,000/= to the purchase price which she paid directly to the respondent, she also testified that she had earlier advanced shs. 3,000,000/= to the respondent through his wife. This makes a total of shs. 10,500,000/= which contradicts her pleadings that her contribution was shs. 7,500,000/= toward the purchase price. The respondent's evidence shows that the purchase price was shs. 16,000,000/= The unexplained inconsistency in the appellant's testimony regarding her contribution to the purchase price corroborated the respondent's case that she was relying on forged documents, as opined by the handwriting expert. The appellant's name did not appear in any document involved in the transaction save the certificate of purchase. The court having found that the property was not jointly owned, it followed that it belonged to the respondent. A statement to that effect was a declaration of the obvious and did not occasion a miscarriage of justice. The decision was reached after evaluation of all the evidence. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[18] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[19] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

Grounds one and two; Failure to find that the appellant and respondent are joint owners.

[20] Grounds one and three will be considered concurrently. The two grounds fault the trial court for its failure to find that the appellant and the respondent are joint owners, ignoring the appellant's evidence and overlooking inconsistencies in the respondent's evidence. In the first place, the appellant's claim is that of being a tenant in common with the respondent. Unlike joint tenancies where each co-owner is equally and "wholly entitled on the whole" to the estate (see *Burton v. Camden LBC [2000] 2 AC 399*), in tenancies in common the co-ownership

arrangements are such that each of the co-owners holds a distinct share, or proportion of the property.

[21] While a joint tenancy requires the presence of the so-called “four unities” in order to exist; that of possession (they must have the right of possession for the whole estate), interest (it must be the same estate or interest), title (they must receive interest from the same document), and time (meaning that the tenants must obtain their interest at the same time - see (*AG Securities v. Vaughan [1990]1 A.C. 417*), the only unity which exists between tenants in common is the unity of possession. The appellant’s claim was for the latter form of co-ownership and therefore the trial court misdirected itself when it held that there “was no intended joint ownership at the time of the purchase.” It misconstrued the mature of the appellant’s claim.

[22] The unity of possession in a tenancy in common may be divided between co-owners, meaning that each co-owner has a separate ownership share in the property. All tenants in common have distinct and separable ownership of their respective interests, in other words every tenant in common owns a distinct share or interest in the land which may be equal or unequal. Unlike joint tenants, with tenancies in common ownership interests do not have to arise at the same time. One person may own the property to begin with and then transfer or sell an ownership interest in the property at a later date. Once characterised as a tenancy in common, the duty of court was to establish whether or not in her claim the appellant’s proved the existence of the unity of possession or a severance thereof, or not.

[23] In rejection of the appellant’s claim to a tenancy in common, the trial court relied heavily on the forensic report and testimony of D.W.2 Ezati Samuel. The forensic examination report states;

1. The signature in question against the names Oyoo Wilson in exhibits C and D are of two different modules. They are not representative of each other and therefore not comparable because all the characters are different and cannot be compared in the principle of “like with like.” I have not observed any evidence of common authorship between them.

2. The signatures attributed to Lakony David Livingstone in both questioned documents B and C and specimens A1 and A2 are very short signatures. There are pictorial resemblances between the questioned signatures and the samples on exhibits A1 and A2. However, there are some fundamental differences between them. The questioned signature on exhibit B pointed with a red arrow exhibits slow hesitating line quality and difference in fluency. These are common signs of simulation. There are further differences in relative sizes and character proportions. Meanwhile the questioned signature in exhibit C also has an extraneous commencement stroke that is not seen in the available samples. The “u” formations in the questioned signature are fewer than those in the samples. There are also difference in direction of finish and location of period marks. I have further observed differences in pen pressure. In my opinion the pictorial resemblances between the questioned and the specimen signatures are due to simulation or copying. The differences above are fundamental and such that in my opinion the signatures attributed to one Lakony David Livingstone on exhibits A1 and A2 (unquestioned) and B and C (questioned signatures) were not written by one and the same person.

