

1. The Judgment/decreed and orders of the Learned Trial Magistrate Grade one be reversed and set aside.
2. The suit land be declared the property of the Appellant with no adverse claims from the Respondent.
3. The Appellant be awarded Costs of the Appeal, and the lower court below.

REPRESENTATION

When this appeal came before me for hearing, the Appellant was represented by M/S. Legal Aid Project of the Uganda Law Society and the Respondent was represented by Counsel Kyeyago Edward for R. Nsubuga & Co. Advocates.

Both sides were directed to proceed on written submissions and they all complied. I have considered them in this Judgement.

BACKGROUND

The background according to learned counsel for the Appellant was that the Appellant filed **Civil Suit No. 002 of 2021** from which the instant appeal arises in the Chief Magistrate's Court sitting at Bugembe against the Respondent for fraud, misrepresentation and for recovery of land situated in Namulesa village, Namulesa parish in Jinja district with all developments thereon. The suit was subsequently transferred to and heard from Jinja.

The Plaintiff's claim was that he advanced money to the defendant to help in the purchase of the suit land and subsequently for the construction of a house thereon until its completion. The parties eventually occupied the suit land for a while, he demanded for the sale agreement from the Defendant but to no avail only to realize that the Defendant had made Sale Agreements in her names in order to defraud the Plaintiff.

In her defence, the Defendant claimed that the suit land belonged to her having purchased the same from Tuzze Awaza on the 31st March, 2018 single handedly. On the 27th March, 2023, the trial Magistrate Grade 1, Her Woeship Sumaya Kasule-Rutahwire held that the defendant was the rightful owner, the Plaintiff had no interest in the suit land and dismissed the suit.

On the other hand, the brief facts according to learned counsel for the Respondent are that the plaintiff now Appellant brought this suit against the

defendant Respondent now the Respondent in the lower court seeking for a declaration that he is the rightful owner of the suit land among other orders.

The plaintiff states that he started cohabiting with the defendant in 2017 as husband and wife when he gave the defendant now Respondent money to purchase the suit land where they would construct their matrimonial home. The plaintiff stated that he sent the said money through mobile money transfer since he was in the same presence of the area chairman. The plaintiff now Appellant further stated that he advanced more money to the plaintiff to construct a house which the defendant did and the house is now complete after which the parties started living together as husband and wife.

That the plaintiff now Appellant asked the defendant to avail him with the sale agreement to the land which the defendant now Respondent refused to do so which cause conflict in the relationship. The plaintiff alleges that he the defendant made complaints against him and the police eventually forcefully evicted him from the house.

The defendant filed a Written Statement of Defense and denied being married to the plaintiff at any point and that the defendant was just a friend.

The defendant avers that she bought the suit land from a one Tuzze Awaza on the 31st March 2018 single handedly and she constructed thereon a house through acquiring loans and denies receiving money from the plaintiff through mobile money as he alleges.

The plaintiff was just a friend that would visit her and did not contribute anything to the purchase of the land or construction of the house and the defendant has no locus to ask for a sale agreement to land he did not contribute to. The defendant avers that the agreement she entered into with the plaintiff was not meant to compensate the plaintiff for the suit land but as a refund since the plaintiff was claiming that he was giving the defendant UGX 20,00/= for food and that is what was calculated and agreed upon to the amount indicated in the agreements.

The plaintiff now Appellant gave powers of attorney to Kaluta Alex to represent him in this matter. Both parties had no legal representation and did not file written submissions.

That when they appeared in court on the **30th of August 2023**, Court gave directions when the parties should file their written submissions in this appeal but to date the applicant has never filed and served unto us submissions. Nevertheless, we shall proceeded and filed their submissions

on behalf of the respondent and argue the three grounds as indicated in the memorandum of appeal filed by the applicant in this court.

THE LAW

It is now settled law that it is the duty of the plaintiff to prove his or her case on the balance of probabilities. In relation to the onus of proof in civil matters, the burden of proof lies on he who alleges a fact and the standard is on the balance of probabilities, and not beyond reasonable doubt as in criminal case. It is provided for in **Sections 101, 102, and 104 Evidence Act** and is discharged on the balance of probabilities. The standard of proof is made if the preposition is more likely to be true than not true.

The standard of proof is satisfied if there is greater than 50% that the preposition is true and not 100%. As per Lord Denning in **Miller v Minister of Pension [1947] ALLER 373**; he simply described it as ‘more probable than not.’ This means that errors, omission and irregularities that do not occasion a miscarriage of justice are too minor to prompt the appellate court to overturn a lower court decision. **See Festo Androa & Anor vs Uganda SCCA 1/1998.**

It is also the position of the law that in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per **Section 58 Evidence Act and Section 33 Evidence Act.** A fact under evidence Act means and includes: -

(i) Anything, state of thing, or relation of thing capable of being perceived by senses as per **Section 2 1(e) (i) Evidence Act.**

Learned counsel for the Appellant submitted that this court sitting as the 1st appellate Court, it is the duty to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have any opportunity to hear and see the witnesses testify. **See Pandya vs R [1957] EA 336; Ruwala vs Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 55; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC)**

I agree with the above submission on the duty of the first appellant court. I only wish to add that a failure to re-evaluate the evidence of the lower court record is an error in law. The appellate court has a duty to re-evaluate the evidence as a whole and subject to a fresh scrutiny and reach its own

conclusion. **See *Muwonge Peter vs Musonge Moses Musa CACA 77; Charles Bitwire vs Uganda SCCA 23/95; Kifamunte Henry vs Uganda SCCA No. 10/1997.***

It is also trite law that the appellate court can only interfere and alter the findings of the trial court in instances where misdirection to law or fact or an error by the lower court goes to the root of the matter and occasioned a miscarriage of justice. **See *Kifamunte Henry vs Uganda SCCA No. 10/1997.***

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to a first appellate court, I will now turn to the substantive matters as raised in the Memorandum of Appeal and proceed to re-evaluate the evidence on record.

