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THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT KAMPALA

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CIVIL APPEAL NO. 8 OF 2018

[CORAM: MWANGUSYA, MWONDHA, TIBATEMWA-EKIRIKUBINZA, MUGAMBA,  
JJ.SC; NSHIMYE, Ag.JSC]

15  
BETWEEN

BETTY KIZITO ..... APPELLANT

20  
AND

- 25  
30  
1. DAVID KIZITO KANONYA  
2. DICKSON NSUBUGA  
3. DIANA SEMAKULA  
4. DENIS KAVULU  
5. JOYCE NANSUBUGA  
6. IVAN ZIMBE  
7. DANIEL KIZITO  
8. MARTHA NANKYA

.....RESPONDENTS

[Appeal from the judgment and Decree of the Court of Appeal in Civil Appeal No. 187 of 2012  
before (Hon. Justice Buteera, Kakuru and Cheborion, JJA) dated 16<sup>th</sup> October 2017.]

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**Representation**

*Ms. Lillian Kuteesa represented the appellant whereas Mr. Edward Kangaho represented the respondents.*

5 JUDGMENT OF PROF.TIBATEMWA-EKIRIKUBINZA, JSC

**Background**

The appellant, Betty Kizito, and the 1<sup>st</sup> respondent (David Kizito Kanonya) are sister and brother respectively. The 2<sup>nd</sup>-8<sup>th</sup> respondents are children of the 1<sup>st</sup> respondent.

10 It was the case of the appellant that she and her brother, the 1<sup>st</sup> respondent, operated a joint business from which they pooled funds to purchase and develop land comprised in Kyadondo Block 244 Plot 5091 at Muyenga and on 6<sup>th</sup> February 1995, they registered it as tenants in common. That the property was said to have remained registered in the names of both the appellant and the 1<sup>st</sup> respondent until 2002 when it was fraudulently transferred into the names of the seven other respondents by the 1<sup>st</sup> respondent.

20 The appellant contended that there was an oral contract (arrangement) between herself and the 1<sup>st</sup> respondent regarding Block 244 Plot 5091 land at Muyenga. The appellant was to surrender her interest in the said land to the 1<sup>st</sup> respondent. In return, the 1<sup>st</sup> respondent was to give the appellant part of his land comprised in Block 244 Plot 1768 land at Kisugu and part of his property at Katwe. The 1<sup>st</sup> respondent did not honour this obligation.

30 On the other hand, the 1<sup>st</sup> respondent denied having jointly acquired the suit land together with the appellant. He contended that the land was bought using his own funds but was registered as jointly owned by the appellant and himself. His explanation was that the land was registered in the joint names of himself and the appellant as a trustee for his children (the 2<sup>nd</sup>-8<sup>th</sup> respondents). He stated that this was because he (the 1<sup>st</sup> respondent) was diagnosed with a terminal illness and needed to secure the future interest of the 2<sup>nd</sup>-8<sup>th</sup> respondents.



5 The 1<sup>st</sup> respondent also claimed that he undertook to incur the expenses of subdividing the land at Kisugu and Katwe. He stated that to effect the arrangement, he approached the appellant and requested her to sign a blank land transfer form and hand it over to him. Subsequently, the 1<sup>st</sup> respondent filled out the blank transfer  
10 form to effect the registration of Block 244 Plot 5091 land at Muyenga into his names as a sole proprietor.

In 2003, the appellant sued the 1<sup>st</sup> respondent in the High Court alleging that on 22<sup>nd</sup> January 2002, the impugned Muyenga land  
15 was fraudulently transferred into the names of the seven other respondents by the 1<sup>st</sup> respondent.

At the High Court, the following two issues were raised for determination:

- 20 (i) *whether the [respondents] were fraudulently registered on the title; and*  
(ii) *whether the [appellant] was entitled to the remedies sought.*

The High Court Judge (Opio-Aweri, J as he then was) found in  
25 favour of the appellant (Betty Kizito) and held *inter alia* that the 1<sup>st</sup> respondent (David Kizito) acted fraudulently and cheated the appellant of the property he co-owned with her when it was transferred allegedly as a gift in favour of the respondent's children(2<sup>nd</sup>-8<sup>th</sup> respondents). Court also held that the 1<sup>st</sup>  
30 respondent acted cunningly, deceitfully and dishonestly in depriving the [appellant] of her interest.

In regard to the remedies sought by the appellant, the Judge declined to grant mesne profits and general damages on ground  
35 that since the suit was between blood relatives, the grant of mesne profits and damages would destroy the value of the family bond between the two parties.

5 The 1<sup>st</sup> respondent (David Kizito) was dissatisfied with the High Court judgment and appealed to the Court of Appeal on the following three (3) grounds:

- 10 (i) The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence of the 1<sup>st</sup> respondent as a whole thereby arriving at a wrong conclusion.
- (ii) The learned trial Judge erred in law and fact when he ruled that the 1<sup>st</sup> respondent fraudulently transferred the proprietorship of Block 244 plot 5091 land at Muyenga.
- 15 (iii) The learned trial Judge occasioned a miscarriage of justice to the 1<sup>st</sup> respondent when he did not properly evaluate the evidence presented.