[24] Forensic document examiners have traditionally premised the claim of scientific validity and reliability of handwriting identification on two asserted principles or tenets: (i) handwriting is unique, meaning that no two people write exactly alike (the principle of uniqueness or inter-writer variability); and (ii) no person can produce an exact duplicate of his or her signature or write exactly the same way twice (the principle of intra-writer variability). However, as the two foundational tenets of forensic handwriting analysis are not capable of empirical proof, handwriting identification is less of a science and more of a technical skill.

[25] While the courts must give proper respect to the opinion of an expert, such opinions are not as it were, binding on the courts. Such evidence must be considered along with all other available evidence and if there is a proper and cogent basis for rejecting the expert opinion, the court would be perfectly entitled to do so (see *Kimani v. Republic [2000] 2 E.A 417 at p. 421*). If a court is satisfied on good and cogent grounds that the opinion, though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it. No Court should mechanically, without application of mind, surrender its will and independence of judging properly the fact in issue to the judgment of an expert. 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.

[26] 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 an 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.

[27] The reliability of an expert opinion on handwriting has two components: the reliability of the handwriting comparison and the reliability of the expert's skills. Specifically, it includes three elements: (i) the reliability of the handwriting comparison; (ii) the reliability of the professional knowledge and experience of the expert; and (iii) the verifiability of the results based on experience. It is the duty of the expert to present the necessary scientific or technical criteria to enable a court to test the accuracy of its own conclusions and to form its own independent judgment of the evidence.

[28] To determine whether a questioned signature is genuine, a trained forensic handwriting expert focuses on the intricate details that make up the component (structural) parts of the signature and the relative speed and fluency (rhythm) with which those details were executed. The court should be able to make its own value judgment about whether the control specimen handwriting samples are sufficiently devoid of distortion or disguise to render them suitable for comparison purposes with the questioned writing and whether the questioned writing contains enough distinguishing features to support a decision regarding source attribution.

[29] 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. The court must explore whether or not the examination procedure used complies with the relevant protocols. It must as well explore the process and methods of examination used and determine whether or not they meet the requirements of the specific norms applicable. It should also examine whether the source, acquisition, custody, and delivery of the materials / samples was in compliance with the law, relevant regulations, norms and practice and whether the contents of the relevant documents and the materials provided were sufficient and reliable.

[30] The court further considers whether or not there is any contradiction between the expert's opinion and other evidence, and whether there is a contradiction between the report and the testimony in court. A court will not act on the opinion of the expert unless all the facts upon which the opinion is based are proved in evidence. When the source of the samples is unclear, the questioned document is a duplicate or Photostat copy, or the samples or specimens are contaminated and do not meet the conditions for identification, or the procedural method otherwise has defects or is inappropriate, reliance on the opinion expressed in the report could be misleading.

[31] Obtaining an adequate number of samples of an individual's normal writing (exemplars) is an essential requirement in investigating whether or not such individual authored a questioned or disputed handwritten item. The exemplars must be sufficient in quantity and quality to provide a sound basis for evaluating and ascertaining the natural range of variation found within the subject individual's handwriting or signature pattern. Many times upon obtaining a truly representative sampling of the disclaiming party's signature pattern from a sufficiently wide randomly selected contemporaneous writing, what at first glance were perceived as "apparent differences" are oftentimes demonstrated and proven to be "normal variations" within the same person's signature pattern.

[32] Perhaps the most important factor in assembling good exemplars is contemporaneousness. Ideally, the exemplars should be written as close as possible to the alleged date(s) of preparation of the questioned writing(s). Best practices require contemporaneous exemplars for comparison purposes because they tend to be far more representative of the subject's writing habits and skill at the time the questioned item was purportedly written; as the time gap between the exemplars and the questioned writing becomes greater, the exemplars have the tendency to be less representative and more unreliable. When the conditions under which the questioned document and the samples were created differ, it results in a low level of comparability between them. The closer the control sample is to the recovered sample in terms of the time when it was obtained, the more reliable the expert opinion is likely to be.