PRELIMINARY POINT OF LAW

In his written submission, learned counsel for the Respondent raised a Preliminary Point of Law as to the framing of the 1st and 2nd Grounds of Appeal and relied on **Order 43 r.1 (1) and (2) of the CPR** that requires a Memorandum of Appeal to set forth concisely the grounds of objection of the decision appealed against. *“Every memorandum is required to set forth, concisely and under distinct heads, the ground of objection to the decree appealed against without any argument or narrative.*

As is the procedure in our courts, I will first address the above Preliminary Point of Law.

They submitted that grounds 1 and 2 are too general and offends the provisions of **Order XLIII Rules 1 and 2 of the CPR S1 71-1 (as amended)** which requires every memorandum of appeal to set forth concisely and under distinct heads, the grounds of objection to decree appealed from which any argument or narrative and the grounds should be numbered consecutively.

That properly framed grounds of appeal should specifically point out errors observed in the course of the trial including the decision, which the appellant believes occasioned the miscarriage of justice; and that such grounds have been struck out as the Appellant would be general fishing expedition hoping to get something he himself does not know. They relied on the decisions of ***Katumba Byaruhanga v Edward Kiwarabye Musoke, Civil Appeal No.2 of 1998 (Reported in 1999-KALR621) & AG v Florence***

Baliranine Civil Appeal NO.79 OF 2023 where such grounds were struck out.

They submitted that the first and second ground of appeal in the Memorandum do not specify the errors and miscarriage of justice which was occasioned by the decision of the learned trial magistrate to the appellant and it should be struck out as the two grounds are too general and offends **Order XLIII 1 and 2 of the CPR SI.71-1 (as amended)**.

In Reply, learned counsel for the Appellant relied on **Black's Law Dictionary, 8th Edition at Page 1191** defines an argumentative pleading as *"...a pleading that states allegations rather than facts and thus forces the court to infer or hunt for supporting facts."*

That it has been held before that grounds of appeal ought to be (a) as clear as possible (b) as brief as possible (c) as persuasive as possible without descending into narrative and argument; and relied on the case of **M/S. Tatu Naira & Co. Emporium vs Verjee Brothers Ltd, SCCA No.2/2000**).

I have critically examined the above stated grounds of appeal in the Memorandum of Appeal. **Order.43 r1 (1) & (2) of the CPR** provides that: - *"That every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose. The memorandum shall forth concisely and under district heads, the ground of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively"*.

My finding is that the first two grounds of Appeal are well framed and are devoid of arguments or narrative; and it is clear that they set out the particular areas which the Appellant believes occasioned a miscarriage of justice.

Having found as I have, it is clear that these grounds of Appeal are clear and can be resolved as they are. I will therefore exercise my discretion and deal with all the issues raised in this appeal by reevaluating all the evidence on record and arrive at my own decision.

RESOLUTION OF THE APPEAL

Following up on my decision above, and for purposes of consistency I will ignore all the grounds of Appeal and instead exercise my powers as a first appellate court to re-evaluate all the evidence of both sides and draw my own conclusions. In doing so, I will apply the submissions of both sides to the re-evaluation of the evidence on record and Judgement as far as they are applicable.

In the first place, learned counsel for the Appellant argued Grounds 1 and 2 concurrently and abandoned ground 3 of the appeal.

They submitted that the Plaintiff lead evidence through two witnesses, **PW1 Kulata Alex** and **PW2, Sempa Paul** who stated that the Plaintiff purchased the suit land which was vacant from Abali on the 31st March 2018 through the Defendant with whom he was cohabiting at the time. The suit land is in Namulesa village, Namulesa Parish in Jinja and measures 28ft by 30ft and has **PW2 Sempa**, Guardian Angels and Ssalongo as neighbors.

That the Plaintiff trusted the Defendant shillings 3.5 million and 15 million in the construction of a house on the suit land.

Further, that the Plaintiff demanded for copies of the Sale Agreement from the Defendant but to no avail. Misunderstandings arose between the parties and mediation by the **PW2** failed and the Defendant kicked the Plaintiff out of the suit land the Plaintiff learnt that the Defendant made two Agreements her name as sole purchaser, one stamped by the L.C 2 Chairperson of Namulesa, while the other was L.C 1 Wabulenga village and both bearing the same date. The former Agreement was admitted as **PEXH. 1.**

That **PW2** particularly stated that when settling the couple's issues at Police the Defendant signed a document returning to Plaintiff the amount of shillings 3.8 million. **PW 2** signed the said document, however, the Defendant did not give the money as promised.

That the Plaintiff attached **Annexure 'D'** to the Plaint which is a document dated 10th May, 2020 to that effect and there is no reason to explain why the trial Magistrate did not guide the unrepresented litigants to tender the same into evidence, however, the Defendant did not deny that in cross-examination. That was an admission on the Defendant's part of having received money from the Plaintiff to purchase the suit land.