In reply to the 1<sup>st</sup> respondent's appeal, the appellant filed a cross-appeal on three (3) grounds namely:

- 20 (a) That the decision of the High Court be reversed and an order be made declaring that the appellant is entitled to mesne profits.
- (b) That the court orders the award of general damages in favour of the appellant.
- 25 (c) Costs of the appeal and the cross-appeal be granted to the appellant.

The Court of Appeal found in favour of the 1<sup>st</sup> respondent and set aside the judgment of the High Court. The Court held that there was no evidence to prove that the property comprised in Kyadondo Block 244 Plot 5091 land at Muyenga had been transferred from the appellant to the names of the 1<sup>st</sup> respondent through fraud. Court noted that the pleadings and the evidence of the respondents point to the fact that the appellant voluntarily signed the transfer form and handed it over to the 1<sup>st</sup> respondent authorizing him to remove her name from the title deed as she had agreed to transfer her interest to him. Furthermore, the court noted that the appellant

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5 having transferred her interest to the 1<sup>st</sup> respondent, he was free to transfer that interest to his children or to any other person.

The Court held that the respondent's signature on the transfer form in respect of the suit land was neither forged nor was it obtained by fraud. Furthermore, the Court of Appeal faulted the learned trial Judge for solely basing his decision on the contents of the transfer and consent forms to reach a finding of fraud.

I note that the contents of the transfer form (Exhibit "C") was that the 1<sup>st</sup> respondent filled out the form indicating that the consideration of the transfer was a gift from the appellant to the 1<sup>st</sup> respondent and the other respondents. Court found that in the land consent form (Exhibit "X"), the 1<sup>st</sup> respondent indicated that there were no developments on the land at Muyenga yet there were two houses on it.

In addition, the Court held that the misrepresentation of the suit land as being undeveloped in the consent form that accompanied the transfer form was of no legal consequence on the transaction. Court concluded that this was because the use of consent forms had no legal basis.

In regard to the cross-appeal, the Court of Appeal found that it lacked merit since the appellant had already divested herself of all interest in the suit property upon signing of the transfer form. Court added that the appellant was not entitled to mesne profits given that she was already receiving rent from another property which she had exchanged for the suit property.

The Court of Appeal made an order compelling the 1<sup>st</sup> respondent to fulfill his obligation to the appellant by subdividing the property at Katwe and Kisugu as agreed by the parties. The Court also held

5 that to foster reconciliation and harmony between the parties who were family members, no order as to costs would be given.

Dissatisfied with the findings and decision of the Court of Appeal, the appellant appealed to this Court on the following grounds:

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**1. The learned Justices of Appeal erred in law in holding that the falsehoods and misrepresentations occasioned by the 1<sup>st</sup> respondent did not amount to fraud but were a mere breach of contract.**

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**2. The learned Justices of Appeal erred in law in holding that there was no evidence to prove that the suit land was transferred from the name of the appellant to the names of the respondent through fraud.**

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**3. The learned Justices of Appeal erred in law in ordering the 1<sup>st</sup> respondent to proceed to subdivide the property at Kisugu and Katwe when the said property was not subject of the suit and its status had not been ascertained.**

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**4. The learned Justices of Appeal failed to properly re-evaluate the evidence as a whole and as a result erroneously found that the respondent was not entitled to mesne profits and general damages.**

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### **Prayers**

The appellant prays that:

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- (i) The appeal is allowed and the judgment of the Court of Appeal set aside.
  - (ii) The decision of the High Court is reinstated.
  - (iii) This Court allows and makes an assessment of the quantum of mesne profits and general damages.



- 5 (iv) The respondent pays costs of this appeal as well as those in the lower courts.

## **Appellant's Submissions**

### **Ground 1**

- 10 Counsel for the appellant submitted that the actions of the 1<sup>st</sup> respondent of transferring the suit land into his names and lying about the consideration in the transfer form amounted to fraud. He argued that the Court of Appeal erred in holding that the said actions did not amount to fraud but were breach of agreement.
- 15 Relying on the authorities of **Yakobo M N Ssenkungu & 4 Others vs. Cerensio Mukasa<sup>1</sup>, Kampala Bottlers Ltd vs. Damanico (U) Ltd<sup>2</sup>** and **Fredrick Zaabwe vs. Orient Bank<sup>3</sup>**, counsel submitted that the appellant need not have been forced or coerced to sign the transfer form to prove fraud. He submitted that the suppression of
- 20 truth in procuring the registration of the respondents on the certificate of title was sufficient to constitute fraud.