[33] The more business writing control samples are compared with questioned samples, the more reliable the expert opinion is likely to be. The more the sample control writings examined, the more reliable the expert opinion is likely to be. If the questioned document is a duplicate, the expert opinion is likely to be less reliable. Quality requires that the conditions under which the questioned document and the control samples were created should be the same or similar in terms of, for instance, writing speed, writing conditions, writing instruments, and

writing posture. From this perspective, handwriting is actually relatively stable. However, as time progresses, there will be some changes in terms of features or details. Therefore slight variation in the signatures need not be given much weight where the time gap between the making of questioned document and the control specimen handwriting samples is relatively wide.

[34] In the instant case, the forensic examination report by D.W.2 Ezati Samuel (exhibit P. Ex. 25 dated 12th January, 2018) shows that the letter dated 7th May, 1998 given to him was a Photostat copy. The questioned agreement dated 1st October, 1995 too was a Photostat copy (he examined the original later, picked from court 6th December, 2017). The specimens were; a Photostat copy of an application for purchase of property dated 28th March, 1995 (marked A1); a Photostat copy of a sale agreement between the respondent and the Ministry of Finance dated 6th April, 1995 (he examined the original later, picked from court 6th December, 2017); a colour Photostat copy of a sale agreement signed by Oyoo Wilson dated 29th December, 1996 (marked “D”);. The questioned document too, the letter dated 7th May, 1998 (marked “B”) was a Photostat copy. The report is silent on the methods used during the analysis.

[35] Analysis of the reliability of the handwriting comparison and the verifiability of the results presented in the report reveals that the two questioned documents were; a Photostat copy of the letter dated 7th May, 1998 and the original agreement dated 1st October, 1995. The control specimen handwriting samples were; a Photostat copy of an application for purchase of property dated 28th March, 1995 (marked A1), and the original of a sale agreement between the respondent and the Ministry of Finance dated 6th April, 1995. While the original agreement dated 1st October, 1995, the Photostat copy of an application for purchase of property dated 28th March, 1995 and the original of a sale agreement between the respondent and the Ministry of Finance dated 6th April, 1995 were made only months apart during the same year, the Photostat copy of the letter dated 7th May, 1998 was written three years later.

[36] It is patent that although there was a reasonable degree of contemporaneousness between the agreements involved in the analysis, the quantity and quality of the control specimen handwriting samples did not meet the comparison requirements. Best practice requires handwriting experts to reduce the likelihood that the exemplar writing submitted to them for comparison purposes is self-serving and not representative of the full range of writing features attributed to a specific writer. In this case only one control specimen handwriting sample (the sale agreement between the respondent and the Ministry of Finance dated 6th April, 1995) was submitted to D.W.2 Ezati Samuel. The full range of the respondent's writing features could not be determined from a single control specimen handwriting sample.

[37] By submitting only one control sample, the reassurance created when multiple control samples sufficiently representative of a reasonable range of the author's writing characteristics, generated under conditions of close similarity in terms of writing speed, writing conditions, writing instruments, and writing posture, was lost. The result is that it was never ruled out that the variations observed by D.W.2 were not "normal variations" within the respondent's signature pattern. Had the respondent been more diligent, there were multiple letters written by him to the Departed Asians Property Custodian Board around that time, the originals of which could have been retrieved and submitted as additional specimen writing control samples, such as the letters dated; 24th May, 1995 (exhibit P. Ex."C"), 26th May, 1995 (exhibit P. Ex."D"); 16th August 1996 (exhibit P. Ex."F"), and 15th December, 1995 (exhibit P. Ex."D2"). As regards the letter dated 7th May, 1998 the three year difference between it and the rest of the documents was too wide to meet the requirements of contemporaneousness.

[38] On the other hand, the letter dated 7th May, 1998 was a Photostat copy of the questioned document presented to the expert for analysis, yet there was no evidence to show why the original could not be retrieved from the addressee, the successor in title to the Departed Asians Property Custodian Board. Reliability of

any forensic analysis is subject to the limitations of the samples used. A Photostat copy may not fully reflect that contained in the original document. An expert opinion based on a Photostat copy will ordinarily not be considered reliable. When unreasonable analytical methods are used, unreliable conclusions result. In short, the trial court was unjustified in attaching the weight it did to the outcome of the forensic analysis, in the light of such grave shortcomings.