That the Defendant in attempting to prove her ownership of the suit land presented testimony from herself, **DW2, Tuze Awaze, DW3, Abaliwano David** whom in her testimony in chief and at the close of her case presented

two agreements both dated 31st March, 2018 both allegedly authored by **DW3**.

That both agreements have the Defendant as the buyer and Tuzze Awaza as Seller of the land for shillings 3 million. The first agreement purports to be a true copy of an original stamped by the LC.1 Chairperson of Wabulega village and signed by a one Izimba Ann.

That the second agreement which the Defendant presented at the close of her case as the “original” copy bears the stamp of the Chairperson L.C.2 of Namulesa Parish. That the Defendant does not anywhere provide explanation for the aforementioned discrepancies, inconsistencies and contradictions in her evidence and even the receipts she exhibited as her evidence for materials she purchased for the construction of the house bear the name “2 Ways Guest House” which name is crossed and replaced with “Yesu Amala Hard Ware”.

That in regard to the payments for the land the Defendant in cross-examination stated that she purchased the suit land in 3 installments with the first installment of shillings 500,000, 2nd installment shillings 1,500,000 and 3rd installment of shillings 1,000,000 while the author of the agreement, **DW3 Abaliwano** contradicted by stating at page 19, as well as the written agreement indicate a one off cash payment; and the Defendant further stated that the land measured 30ft by 27ft, and 47ft in length whereas the author of the agreement, **DW3** stated that the suit land measures 28ft by 30ft.

That the Seller, **DW2** stated the land to be 30ft by 50ft. That the Defendant’s witnesses contradicted themselves at all fronts.

That the Supreme Court in ***Fredrick J.K Zaabwe vs Orient Bank Ltd and 5 Ors (Civil Appeal No.4 of 2006) [2007] UGSC 21*** defined fraud from the **Black’s Law Dictionary, 6th Edition page 660**, as below.

“An intentional perversion of truth for the purpose of including another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look gesture....”

They submitted that in presenting two totally distinct agreements claiming to prove a single transaction is the real meaning of **international perversion of truth for the purpose of including another and a false representation of a matter of fact** as defined by the Supreme Court in the above cited case. More so, that the act of the Defendant forging receipts to deceive cannot be taken lightly. That the fraudulent acts only prove that the Defendant will go to such extent to deprive the Plaintiff of his interest in the suit land.

Further, that it is trite the Law now governing inconsistencies or a discrepancy is that grave inconsistencies if not satisfactorily explained will usually result in the evidence of the witness being rejected. That grave inconsistency or contradiction is the one that goes to the root of the case. They relied on the case of **Mujuni v Uganda (HCT-04-CR-CN 33 of 2011-2013)**.

That **DW2 Tuze Awaze**, the previous owner of the suit land did not clarify the inconsistencies, however stated that although the Defendant was the only one at the transaction to sell the suit land, he is aware that both parties oversaw the construction of the house thereon.

That the outright fraud, inconsistencies and contradictions on the part of the Defendant only prove the Plaintiff's ownership. The Defendant does not deny receiving money from the Plaintiff to purchase the suit land as the Plaintiff's agent. Even if she eventually made the Sale Agreement in her own names, the Plaintiff remains with a beneficial interest in the suit land as a result of a resultant trust. They relied on **Kenya Seed Company Limited vs Nathaniel Tum & Anor. HCCS No. 180 of 2010** where Justice Madrama Izama (as he then was) defined resultant trust from **Black's Law Dictionary, 7th Edition at page 1417** as a trust imposed by law when property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. 'Resulting trust' is also referred to as 'implied trust' or 'presumptive trust'.

Further, that in the case of **Gathiba vs. Gathiba [2001] 2 EA 342**, it was held that *"a resulting trust is an implied trust where the beneficial interest in property comes back, or results for the benefit of the person on his respective who transferred the property to the trustee or provided the means of obtaining it. These include where upon purchase, property is conveyed into the name of someone other than the purchaser, there is a*

resulting trust in favor of him or her who advances the purchase money but not where it would defeat the policy of the law”.

They therefore submitted that the Plaintiff in giving money to the Defendant to purchase the suit land retained the beneficial interest in the suit land; and according to English decisions ***Fowkes v Pascoe (1875) LR 10 Ch App 342 and Tinsley v Milligan [1994] 1 AC 340***, in such instances, the Defendant could only rebut that presumption of a resultant trust by availing concrete evidence to the contrary.

That the Defendant in this case miserably failed to rebut the same given the fraud in making up Sale Agreements, contradictions and inconsistencies in the witness testimonies and they contended that had the learned trial Magistrate properly evaluated the evidence on record and stayed away from discussing issues regarding the nature of broken relationships in general, she ought to have found that the suit land belongs to the Plaintiff.

They invited this Honourable Court to find that the Appellant/Plaintiff has a beneficial interest in the suit property making him lawful owner of the suit land grant the remedies sought by the Appellant in Memorandum of Appeal with costs.

In respect Ground 3, learned counsel for the Respondent submitted that the Appellant will be tasked to prove the propriety of this ground as it is an open lie and failure to appreciate proceedings as was in the holding of court in ***Dr. Louis Okio Talamoi v. Mathew Okello & Anor CA 22/2015***, per Justice Stephen Mubiru succinctly elucidated on the purpose of the visit locus in quo thus:

“The purpose of visit to locus in quo, as has been repeatedly stated is not recite the evidence already led but to clear doubt which might have risen as a result of conflicting evidence of both sides as to existence or nonexistence of the state of facts relating to the land and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue”.