### **Respondent's reply**

- 25 The respondents' counsel conceded to the fact that the 1<sup>st</sup> respondent did not state the true consideration of the transaction in the transfer form. That whereas the 1<sup>st</sup> respondent stated that the consideration for the transaction was a gift, it was an exchange of properties. Nevertheless, counsel argued, it was the duty of the government valuer who endorsed the transfer form to declare the
- 30 true value of the land and not the parties to the transaction. He submitted that as such, there was no evidence to prove that the suit land was transferred from the name of the appellant to the names of the respondents through fraud.

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<sup>1</sup> Supreme Court Civil Appeal No.17 of 2014.

<sup>2</sup> Supreme Court Civil Appeal No. 22 of 1992.

<sup>3</sup> Supreme Court Civil Appeal No.4 of 2006

5 **Ground 2**

**Appellant's submission**

10 Counsel reiterated his submissions made under ground 1 on the definition of fraud. In addition, counsel faulted the learned Justices of Appeal for downplaying the use of the consent form and the misrepresentations made by the 1<sup>st</sup> respondent in the transfer form. Counsel argued that the misrepresentation of the consideration by the 1<sup>st</sup> respondent went to the root of the transaction and was contrary to **Section 92 (1)** of the **Registration of Titles Act**. The Section provides:-

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**The proprietor of land or of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act; but where the consideration for a transfer does not consist of money, the words "the sum of" in the forms of transfer in that Schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated.**

25 **Respondents' reply**

The respondents' counsel invited this Court to uphold the finding of the Court of Appeal that the misrepresentation made by the 1<sup>st</sup> respondent was of no legal consequence

30 **Ground 3**

**Appellant's submission**

35 Under this ground, counsel for the appellant faulted the Court of Appeal for directing the 1<sup>st</sup> respondent to honour his obligation of subdividing the land at Kisugu and Katwe without first establishing the status quo of the said properties. Counsel contends that the 1<sup>st</sup> respondent during cross-examination testified that the property at Katwe had been sold long before the time of the trial. Counsel



5 submitted that the order made by the Court of Appeal was  
inconsequential and prejudicial to the appellant.

### **Respondents' reply**

10 Counsel argued that the appellant misled the Court of Appeal to  
believe that the properties at Kisugu and Katwe were still in  
possession by the 1<sup>st</sup> respondent whereas not.

Counsel however conceded to the fact that the learned Justices of  
Appeal erred in making an order of subdivision of properties which  
the 1<sup>st</sup> respondent no longer had possession of.

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### **Ground 4**

#### **Appellant's submission**

20 Counsel submitted that the Court of Appeal erroneously held that  
the appellant was not entitled to mesne profits and general  
damages because she had divested herself of all interest in the suit  
land. Counsel added that the court held that the appellant was not  
entitled to mesne profits because she was earning rent from the  
Kisugu property which she had exchanged with her interest in the  
suit land.

25 Counsel contended that the above holding contradicted the decision  
of the High Court where the grant of mesne profits was declined on  
ground that the parties were blood relatives and that there was  
need to promote harmony and reconciliation between the family  
members.

30 Counsel prayed that this Court makes an award for mesne profits  
and general damages since the 1<sup>st</sup> respondent had reneged on his  
obligation and stopped the tenant in the Kisugu property from  
paying rent to the appellant.

### **Respondents' reply**

35 Counsel submitted that the Court of Appeal properly re-evaluated  
evidence and arrived at the right conclusion when it declined to  
grant mesne profits and general damages.

5 **Consideration of Court**

I will resolve grounds 1 and 2 of the appeal together. Grounds 3 and 4 will be resolved separately.

10 **Grounds 1 and 2**

15 The appellant faults the Court of Appeal for holding that the 1<sup>st</sup> respondent's actions of concealing the true consideration in the transfer form did not amount to fraud but was a breach of agreement; and that there was no evidence to prove that the transfer of land from the joint names of the appellant and the 1<sup>st</sup> respondent into the names of the 1<sup>st</sup> respondent and the other respondents was through fraud.

20 These grounds raise two questions:

(i) Did the actions of the 1<sup>st</sup> respondent amount to breach of contract and not fraud?

25 (ii) Did the concealing of the true consideration amount to fraud?

I will answer question (i) first

30 *Did the actions of the 1<sup>st</sup> respondent amount to breach of contract and not fraud?*

Breach of contract is committed when a party without lawful excuse refuses or fails to perform, performs defectively or incapacitates himself from performing the contract.<sup>4</sup>

35 In the present case, the appellant and 1<sup>st</sup> respondent entered into an oral contract for the transfer of interest in land. This created

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<sup>4</sup> G.H.Treitel, *The Law of Contract*, 4<sup>th</sup> edition, page 571.