[39] That forensic evidence should have been contextualised and analysed alongside the other available evidence, which was not done. It is now incumbent upon this court to re-examine the rest of the evidence. The material contextual evidence is that the respondent signed the sale agreement (exhibit P. Ex."G" attached to the witness statement of P.W.4 Bizibu George) on 6th April, 1995 requiring him to pay the full purchase price of shs. 15,002,191/= within 60 days. In the testimony of P.W.4 Bizibu George he indicated that a month later, the respondent was already experiencing financial difficulty. By his letter dated 24th May, 1995 (exhibit P. Ex."C") the respondent indicated he was struggling to raise the outstanding balance of the purchase price because;

> "the capital I had expected is locked up in other businesses that may not be forthcoming within the period of the contract……on 13th April, 1995 I paid cash shs. 1,525,000/= …. On 12th May, 1995 … I made another deposit of shs. 1,500,000/=…. The purpose of writing this letter is to request you to consider my request for extending the period when I should complete payment…"

[40] The respondent wrote to the Departed Asians Property Custodian Board again on 26th May, 1995 (exhibit P. Ex."D") stating that he had by then paid more than 10% of the agreed purchase price and proposed an extension of a further period of either six months during which he would pay instalments of shs. 2,000,000/= per month or alternatively, for a period of twelve months during which he would pay instalments of shs. 1,000,000/= per month. The Departed Asians Property Custodian Board by a letter dated 8th September, 1995 (exhibit P. Ex."E1") replied demanding that he pays shs. 2,500,000/= per month such that the

outstanding balance is cleared by 22nd December, 1995. By 16th August 1996 he had paid a total of shs. 11,025,000/= (exhibit P. Ex.“F”) leaving a balance of shs. 3,977,191/= On 22nd May, 1997 the Departed Asians Property Custodian Board wrote a letter giving the respondent notice that if he did not clear the balance outstanding by 30th August, 1997 the sale would be cancelled (exhibit P. Ex.“E2”).

[41] Contrary to that paper trail and the extreme financial difficulty that the respondent expressed therein to be facing at the time, by which two years following the signing of the agreement he was still pleading for extension of time within which to pay the full purchase price, in his oral testimony in court the respondent stated that he was operating multiple businesses at the time from which he was generating a good income. He was able to purchase the building from his own business and employment income as illustrated by his Co-operative Bank statement (exhibit D. Ex.F4 / D. Ex.11). There was no need to borrow money from the appellant. This was corroborated by D.W.3 Olanya Charles who testified that during that period of time, he was managing a taxi belonging to the respondent from which he would collect a daily income of shs. 50,000/= and a minimum collection of shs. 1,500,000/= per month, which he would bank onto the respondent’s account.

[42] The oral testimony of the respondent regarding his financial capacity at the time of the transaction ought to have been rejected in favour of the trail of documentary evidence. The oral testimony was clearly self-serving while the documentary trail was not. Secondly, before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either: (a) by anyone who saw the document executed or written; or (b) by evidence of the genuineness of the signature or handwriting of the maker. Documents must be proved by primary evidence except in the cases in which *The Evidence Act* permits secondary evidence (see sections 60 - 64 of the Act).

[43] According to section 64 (1) (c) of *The Evidence Act*, secondary evidence may be given of the existence, condition or contents of a document when the original has been destroyed or lost. To qualify as secondary evidence, it must have been produced from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with those copies (see sections 62 (b) of the Act). Photocopying is not a mechanical process which in itself ensures the accuracy of the copy. It is a matter of common knowledge that after inserting some words on a document which is already a photocopy and by interpolating the same, another photocopy of the said interpolated photocopy may be obtained and thus the accuracy of photocopy is always surrounded by dark clouds of doubt.