It is to enable the trial court understand the oral evidence adduced in court better, by visiting the physical location to physically assess the status quo. Being demonstrative evidence therefore, it has no evidential value independent of the witness’s testimony. This is because it is an extension of what transpired in court as a procedure arising under **Order 18 rule 14 CPR (as amended)**.

They added the land being abstractive thing, the practicalities of such an exercise, mandate the interaction of locals as circumstance require, limited to the purposes of testing the oral evidence already on court record. That in **Kaggwa Micheal v Olal Mark & others (supra)**, Court held that *“notwithstanding, according to section 166 of the Evidence Act, the improper admission or rejection is not to be ground of itself for a new trial or reversals of any decision in any case if it appears on the court before which the objection is raised the independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that according to section 70 of the civil procedure act, no decree maybe reversed or modified for error, defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of court.*

Further, that in **Dr. Louis Okio Talamoi v Mathew Okello & Anor (supra)**, Court observed that *“a court will not set aside a judgement or an order or a new trial on ground of a misdirection or of the improper admission or rejection of evidence or for any error as to any matter of pleading or as to any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted into miscarriage of justice. I am of the view that there was sufficient evidence to guide the proper decision of this case, independently of the observations made at locus in quo...”*.

They argued that the Plaintiff /Appellant must prove that what transpired at the locus quo substantially affected the decision of court hence occasioning miscarriage of justice which the Appellant has demonstrably failed to prove; and submitted that there is sufficient evidence **of DW1, DW2 and DW3** on which the learned trial Magistrate relied on, considered and evaluated at pages 3, 4, 5 and 6 of the Judgement before arriving at the decision.

They therefore submitted that this court as the first appellate court has a duty to re-evaluate the evidence per the lower court record and that from the **record of proceedings at pages 11, 12,13,14,15,16,17,18 and 19**, the Defendant/ Respondent adduced evidence of three witnesses namely herself, **Tuzze Awazab** and **Abaliwano David** who all gave evidence and confirmed that the Defendant/ Respondent is the lawful owner of the suit land **DW2** is the one who sold the suit land to the Respondent and **DW3** is the author of the Sale Agreement.

That the Sale Agreement was exhibited in evidence as **DEXh 2** and **DW1** gave evidence that she acquired loans to finance the buying of the land from UGAFODE MICROFINANCE and by the time she testified in court, the original

agreement was still held by the Microfinance which confirmed that it had the original because she had not fully paid the loan.

DW1 further availed court with receipts from the hardware confirming that she is one who purchased the building materials used to build the house on the suit land.

That the above evidence was never controverted by the Plaintiff /Appellant and from the **record of proceeding at page 4, 5,6,7,8 and 9, PW1 a one Kulata Alex** the lawful attorney stated that the Plaintiff /Appellant left money with the Defendant /Respondent to purchase the suit land and he was not there when the Plaintiff /Respondent bought the land from **DW2** and his evidence is hearsay as he was not there. That the Appellant alleges that he used to send the money through mobile money.

They submitted that from the evidence on record adduced by the parties, it is clear that the Defendant is lawful owner of the suit land and house as the Appellant failed to controvert the evidence by either producing proof that he gave any money to the Respondent to purchase the suit land, build a house thereon and or produce a printout from Telephone Company to prove that he indeed sent the money to the Respondent. That in the decisions of **Kaggwa Micheal v Olal Mark & others Civil Appeal No.10 of 2017** and in **Dr. Louis Okio Talamoi v Mathew Okello & Anor CA22/2015**, court refused to set the lower court Judgement on ground of existence of sufficient evidence, independent of observations at locus, to uphold the decisions appealed against.

They submitted that Court adopts the same approach above to find that the evidence adduced by the Defendant/ Respondent was sufficient to lead to the conclusion that the Defendant/ Respondent is the lawful owner of the suit land as rightfully held by the learned trial Magistrate and disregard the observation at the *locus in quo*.

They prayed that this Appeal lacks merit and be dismissed with costs.

I have carefully re-evaluated and analyzed the evidence of both sides, the Judgment of the lower court as availed to me on the typed and certified proceedings and the submissions of both sides as captured in this Judgment. During the trial in the lower court, the Plaintiffs/Respondent brought five (5) witnesses to prove her claim in the suit land; and the Witness Statements of each of them was admitted as evidence in chief and they were subjected to cross-examination as follows:-

The first witness was **Kulata Alex, aged 37 years, businessman, resident of Commercial Zone, Budumbuli East Ward, Jinja North Division, Jinja City (hereinafter referred to as PW1)**. He testified that he got Powers of Attorney to represent the plaintiff in this matter and knows Nanvuba Sanon- the Plaintiff and his law and he gave him Powers of Attorney to represent him. The said Powers of Attorney were tendered in Court and that they were given to him as Kulata and the donor is Nanvuba Sanon. That it was given to him on 20/5/2022 and it was registered on 23/5/2022 at URSB; and Nanvuba signed as a donor and **PW1** also signed as a done. The Defendant had no objection and Court admitted as **P Exh 1**

PW1 knew the defendant in the matter, that she was a wife to the plaintiff; and that the plaintiff sued the defendant because the defendant was denying him a building and plot that belongs to him. That the building and plot is located in Namulesa 28ft by 30ft; and it neighbors on top: Mr. Sempa, on the right: Guardian Angels, on the left: Salongo and the bottom: unknown (**PW1** did not don't know his name)

Further, that the plaintiff bought the plot from Abali on 31/3/2018 and there was nothing on the plot by the time it was purchased. Those present while the plot was being purchased was the defendant, the vendor Abali and other people that he did not know. That the plaintiff was not present at the time the plot was purchased and he left 3.5 million to the defendant to purchase the plot in 2 names of plaintiff and defendant.