5 obligations for both parties. The appellant on the one hand had the  
obligation of transferring her interest in the land at Muyenga to the  
1<sup>st</sup> respondent. On the other hand, the 1<sup>st</sup> respondent had the  
obligation of subdividing the Katwe and Kisugu properties and  
transferring the some of the property to the appellant. Whereas the  
10 appellant fulfilled her obligation by handing over the blank signed  
transfer forms to the 1<sup>st</sup> respondent, the latter did not fulfill his  
obligation of subdividing the properties. By refusing to fulfill his  
obligations, the 1<sup>st</sup> respondent breached the oral contract and  
refusal to perform a contractual promise is prima facie a breach.<sup>5</sup>

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It is imperative to note that the 1<sup>st</sup> respondent's refusal to perform  
his obligation was after the appellant had handed over to him  
signed blank forms of transfer. No evidence has been adduced to  
prove that the 1<sup>st</sup> respondent's intent not to perform his obligation  
20 existed at the time the parties entered into the oral arrangement  
which would amount to fraud.

I cite with approval the High Court decision of **Gwolo Jackson vs. Uganda**<sup>6</sup> where Mubiru J in addressing the argument whether  
representations involved in the case demonstrated a simple breach  
25 of contract rather than fraud held as follows:

**It is the preconceived design of the accused, formed  
at or before the contract, not to perform his or her  
side of the bargain, that constitutes the fraudulent  
concealment which renders the representation  
30 fraudulent, and not an intent formed after the  
contract is executed. If the accused forms the intent  
not to perform his or her side of the bargain after he  
or she has received the goods and the title has  
passed, it is a mere intended breach of contract, and  
35 not such a fraud as to give rise to a false pretense.**

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<sup>5</sup> See fn.4, page 571.

<sup>6</sup> High Court criminal appeal no. 0014 of 201 (Arua)

5       **This intent never to perform his or her side of the  
bargain has sometimes been treated as a fraudulent  
misrepresentation, and sometimes as a fraudulent  
concealment, but in either event it must precede or  
be contemporaneous with execution of the  
10       contract.(My emphasis)**

In line with the above exposition of the distinction between fraud and breach of contract, I find that the 1<sup>st</sup> respondent's actions amounted to breach of contract and not fraud.

15       I therefore come to the same conclusion as the Court of Appeal that there was breach of contract by the 1<sup>st</sup> respondent as opposed to fraud.

20       The effect of breach of a contract is that it gives the victim (in this case the appellant) the option to rescind the contract, sue for specific performance or compensatory damages. Andrew Burrows notes that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same  
25       situation, with respect to damages, as if the contract had been performed.<sup>7</sup>

30       Before taking leave of this issue I will also address the explanation given by the 1<sup>st</sup> respondent that the appellant was registered on the certificate of title as a trustee for the 2<sup>nd</sup>-8<sup>th</sup> respondents.

35       The High Court record indicates that during cross-examination, the 1<sup>st</sup> respondent stated that the appellant was registered on the title as a trustee. At the hearing of this appeal, the 1<sup>st</sup> respondent's counsel explained that at the time of registration, his client was terminally ill and in order to secure the interests of the 2<sup>nd</sup>-8<sup>th</sup> respondents who were minors then, he jointly registered his interest

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<sup>7</sup> Andrew Burrows, A casebook on Contract, 3<sup>rd</sup> edition, page 348.



5 with the appellant who would act as a trustee for the minor children.

When Court asked the 1<sup>st</sup> respondent's counsel to specify the year his client was diagnosed with the illness, counsel referred to the evidence given by the 1<sup>st</sup> respondent during cross-examination at  
10 the High Court. However, a look at the record reveals that there was no mention of any reason by the 1<sup>st</sup> respondent concerning the appellant's joint registration on the title as a trustee. Counsel was therefore giving evidence from the bar since the explanation he proffered is not on record.

15 But more important is that the certificate of title on record shows that on 6<sup>th</sup> February 1995, both David Kizito and Betty Kizito were registered as joint proprietors of the land at Muyenga as tenants in common under instrument number No. KLA 171228. The title did  
20 not indicate that the appellant was only a trustee.

Therefore, Court is left with no choice but to believe the appellant's account that she was a tenant in common and not a trustee.

*Question (ii)*

25 *Did the concealment of the true consideration amount to fraud?*

Fraud is a question of fact. In order for an action of fraud to be sustained, there must be actual fraud. Mere suspicion or inference of fraud is not sufficient.

30 It is trite law that fraud must be strictly proved;<sup>8</sup> and the facts constituting fraud must be clearly and conclusively established.

The facts relied upon by the appellant to prove the 1<sup>st</sup> respondent's  
35 fraud are that he concealed the true consideration in the transfer form and the status of the suit property. That whereas the land was developed with two houses thereon, the 1<sup>st</sup> respondent stated that

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<sup>8</sup> Kampala Bottlers Ltd v Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992.

5 the land was undeveloped. Indeed it is on record that in his defence  
the 1<sup>st</sup> respondent stated that he declared that there were no  
developments on the land after being advised by the officers in the  
land registry that he would pay taxes if he declared that the land  
was developed.