[44] To prove his financial clout at the time, the respondent produced a Photostat copy of the defunct Co-operative Bank statement (exhibit D. Ex.F4 / D. Ex.11). Neither was there evidence presented before court to explain the whereabouts of the original nor showing that the Photostat copy proffered was made from the original. The court never had the opportunity to compare the Photostat copy with the original. Neither the identity of the person who obtained the Photostat copy by mechanical process nor was that of the one who compared the same with original, to prove that it an accurate Photostat copy of the original was disclosed. The trial court erred when in preferred the oral testimony to the more reliable documentary trail of communication between the respondent and the Departed Asians Property Custodian Board, which occurred in real time during the transaction.

[45] That documentation was adduced as part of the testimony of P.W.4 Bizibu George. During the cross-examination of this witness, the authenticity of these correspondences was never called into question. It is trite that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue (see

Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008; R *v. Hart (1932) 23 Cr App R 202* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*).

[46] P.W.4 Bizibu George testified that in the respondent's letter of 15th December, 1995 (exhibit P. Ex."D2"), when requesting for further extension of the period for payment, he wrote;

> "….On 2nd October, 1995 I made a deposit of shs. 6,000,000/= ….leaving a balance of shs. 3,977,191/="

[47] It is curious that the date the respondent acknowledged having paid a sum of shs. 6,000,000/= to the Departed Asians property Custodian Board, which is 2nd October, 1995, is the day after the appellant, P.W.1 Auma Lillian, claimed to have advanced to him shs. 7,500,000/= on 1st October, 1995 while in Kampala (exhibit P. Ex.1). Her testimony was corroborated by P.W.2 Lamony Apollo Michael who testified that it is him who wrote that acknowledgement from Nsambya Police Barracks at the home of the respondent's brother, the late Oyo Wilson, the money was paid in his presence, and all parties signed in his presence. Exhibit P. Ex.1 shows that the appellant gave the respondent shs. 7,500,000/= on 1st October, 1995 while in exhibit P. Ex."D2" the respondent acknowledged that the following day, 2nd October, 1995 he paid an instalment of shs. 6,000,000/= The only question is whether that occurrence was a mere coincidence or a reflection that he paid it out of funds he had received the previous day from the appellant.

[48] The answer to that question is still found in the respondent's series of letters to the Departed Asians property Custodian Board before and after that payment. Before that payment, he had in a letter of 24th May, 1995 (exhibit P. Ex."C") and that of 26th May, 1995 (exhibit P. Ex."D") expressed difficulty in raising the purchase price from his business. He suggested in the letter of 24th May, 1995

that he had "started to process a loan from Housing Finance Company of Uganda Limited……" but in his testimony he never adduced evidence to show that he financed the transaction with the aid of any bank loan.

[49] After that payment, by 16th August 1996 he still had not cleared the purchase price. In his letter to the Departed Asians property Custodian Board, he explained that had paid a total of shs. 11,025,000/= (exhibit P. Ex."F") leaving a balance of shs. 3,977,191/= On 22nd May, 1997 the Departed Asians Property Custodian Board wrote a letter giving the respondent notice that if he did not clear the balance outstanding by 30th August, 1997 the sale would be cancelled (exhibit P. Ex."E2"). This indicates that nearly a year after the payment of shs. 6,000,000/= which he made on 2nd October, 1995, he was still struggling with payment of the outstanding balance.

[50] Additionally, examination of the rate at which he paid the instalments is revealing. On 6th April, 1995 the respondent signed the purchase agreement, undertaking to pay the full purchase price of shs. 15,002,191/= within 60 days. On 13th April, 1995 he paid shs. 1,525,000/=; on 12th May, 1995 he paid shs. 1,500,000/=; on 2nd October, 1995 he paid shs. 6,000,000/= and by 16th August 1996 he stated that he had paid a total of shs. 11,025,000/= leaving a balance of shs. 3,977,191/= Hence the only instalment whose date of payment is not disclosed in the correspondences was of shs. 2,000,000/=

[51] What is clear though is that by 16th August 1996 by four instalments paid between 13th April, 1995 and 16th August 1996 (a period of one year and four months), the respondent had paid a total of shs. 11,025,000/= On 22nd May, 1997 the Departed Asians Property Custodian Board wrote a letter giving the respondent notice that if he did not clear the balance outstanding by 30th August, 1997 the sale would be cancelled (exhibit P. Ex."E2"). He did not make any further payment of cash. Instead the outstanding balance was offset from his claim for compensation for improvements he had made to the property.