That the agreement was not made in two names and it was only made on the names of the defendant.

PW1 confirmed that no one was present when plaintiff was giving the defendant money because they were in their house alone. That after the defendant purchased the plot, the plaintiff requested to be shown the agreement and the defendant refused to show it to him; and it was at that moment that the disagreement started in their marriage.

That later the pastor called Sempa to intervene verbally and both defendant and plaintiff agreed to construct on the plot despite the defendant refusing to show them the agreement. That the house is both commercial and residential house and he estimated that Sanon invested about 10-15 million on the said house construction, the plot was purchased at 3 million.

In addition, that the house was constructed from April 2019 and it was completed in July 2019 and they started occupying it together. Currently it is

the defendant Lydia occupying the house having chased the plaintiff out of the house with use of force. That actually the purchase that was made has two L.Cs and it erroneous because the L.Cs which authorized the agreement is Namulesa and the one which confirmed by stamping is Wabulenga village, yet the plot is in Namulesa village.

That the receipts she used are dispute and he wanted this court to determine the case in our favour and costs and also wanted court to give me a chance to bring them to court.

During cross examination by defendant, PW1 was not sure why the plot is 28ft by 30ft. That it is the Defendant who told them that it is Abali who sold to her, for him, he knows the neighbor as Salongo and PS. Sempa. That the plaintiff gave her 3.5 million and you purchased it at 3 million and he gave money as his wife and he is her husband and they have no children for the plaintiff.

He confirmed that the plaintiff has not officially married the defendant. That the house was constructed in 3 months and she entered it because she started having conflicts. The house has 40 iron sheets but **PW1** did not know how much each was purchased, but the total was 1,445,000/=. That he got the total from receipt the defendant attached on the WSD and the house occupied the whole plot of 28ft by 30ft.

That the defendant chased the plaintiff out of the house because she wanted to steal the house from him, but **PW1** did not know who constructed the house as the builder and did not know how much he was given but it was 1.5m.

There was no Re-examination

PW1 later come with the Sale Agreement. The purchaser is Kubonaku Lydia and seller is Luzze Awali. That it was made on 31/3/3018 for land measuring 28ft by 30 ft; and he prayed the agreement dated 31/3/2018 be admitted in evidence. The Defendant had no objection and Court admitted the agreement dated 31/3/2018 admitted as **P Exh. 1**.

There was no cross examination by defendant

The second witness was Sempa Paul, a male adult aged 48 years, pastor of Adonal Power Sanctuary in Namulesa, R/O Namulesa, Mafubira, Jinja City (hereinafter referred to as PW2). He knew Kubonaku Lydia that she is a wife to Nanvuba Sanon, but he did not know how long they have been married. That they were staying together and he presumed they were husband and wife since they would call him on marriage matters resolutions in their home. That it is Sanon who would call him and they were not my followers in the church.

That they discovered he was pastor so they sought his services. They are not staying together and he only resolved their issues only 3 times-the 1st time he went to resolve the defendant said never entered. The 2nd time it was about resolving their marriage, so he did not entertain it and the 3rd time it was now resolve their marriage.

That they are in court today because the defendant threw the husband from the house and the husband was not contented. That the way he followed this matter, the house belongs to both of them because they were building it together because both of them were on the site.

That he is a pastor and in his church what makes one husband and wife is making vows. **PW2** was married to his wife because he took vows; and that in his church he has people who have children and are husband and wife even without vows. That according to him the plaintiff and defendant are just cohabiting and they are not husband and wife.

That in 2019 August he started hearing about their disputes; and he was told by the plaintiff that he gave defendant money 3 million to purchase land. That he was not there when he was giving her money. The wife bought land and the wife hid the agreement from the husband. The husband was asking the wife for the agreement and he came and complained to him. That he went to their home. Since by the time Sanon (plaintiff) complained to him about the agreement, they had already constructed.

That if someone comes to court and says the plaintiff to me before construction, he will be lying because he never entertained their matter before construction. That the defendant purchased the land from Tuzze. That he was not there and he never signed on the agreement though am a neighbor and he purchased his land each from the defendant.

That according to what the defendant stated at the Police while Police was separating them it is their evidence that both of them contributed to the

property in question. That at Police the defendant stated *“we are separating with my husband because I can no longer tolerate him and because we built this house together I decided to give him 3.8 million so that he starts his own life”*.

That **PW2** signed on this document but he never received a copy. Lydia didn't give Sanon 3.8 million she had promised, Sanon had accepted to be given the 3.8 million, but Lydia did not give it to him.

During cross-examination, PW2 insisted that he was her neighbor and came to know her when she transferred to his place. That she started constructing in 2018. The plaintiff is his neighbor, but not immediate and he never signed on the agreement because he was not around.