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It is clear from the facts on record that the false declaration was  
made in the land transfer form whose recipient was the  
Commissioner Land Registration. The Commissioner is the officer  
mandated to receive all transfer forms and effect their registration.

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In a recent decision of this Court, **Senkungu vs. Yakobo**<sup>9</sup>, the  
Court cited with approval Kerr's statement that fraud is infinite in  
variety with the ever dynamic operations of mankind. It includes all  
acts, omissions and concealments which include a breach of legal  
20 or equitable duty, trust or confidence ... Fraud in all cases implies a  
wilful act on the part of anyone, whereby another is sought to be  
deprived, by illegal or inequitable means, of what he is entitled to.<sup>10</sup>  
(My emphasis)

25 The law requires that the true consideration in land transfers must  
be declared.

**Section 92 (1)** of the **Registration of Titles Act** provides in part:

30 **... where the consideration for a transfer does not  
consist of money, the words "the sum of" in the  
forms of transfer in that Schedule shall not be used  
to describe the consideration, but the true  
consideration shall be concisely stated.** (My emphasis)

35 In the matter before Court, the contract between the appellant and  
the 1<sup>st</sup> respondent provided that the suit land be transferred into

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<sup>9</sup> Supreme Court Civil Appeal No.35 of 2006.

<sup>10</sup> Kerr on the Law of Fraud and Mistake, 5<sup>th</sup> edition, part I, page 1.



5 the names of the 1<sup>st</sup> respondent as a sole owner in exchange of his  
properties at Katwe and Kisugu. It is therefore these properties that  
would be the consideration for the appellant to give up her interest  
in the suit land. It follows that the transfer of the suit land was not  
a gift as was stated in the transfer form. In circumstances such as  
10 these, what Section 92(1) (supra) would require of the 1<sup>st</sup>  
respondent is to indicate the properties in Katwe and Kisugu as the  
true consideration.

I therefore find that the false declaration that the suit land was a  
15 gift contravened the provisions of Section 92 (1). It was a breach of  
legal duty.

In **Samuel Kizito Mubiru & Ano vs. G.W.Byensiba & Ano**,<sup>11</sup>  
Karokora J held that a buyer is not a bonafide purchaser where he  
20 inserts a lesser figure on the transfer form as consideration when  
he actually paid more in order to defraud government of revenue.  
The mode of acquisition becomes tainted with fraud and illegality.  
The Judge further held that by public policy, any transaction  
designed to defraud the government of its revenue is illegal and  
25 therefore a title deed acquired in such circumstances would be void  
because of fraud.

The principle enunciated in the above authority has been followed  
in numerous High Court decisions<sup>12</sup> and I find it good law.

30 Applying the above principle to the present appeal, it follows that  
stating that one acquired land as a gift when the transfer was based  
on exchange of another piece of land can be equated to inserting a  
lesser figure in the transfer form than what was actually paid as  
35 consideration for the land. Such conduct is tantamount to

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<sup>11</sup> High Court Civil Suit No.513 of 1982.

<sup>12</sup> (See: *Tradimpex (U) Ltd vs. Chris Serunkuma and Christine Okot* HCCS No.1519 of 1999, *Janet Diana Cope & 4 Ors vs. Janet Namuli and Allan Katusiime* HCCS No.33 of 2005, *Mudiima Issa & 5 Ors vs. Elly Kayanja & 2 Ors* HCCS No.232 of 2009).

5 concealment of the true consideration for the transaction and amounts to fraud.

Furthermore, declaring that were no developments on the land in order to evade payment of taxes and therefore defrauding government of revenue also constitutes fraud. I am fortified in my view by the definition of fraud in **Fredrick. J. K. Zaabwe vs. Orient Bank & 5 Ors**<sup>13</sup> where Katureebe, JSC (as he then was) adopted the definition of intent to defraud given in Black's Law Dictionary<sup>14</sup>, that, *"to act with 'intent to defraud' means to act willfully, and with the specific intent to deceive or cheat; ordinarily for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself."*

I therefore hold that the transfer of land into the names of the respondents was void for fraud.

Arising from the above analysis, I respectfully differ from the Court of Appeal's finding that the misrepresentation of the true consideration had no legal effect on the transaction.

Consequently, the registration of the 1<sup>st</sup> respondent together with his children as proprietors of the property at Muyenga is void. It follows that the certificate of title in question would revert back into the joint names of the appellant and the 1<sup>st</sup> respondent as tenants in common.

### **Ground 3**

The main contention by the appellant under this ground was that the Court of Appeal erred in giving an ineffective order of subdivision of Katwe and Kisugu properties yet it was on record that the properties were no longer in the 1<sup>st</sup> respondent's names.

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<sup>13</sup> Supreme Court Civil Appeal No.04 of 2006.

<sup>14</sup> 6<sup>th</sup> edition Page 660.



5 On the other hand, the 1<sup>st</sup> respondent's counsel submitted that the Court of Appeal was misled in making the order by the appellant who sought for subdivision as a remedy in the trial Court.