[52] That analysis shows that three of the four instalments paid were in sums of not more than two million shillings, viz.; shs. 1,525,000/= paid on 13th April, 1995; shs. 1,500,000/= paid on 12th May, 1995; shs. 6,000,000/= paid on 2nd October, 1995 and shs. 2,000,000/= paid on an unspecified date, to make a total of he paid of shs. 11,025,000/= the respondent had paid by 16th August 1996.

[53] A person who had been paying the purchase price in instalments of not more than two million shillings each, who explained the reason as being "the capital I had expected is locked up in other businesses that may not be forthcoming within the period of the contract," who as a result promised to clear the balance soon because he had "started to process a loan from Housing Finance Company of Uganda Limited..," yet there is no evidence to show that he indeed processed such a loan, suddenly raised a sum of shs. 6,000,000/= paid a day after both P.W.1 Auma Lillian and P.W.2 Lamony Apollo Michael adduced evidence of a document they claim he had signed only a day before showing he received shs. 7,500,000/= from P.W.1. The conclusion is inescapable. The sum of money neither came from his business nor from a bank loan or any other borrowing yet its source was not otherwise explained, save by P.W.1 Auma Lillian, P.W.2 Lamony Apollo Michael and exhibit P. Ex.1 dated 1st October, 1995.

[54] Had the trial court considered the forensic examination report and the testimony D.W.2 Ezati Samuel alongside the rest of the evidence, it would have rejected the forensic examination report and expert testimony. That evidence is totally inconsistent with the more credible evidence of the documentary trail that was generated by the respondent and the Departed Asians Property Custodian Board, in real time during the transaction. That evidence corroborates the appellant's claim and exposes the respondent's post-transaction evidence as self-serving, tailored specifically to defeat the appellant's claim. This is a proper and cogent basis for rejecting the expert opinion, and the court would be perfectly entitled to do so as it does now.

[55] According to exhibit P. Ex.1 dated 1st October, 1995 the appellant advanced to the respondent a sum of shs. 7,500,000/= as consideration for becoming a co-owner of the property comprised in Plot 7 Nehru Road. It was stated "my Plot will be Plot 7B, for Lakony D. L. is plot 7A. If payment for Lakony is made the title will have both names." P.W.4 Bizibu George testified that on 11th May, 1998 the departed Asians Property Custodian Board received a letter from the respondent' dated 7th May, 1998 (exhibit P. Ex."D2"), by which he stated that;

> I would like to inform you that although all payments made to the purchase of the abovementioned property are in my names as per the bid, my sister one Auma Lillian also made equal contribution towards the same. The purpose of this letter is therefore to request your good office to arrange and make a joint agreement for both of us as the purchaser…

[56] This was after a draft certificate of purchase in the respondent's sole name had been submitted to the Minister of Finance on 27th April, 1998 (exhibit P. Ex."H"). The final certificate though was eventually issued in both their names on 4th May, 1998 (exhibit P. Ex.3) and so was the notification to The Commissioner Land Registration on 11th May, 1998 (exhibit P. Ex."J"), although the last statement thereof was that "Lakony David Livingstone has sole responsibility regarding this property." When the Departed Asians Property Custodian Board on 18th April, 2002 responded to a demand for Municipal Rates (exhibit P. Ex."K"), it indicated that Plot 17 Nehru road had been sold to both the appellant and the respondent on 13th April, 1995. The two were later on 4th November, 2013 (exhibit P. Ex."L"), invited by the Departed Asians Property Custodian Board for mediation over a dispute that had erupted between then over rents collected from the property. To the appellant's surprise, when the title deed was issued it was in the respondent's sole names.

[57] 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*).

[58] 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*).

[59] 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*).