That he is a pastor and did not know the witnesses on the agreement and was not there when plaintiff gave her money. He could not remember the month she entered the house, but it was in 2019 and construction took about 8-7 months

There was no cross examination by defendant

The Plaintiff claimed he had some evidence on a video that's on this flash but had no other witness; and court adjourned to consult on how to have the evidence admitted. Later he informed court that Camilla needed the videos and he won't give evidence for him.

The plaintiff's closed his case.

The defence opened with **Kubonaku Lydia a female adult aged 38 years, resident of Namulesa village, Mafubira Jinja City, a nurse self-employed with her clinic at Namulesa (hereinafter referred to as DW1)**. She testified that the defendant, was her friend and they stayed together for two years. That he would come visit at her place and go back and he asked to be in a shop. That she was renting in front she had a clinic behind is where she was staying. That the plaintiff had a sick hand he wanted treatment, he came to Namulesa, **DW1** was home children called her that there is a visitor.

That the Plaintiff came, they started to a shop and he said he wanted to come to Jinja. That he came to Jinja, she helped him get a room of shs.50,000/= and she told him *“he said he had no money I have to pay”*. That **DW1** paid the landlord 150,000/= for 3 months. That she told him she had land and even went to Kampala he packed he came to Namulesa for 3

months after 3 months, he failed to pay. He wanted to move things to her house to stay there, he moved his things to her house they started staying together.

That she told him she bought a plot but haven't built. His arm was always sick he tried to treat him and told him we go to St. James they went he was checked and found his bone marrow is spoilt. Dr. proposed an operation. He said they look for money, his relatives collected money and also contributed shs.700,000/= out of 1.5 million.

That he started making conflict, he didn't want male clients, he wanted her to take away the children, they are 5 and she refused to take away the children and told him she can't be in a relationship with him and he got very angry

Further, that she had got a loan and went to her house and which she built and told plaintiff she had shifted. Then he joined her and she has an S.4 child she had put her child to fry cassava and he would kick the children's stall he had put. That it was 11.00 pm, she went live with him. He should leave, and he said he wanted money claiming he had put in her money.

That **DW1** bought this land from Tuze Awaza 2018 March 30th and present was. Tuze Awaza, Mutabaza Richard son of the seller and wife of seller. That she has the copy of the Sale Agreement. The original is in the bank in UGAFODE MICROFINANCE, and she has a letter from the said microfinance, and then with the agreement, translation and letter from UGAFODE

It was tendered, for Defendant agreement and its translation **D.Exh 1** and letter from MDI is **D.Exh 2**

DW1 added that he started working and he would give her 30k and 20k thought it was for food. The most he gave is 500,000/=. He gave it to her to buy food and drugs in her shop and told her his permit was finished and she gave him 350,000/=. That she thought it payment and he had done a lot of things so he agreed to pay him shs.3,00,000/=.

That she told chairman called Kateba they came to her home solving those issues in chairman LC2 and other neighbors; and **DW1** and went borrowed from a village group and she gave him Shs 800,000/= they gave him 5 days to leave. He refused and even after she borrowed. The 800,000/=, they put it in writing when she was giving it to him. She presented the Agreement is here, a photocopy that the original remained with chairman Kateba. The plaintiff signed on the document as Nanvuba Sanon.

Court noted that the document needs to be translated; and was identify and marked as **DID1**

That they went to LC.1 and they failed to settle, they went to Probation Office and Probation told the defendant to leave her but he refused. That she went to Mr. Mpanuka at Police the within CPS in charge of family matters and the Plaintiff went first and she was summoned. That Mr. Mpanuka gave plaintiff two Police Officers to go with the plaintiff to remove the things. That she made a list of all his things, they went and removed them with the Police Officer and she had already given him money to move elsewhere.

The things were given to him he confirmed they were his and that they put it in writing, the LC1 Munaaza made this document, he sent the Secretary. She did not know if he can come and testify, the original remained with the LC Committee. That the plaintiff signed on the document, he signed down here photocopy not clear and they shall get the original.

Court admitted the document is identified and marked **DID 2, 'E'** on the Plaintiff.

DW1 added that he said he had no transport, she got shs100,000 and gave him. That he got people he got things and took the things to pastor Sempa to keep the things. That Police officers land Local Committees told him if he comes back to her home he will be trespasser.

That after one week he returned drunk saying he is back in his home and none should stop him. **DW1** was scared it was at night he entered the house, and took laptop bag, blood pressure machine a light and a mat and he took them and said it's just the beginning.

That the land is hers, he bought that land when she hadn't met him; and that they aren't married. That she reported to Police. He continued threatening her until they went to court at Bugembe.

That she wanted court to help her by deciding so he knows he land and house. That she should compensate all her time and that am a whore and thief; and she even got diabetic because of stress. That she was in the house and he stopped entering the house.

During cross examination by lawful attorney, DW1 answered that 31 March 2018 is when she bought and had an agreement. It's in the bank. That the LC1 present was Kateeba with the defence of the village. That Abali made the Agreement as L C 1 chairman at that time and she paid for the

land in installments, she paid 3 installments. That she started pay 500,000/=, it is shown in the agreement. The agreement was made after she fully paid, next 1.5 million and 1 million finally.

That he just came when he had a problem. Tuze Awaza sold to her and he even with neighbor who was old so as to prove ownership. That documents aren't forged they are true. That the money she borrowed in the MDI was to build.