10 A careful study of the judgment of the Court of Appeal reveals that the court made the order of subdivision following its finding that there was breach of contract. The order was not based on the remedies sought by the appellant.

15 The appellant who was a victim of breach of contract deserved justice by putting her in a position she would have been in had the 1<sup>st</sup> respondent fulfilled his obligation.

20 It was incumbent on the court to first establish the status quo of the Katwe and Kisugu properties before making the order of subdivision.

I therefore hold that the court erred in ordering the 1<sup>st</sup> respondent to proceed to sub-divide property before ascertaining its status.

25 **Ground 4**

The appellant faults the Court of Appeal for denying her mesne profits on ground that she had divested herself of all interest in the suit land. The 1<sup>st</sup> respondent's counsel agreed with the reasons given by the court in declining the grant of mesne profits.

30 **Section 2 (m)** of the **Civil Procedure Act** defines mesne profits as *profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include*  
35 *profits due to improvements made by the person in wrongful possession.*

5 In the recent decision of **Vivo Energy (U) Ltd (Formerly Shell (U) Ltd) vs. Lydia Kisitu**,<sup>15</sup> this Court had occasion to expound on the law on mesne profits. Tumwesigye, JSC in his lead Judgment cited Section 2(m) above and two persuasive authorities from India on the issue of mesne profits and held as follows:

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15 “Clearly, according to section 2(m) of the Civil Procedure Act and as can be discerned from the excerpts of the Indian Judgments, mesne profits are profits which the person in wrongful occupation of the property ‘actually received’ or might have received with ordinary diligence.”

In light of the above definitions and circumstances of this case, the question which follows is: *would the appellant be entitled to mesne profits?*

20 At the hearing of this appeal, the 1<sup>st</sup> respondent’s counsel argued that the appellant was not entitled to mesne profits because she used to receive rent as a landlady from the Kisugu property.

25 I however note that on record is a letter dated 2<sup>nd</sup> February 2002 written by Mr. Gabidande Musoke, a tenant who occupied the Kisugu property. In the letter, the tenant indicated that at one time the 1<sup>st</sup> respondent introduced the appellant as the landlady to whom the rent was to be paid. Subsequently, the 1<sup>st</sup> respondent  
30 instructed the tenant to stop paying rent to the appellant and instead pay it to him.

From the above facts, it is clear that the appellant was stopped by the 1<sup>st</sup> respondent from receiving the rent due to her from the  
35 Kisugu property which she was meant to own. This would entitle her to the award of mesne profits.

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<sup>15</sup> Supreme Court Civil Appeal No. 07 of 2015.



5 The Court of Appeal therefore erred when it declined to grant mesne profits to the appellant on the basis that she was already receiving rent from the Kisugu property.

10 In the **Vivo Energy (U) Ltd case (supra)**, this Court also dealt with the question on how mesne profits can be proved. The Court held that, *it is the duty of the plaintiff to show what the unlawful occupant earned as profit during the period of dispossession of the rightful owner*. The Court went on to say that *such a rightful owner can apply for an order of discovery if necessary to enable him or her*  
15 *to obtain the necessary information*.

*How then is the Court to arrive at the quantum to be paid in form of mesne profits?*

20 In the present case, as was in the Vivo Energy (U) Ltd case, no evidence was placed before Court showing the profits that the unlawful occupant earned. Neither was evidence of rent value of the Kisugu property nor the period of dispossession adduced before court.

25 Consequently, I am unable to grant the mesne profits since I cannot speculate its quantum.

### **Conclusion and Orders**

30 (i) On ground 1, the learned Justices of Appeal did not err when they held that the failure of the 1<sup>st</sup> respondent to honour his obligation to the appellant amounted to breach of contract and not fraud.

35 (ii) On ground 2, the learned Justices of Appeal erred when they held that the under declaration of the value of the Muyenga property as well as the consideration in the transfer form did not constitute fraud.

(iii) On ground 3, the learned Justices of Appeal erred in making an order of subdivision of the Katwe and Kisugu properties when they had long been sold to third parties.

10 (iv) On ground 4, the learned Justices of Appeal erred in their reasoning and finding that the appellant was not entitled to mesne profits as well as general damages.

15 Having held that there was breach of contract, it would follow that the appellant be put in a position that she would have been in had the 1<sup>st</sup> respondent fulfilled his obligation. This would entitle the appellant to an award of general damages arising out of breach of contract. The question is: *how does the Court arrive at the appropriate quantum?*

20 As Katureebe, JSC (as he then was) noted in his paper entitled Principles Governing the Award of Damages in Civil Cases:

25 **It would be prudent for the parties or their lawyers to provide the court with proper guidance relating to the inquiry of damages generally. The impression that general damages are damages at large and any figure picked from the blue would suffice, is at best, disturbing and, at worst entirely erroneous ... The parties, their lawyer and the court must at all times suggest a reasonable hypothesis for their inquiry of damages.**<sup>16</sup>

35 I note however that in the present matter, no evidence has been adduced to guide Court on the quantum of damages to be awarded. Nevertheless, the failure to adduce evidence to guide court does not disentitle the appellant from an award of general damages. The

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<sup>16</sup> Katureebe (2008), paper presented at the *induction Course of newly appointed Judges of High Court Uganda*, at Entebbe Resort Beach Hotel, on Wednesday 18<sup>th</sup> June, Pages 38-39.