[60] According to section 9 (3) of *The Expropriated Properties Act*, it is a certificate issued to a purchaser under the provisions of section 6 of that Act that forms the basis upon which the Chief Registrar of Titles may transfer title to the new owner(s). The only evidence of such a certificate adduced before the trial court was a certificate of purchase dated 4th May, 1998 (exhibit P. Ex.3), in the joint names of the appellant and the respondents as co-owners of the property. That the title deed was issued in the respondent's name was thus a mistake that calls for rectification of title. By virtue of section 33 of *The Judicature Act*, this court may grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided. Therefore apart from a proprietor of land seeking rectification of title, this court may make an order for the alteration of the register for the purpose of (a) correcting a mistake, (b) bringing the register up to date, or (c) giving effect to any estate, right or interest excepted from the effect of registration.

[61] In *NRAM Ltd v. Evans, [2017] WLR(D) 491; [2018] 1 WLR 1563*, it was held that there will have been a mistake where the Registrar;- (i) makes an entry in the register that he or she would not have made; (ii) makes an entry in the register that he or she would not have made in the form in which it was made; (iii) fails to make an entry in the register which he or she would otherwise have made; or (iv) deletes an entry which he or she would not have deleted; had he or she known the true state of affairs at the time of the entry or deletion (see also *Norwich and Peterborough Building Society v. Steed, [1993] Ch 116*). The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration. In the instant case, the Registrar made an entry by which the appellant's interest as co-owner in equal shares with the respondent was not reflected on the title deed.

[62] The appellant's co-ownership interest in the property arose on 1st October, 1995 upon execution of exhibit P. Ex.1 yet by that time the respondent had signed an agreement of purchase as sole owner six months earlier on 6th April, 1995 (exhibit D. Ex.4). Unlike joint tenants, with tenancies in common ownership interests do not have to arise at the same time. One person may own the property to begin with and then transfer or sell an ownership interest in the property at a later date. This is what happened when the respondent signed exhibit P. Ex.1 on 1st October, 1995. He became co-owner of the property, in equal shares with the appellant.

[63] The appellant adduced evidence to show that since August, 2010 to-date she has not received rent from her property, which at the time was shs. 500,000/= per month. She was due to increase the rent payable to shs. 600,000/= per month as from January 2011. This means that she is owed shs. 2,000,000/= from August 2010 to December, 2010. She is owed a further sum of shs. 69,600,000/= from January, 2011 to August 2020, a period of nine years and eight months at the rate of shs. 600,000/= per month. The total indebtedness of the respondent to the appellant in outstanding rent to-date is therefore shs. 71,000,000/= to-date. That sum is awarded to the appellant as *mesne* profits.

[64] Evidence was adduced further that showed the respondent has for all this time blocked the appellant's access to the front of her side of the building. This is a callous violation of the appellant's property rights that attracts an award of general damages. I consider a sum of shs. 25,000,000/= as an appropriate recompress for the damage and inconvenience it has caused the appellant over the period of nine years.

[65] Had the trial court properly evaluated the evidence, it would not have come to the decision that it did.

Order:

[66] In the final result, below is set aside. Instead judgment is entered for the appellant against the respondent in the following terms;

a) The appellant is declared a co-owner, as tenant in common in equal shares with the respondent, of the property comprised LRV 208 Folio 20 Plot 7 Nehru Road Gulu District. Her side of the property is what is commonly known as 7B Nehru Road.

b) The Commissioner Land Registration is hereby ordered to rectify the certificate of title to land comprised in LRV 208 Folio 20 Plot 7 Nehru Road Gulu District, so as to reflect the appellant as tenant in common in equal shares with the respondent.

c) Vacant possession of the entire side of that property, commonly known as 7B Nehru Road is granted to the appellant.

d) A permanent injunction issues restraining the respondent, his agents, persons claiming under him from interference with the appellant's quiet possession and enjoyment of the side of that property, commonly known as 7B Nehru Road.

e) She. shs. 71,000,000/= as *mesne* profits

f) Shs. 25,000,000/= as general damages.

g) Interest on the sums in (e) and (f) above at the rate of 10% per annum from the date of this judgment until payment in full.

h) The costs of this appeal and of the court below.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s MOM Advocates

For the respondent : M/s Ladwar, Oneka and Co. Advocates.