That she met Sanoni in April 2018; and has the receipt of the house. That the same information she has in the defence. That she was with you for 2 years, I 1st rented him a house for 3 years; one year she stayed with a sick hand and she was operated not working. That Izimba Anna was in the Agreement he wasn't in the Agreement, the bank wanted chairman to certify as true copy, that's why Izimba Anna is on that Agreement he stamped and put true copy.

That that time she was in Wabulenga, land is in Namulesa and used Awali he was chairman then. The stamp is for LC.2, the agreement is in the bank and the bank wrote to court. That she brought it because Magistrate in Bugembe asked for it. That she bought it 3 million, in front its 30ft by 27ft, in length 47ft. That Richard is all she knows, on the side of the plot, west, Charles in the south

She confirmed that she is Kubanaku Lydia even *musawo* is her name as it's her profession. That receipts they put for her *muswawo* and she is the one. That she got a loan since 2017 and started building in September. That the plaintiff had just been operated he had a plaster on the arm.

That Munaza got to know him in 2020, when conflicts began, Kateeba was the one those days, she bought from several hardwares from Walubo, Yesu Amala hardware. That the receipts one is on WSD and she the originals here-one here is for payment of rent, others are the ones she bought property.

DW1 added that she will bring person who made it; and the receipt 27/4/2018 **DE3** and rest of receipts was admitted as **DE4**.

Further, that **DW1** entered the house in July in 2019; 2020/14/02 - yes she bought nails, and cement, binding and that month she had entered the house and bought those materials to put a ceiling where she put the drug shop. That the plaintiff had abused the landlord and in September she borrowed 5 million; and that it doesn't mean she was building all money she borrowed.

There was reexamination.

The defence second witness was **Tuze Awaze, a male adult aged 54 years old, resident of Namulesa, Mafubira Jinja District peasant farmer (hereinafter referred to as DW2)**. He knew the plaintiff he was his neighbor and was a husband to her; and knew the defendant because he is the one who sold to the defendant in 2018. That the land is in Namulesa, land id about 30ft to 50 ft, he did not remember well.

DW2 did not know their connection, but that he sold to only defendant; present when he sold, chairman, Abali, Lwanga Charles Mutabuza Sam, Bagonza Ruth, Aidah Nabirye and they made an Agreement Abali wrote it. That the agreement was made at the site, he did not know if plaintiff and defendant came to buy he don't know if they were already together.

That the defendant came alone to purchase, and to first see them together when they entered the house. He did not remember when they entered the house. That when they were constructing they were both responsible for workers, he did not don't know who built.

DW2 was shown **DE1** and he confirmed that this is the agreement they made, made it in Namulesa. The people on the agreement are the ones who were present. That he just knows the person he sold to is the defendant and she came alone at the transaction.

During cross examination by plaintiff, he confirmed that he is Tuzze Awaza and he sold the land 2 the defendant, the land is 28ft in width and 30ft in length. That the truth is what is in writing and at the time he was LC2 Chairman Abali in Namulesa. He could not confirm the stamp, on the village that's shown and he was sure the land he sold was his, if it wasn't his, they would sue him.

That it was 28/3/2018 on 31st, in the Agreement he shares boundaries with Lwanga Charles and Awali and he made the Agreement since she paid all the money. That he called the chairman after money was paid; Munaaza wasn't present at chairman that is why he got the LC2 to make the Agreement. That he has never got a complaint that he sold what wasn't his and Izimba Anna and Alibawano David, Ahbano was right once.

There was reexamination.

The third defence witness was **Abaliwano David, a male adult aged 65 years resident of Wabulenga Namulesa Northern Division Mafubira**

Jinja and retired (hereinafter referred to as DW3). He testified that he sees the plaintiff usually in the bar. The defendant, he got to know her when she had just come to the neighborhood she had a drug shop. That the Plaintiff told him about the land saying he bought and defendant also claiming she bought.

He knew defendant is the owner of the land and when she was renting, she bought land from **DW2** and he was present. That when she was approached by plaintiff in the bar, he just kept quiet in the bar and he feared. That he does not live very near, there are in the slope land is up. That where he lives, the defendant used to rent there before buying and building up there and he was just a neighbor of the house she was renting

That he first saw plaintiff in 2022, or 2021, won't go into the house he knows about the land and was just present at making the Agreement AND wrote the Agreement. That the Defendant was renting near him, but he did not know the Plaintiff and was the writer of this Agreement **DE1** and wrote.

During Cross examination by the Plaintiff, DW2 confirmed that he is a Musoga and was both the chairman and wrote the agreement. That he wrote as LC2, the reason was the **DW2** had an issue with L.C I and they had just settled it, he didn't trust them that's why he came to him.

That he put the stamp of LC2, the original in the bank and has a stamp of LC 2. That he was the author of the Agreement and wrote the Agreement 31/03/2018. That the agreement is correct but duplicate is a stamp not his. He confirmed that this agreement is correct but duplicate is a stamp not his, the original has his things. The way they are it's in the bank.

That Izamba was his secretary, the original has stamp of 2 and the land was small 28 by 30ft; behind Kemb, side Anet Mbabazi, side is **DW2** and a road. That he wrote agreement gave it to defendant and never told Izimba to verify the stamp he is around to come and tell them. That she paid cash, present Samwiri , Bagonza, Aida Nabirye and **DW2's** son and Kemba was around and signed

There was reexamination.

The defendant closed her case.