5 difficulty of assessing damages is no reason for the court not  
granting them.<sup>17</sup> In the persuasive authority of **Chaplin vs. Hicks**<sup>18</sup>  
the court held that: “*where it is impossible to assess the appropriate*  
*measure of damages with certainty and precision, the defendant*  
10 *must not be relieved of his liability to pay the plaintiff any damages*  
*at all in respect of a breach of contract or any other actionable*  
*wrong*”. In all such cases, where ascertainment of damages is  
difficult, the court must attempt to ascertain damage in some way  
or other.<sup>19</sup>

15 The East Africa Court of Appeal in **Obongo vs. Kisumu**  
**Council**<sup>20</sup> offered some guidance on how to ascertain general  
damages arising out of breach of contract. The court among  
other things held that:

20 **When damages are at large and a court is making a**  
**general award, it may take into account factors such**  
**as malice or arrogance on the part of the defendant**  
**and the injury suffered by the plaintiff, as, for**  
**example, by causing him humiliation or distress.**

25 Furthermore, this Court in **Crown Beverages Ltd vs. Sendu**  
**Edward**<sup>21</sup> held that the amount of general damages which a plaintiff  
may be awarded is a matter of discretion by the court.

30 Therefore, in exercise of that discretion and on account of the fact  
that the respondent denied the appellant enjoyment of her share in  
the property located in an upscale Kampala suburb from 2002 to  
date (a period of 17 years) as well as the impossibility of subdividing  
the property located at Katwe, I would award the appellant general  
damages in the sum of Ushs.100, 000,000/=.

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<sup>17</sup> Bovet V Walettr (1917) 62 Sol Jo 104.

<sup>18</sup> [1911] 2 KB 786.

<sup>19</sup> Hall vs. Ross (1831) 3 All ER, 672.

<sup>20</sup> [1971] EA 91 at page 96.

<sup>21</sup> Supreme Court Civil Appeal No.01 of 2005.

5

Arising from the above, I would allow the appeal and set aside the decision of the Court of Appeal with the following orders:

**Orders**

10

1. Since it is now impossible to make an order of subdivision of the Kisugu and Katwe properties which have long been sold to third parties, I would order for the reinstatement of the appellant on to the property at Muyenga.

15

2. Consequently, I would order the Commissioner Land Registration to reinstate the appellant onto the certificate of title of the suit land as a tenant in common with the 1<sup>st</sup> respondent.

20

3. General damages in the sum of Ushs.100,000,000/= be awarded to the appellant.

25

4. The costs of this appeal and in the courts below would be awarded to the appellant.

Dated at Kampala this 19<sup>th</sup> day September 2019.

30

*L. Tibatemwa*  
.....  
**PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA**  
**JUSTICE OF THE SUPREME COURT.**



THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
CIVIL APPEAL NO. 08 OF 2018

Coram: Mwangusya, Mwondha, Tibatemwa-Ekirikubinza, Mugamba,  
Nshimye JJSC)

BETTY KIZITO.....APPELLANT

AND

1. DAVID KIZITO KANOONYA  
2. DICKSON NSUBUGA  
3. DIANA SEMAKULA  
4. DENIS KAVULU  
5. JOYCE NANSUBUGA  
6. IVAN ZIMBE  
7. DANIEL KIZITO  
8. MARTHA NAMKYA

.....RESPONDENTS

**JUDGMENT OF MWONDHA JSC**

I had the opportunity of reading in draft the Judgment by my learned sister Hon. Justice Ekirikubinza JSC. I agree with the decision and orders made.

I would like to emphasize the issue of entitlement to general damages by citing **Haji Asuman Mutekanga Vs Equator Growers Limited Civil Appeal No. 07 of 1995**, Oder JSC citing Prehn Vs Royal Bank of Liverpool (1870) LR 5 Ex 92 held as follows:

**With regard to proof, general damages in a breach of contract are what a court (or jury) may award when the court cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man.**

On the issue of Mesne profits, I would add that, **“mesne profits are not in the category of general damages. They are in essence, loss of earnings and therefore fall squarely in the category of special damages. That**

**being the case, the law requires that special damages must be pleaded with specificity and must be proved".** (See Crane Bank Limited Vs Nipun Narottam Bhatia SCCA No. 2 of 2014 this court citing the case of Kyambadde Vs Mpigi District Administration (1983) HCB 44).

In her pleadings, the plaintiff pleaded breach of contract & fraud and prayed for the following reliefs:

- a) a declaration that the defendants were fraudulently registered on title to land comprised in Kyadondo Block 244 Plot No. 5091 at Muyenga
- b) an order cancelling the names of the defendants from the said title and reinstating the name of the plaintiff and 1<sup>st</sup> defendant as tenants in common in equal shares.
- c) an order sub-dividing the said land equally for the plaintiff and 1<sup>st</sup> defendant each with her/his own title.
- d) Costs of the suit.
- e) further and better reliefs at the Court may deem fit and just.

According to the court record, the appellant did not pray for special damages or mesne profits neither did she prove them.

I would therefore decline to grant mesne profits.

Appeal is allowed in terms as given in the lead judgment.



**MWONDHA**

**JUSTICE OF THE SUPREME COURT**



THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
CIVIL APPEAL NO.08 OF 2018

CORAM: MWANGUSYA, MWONDHA, TIBATEMWA-EKIRIKUBINZA,  
MUGAMBA, NSHIMYE, JJ.SC]

BETWEEN

BETTY KIZITO ..... APPELLANT

AND

- 1. DAVID KIZITO KANONYA
  - 2. DICKSON NSUBUGA
  - 3. DIANA SEMAKULA
  - 4. DENIS KAVULU
  - 5. JOYCE NANSUBUGA
  - 6. IVAN ZIMBE
  - 7. DANIEL KIZITO
  - 8. MARTHA NANKYA
- ..... RESPONDENTS

JUDGMENT OF HON. JUSTICE PAUL K. MUGAMBA, JSC

I have had the advantage of reading in draft the lead judgment of my sister, Prof. Lillian Tibatemwa-Ekirikubinza, JSC.

I agree with her conclusion and the orders she proposes.

Given at Kampala this 19<sup>th</sup> day of Sept 2019

.....  
  
PAUL.K.MUGAMBA  
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT KAMPALA

[CORAM: MWANGUSYA, MWONDHA, TIBATEMWA, MUGAMBA,  
JJSC, NSHIMYE AG.JSC,]

CIVIL APPEAL NO.08 OF 2018

BETWEEN

BETTY KIZITO:.....APPELLANT

AND

1. DAVID KIZITO KANONYA
2. DICKSON NSUBUGA
3. DIANA SEMAKULA
4. DENIS KAVULU
5. JOYCE NANSUBUA
6. IVAN ZIMBE
7. DANIEL KIZITO
8. MARTHA NANKYA

.....RESPONDENTS

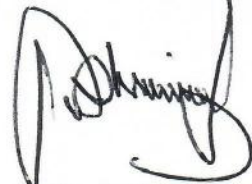
[Appeal from the judgment and Decree of the Court of Appeal in Civil Appeal  
No, 187 of 2012 before: (Hon Justice Buteera, Kakuru, Cheborion JJA) dated  
16<sup>th</sup> October 2017]

**JUDGMENT OF A.S. NSHIMYE, A.G JSC.**

I have had the benefit of reading in draft the lead judgment  
of my sister Hon Justice Prof. Tibatemwa Ekirikubinza JSC.

I agree with it and the orders she has proposed.

Dated at Kampala, this 19<sup>th</sup> day of Sept 2019.



A.S. NSHIMYE

**A.G. JUSTICE OF SUPREME COURT**



**IN THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 8 OF 2018**

[**CORAM:** MWANGUSYA, MWONDHA, TIBATEMWA-EKIRIKUBINZA, MUGAMBA, JJSC  
NSHIMYE; Ag. JJSC]

**Between**

Betty Kizito ..... Appellant

**And**

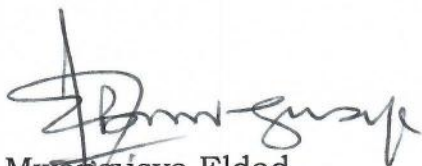
- |  |   |                   |
|--|---|-------------------|
| 1. David Kizito Kanonya<br>2. Dickson Nsubuga<br>3. Diana Semakula<br>4. Denis Kavulu<br>5. Joyce Nsubuga<br>6. Ivan Zimbe<br>7. Danial Kizito<br>8. Martha Nankya | } | ..... Respondents |
|--|---|-------------------|

*[Appeal from the Judgment and Decree of the Court of Appeal in Civil Appeal No. 187 of 2012 before (Hon. Justice Buteera, Kakuru and Cheborion, JJA) dated 16<sup>th</sup> October 2017]*

**JUDGMENT OF MWANGUSYA, JSC**

I have had the opportunity of reading in draft the judgment of my sister Prof. Lilian Tibatemwa-Ekirikubinza, Justice of the Supreme Court. I agree with her decision and the orders proposed.

Since all the other justices are in agreement, the appeal is allowed with costs in this Court and Courts below.



Mwangusya Eldad  
**JUSTICE OF THE SUPREME COURT**