Court visited the locus on 24th March at 12:00pm in the presence of the Plaintiff, Defendant, Joyce court clerk, Chairman: Batambuze David and Munaaza. The chairman confirmed that he has been chairperson since 1992

and was here with his committee. They knew they were staying together and court noted that there is a tenant 3 months who stated that the Defendant is her land lord and she was paying 100,000/= (Nakanda Rebecca).

Court drew and attached the Map and Attendance list.

The Plaintiff brought the original agreement made on 31/3/2018. Presnet was Bazona Ruth Mutabuza Samuel, Ibinga Rich and Lwanga Charles and Nabirye Ida and Abaliwano David.

That Kobonaku Lydia was buying, Selling Tuze Awaza and Abaliwano David C/M LC2 was present. That it is stamp of chairman L C 2 Namulesa and this is the true copy he sued to buy land.

That Document tendered as an exhibit marked **PE1**.

During cross examination PW1 answered that Kabali made the agreement for LC2, Stamp is for L. C 2 for Namulesa and what the defendant has is a photocopy that is the original; one that one the stamped on it as he was getting a loan. That he was sure he had land and share boundaries with Tuze, other side Tuze and a road.

In resolving this Appeal, I have carefully analyzed the evidence of both sides. Both counsels cited a plethora of authorities on what constitutes fraud and I entirely agree with those authorities. The position of the law is that fraud must be particularly pleaded and particulars of the fraud alleged must be stated on the face of the pleading as per **Order 6 rule 3 Civil Procedure Rules**.

The law also specifies that if the facts of alleged in the pleading are such as to create a fraud it is not necessary to allege fraudulent intent; what is important is that the acts alleged to be fraudulent must be set out, and it should be stated that those acts were done fraudulently. **See B.E.A Timber Co. v Inder Singh Gill [1959] 463 per Forbes, V.P at page 469.**

The term "fraud" was given judicial interpretation by the Supreme Court in **Fredrick J.K Zaabwe vs. Orient Bank & Others, SCCA No.4 of 2006**, per Katureebe JSC (as he then was), as;

"...Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood ... a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of

truth....and an unfair way by which another is cheated, As distinguished from negligence, it is always positive, intentional. It involves all acts.... involving breach of a legal duty or equitable duty resulting in damage to another."

It was also elaborately defined in the case of **Edward Gatsinzi and Mukasanga Ritah vs Lwanga Steven CS No.690 of 2004** as:-

"Intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by a single act or combination or by suppression of the truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture. A generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or suppression of truth and includes all surprise, trick, and cunning dissembling..."

See also Kampala Bottlers Ltd v. Damanico (U) Ltd, SCCA No.22 of 1992, where it was held that fraud must be particularly pleaded and strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters. It was held further held that;

"The party must prove that the fraud was attributed to the transferee. It must be attributable either directly or by necessary implication, that is; the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act."

This court is acutely aware that the standard of proof in fraud cases is heavier than on the balance of probabilities generally applied in civil matters. The case of **Bugembe Kagwa Segujja vs Steven Eriaku & Alvin Ssetuba Kato** cited with approval in the case of **Sebuliba vs Coop Bank Ltd (1987) HCB 130**, where court stated that *"the standard of proof in fraud cases is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases."*

In the instant case, I have had occasion to examine the pleadings before the lower court out of which this Appeal arises:-

The Plaintiff/Appellant pleaded fraud against the Defendant/Respondent in four particulars in paragraph (i) of his Plaint that is;-

- i. The Defendant buying land and making agreements in her sole names well knowing that it is the Plaintiff who gave her the money to purchase the land.
- ii. The Defendant incriminating the Plaintiff ab reporting him to Police for domestic violence whereas not in a bid to defraud him.
- iii. The Defendant forcing the Plaintiff to relinquish his interests in the suit land in a bid to illegally take it over.
- iv. The Defendant conniving with police and illegally evict the Plaintiff from his house and land.

After a careful reevaluation of all the evidence as captured above, I have found that the evidence relating to the disputed ownership of the suit land is fairly straight forward. The Defendant /Respondents bought suit land from one **Tuzze Awaze (DW2)** as per Sale Agreement dated the 31st day of March, 2018, admitted and marked as **"DE1"**. Both the vernacular Agreement and English Translations were on record.

I have critically analyzed **DE1** with **PEXHT 1** relied upon by the Appellant/ Plaintiff and found that both are identical to each other. I therefore do not agree with the submissions of learned counsel for the Appellant when he submitted that there were two Sale Agreements bearing different stamps one from LC1 and the other from LC2. The explanation as to how the LC2 Stamp came to be affixed was made clear by **DW1, DW2 and DW3** and I found them truthful since the seller was very positive as to whom he sold the land.

I have also noted that what learned counsel for the Appellant/ Plaintiff refers to as the second agreement which the Defendant presented at the close of her case as the "original" copy bears the stamp of the Chairperson L.C.2 of Namulesa Parish. The same goes for the actual size of the suit land, this is not in dispute and the seller is not contesting that he sold to the Respondent/Defendant.

I find the above two arguments as the tale of a drowning man clutching on straw to try and save himself since it does not in any way go to the root of the case since the location of the suit property is not in dispute and the sale refers to a plot which it is clear was not measured to exact locations on the ground. This would have been material if there was a dispute between the seller and the buyer, but this is not the case here since DW2 who sold the plot was very clear of what he sold and to whom.

The Respondent/ Defendant's witnesses also gave supporting evidence to her claim to the suit property. **DW2 Tuzze Awaze** was clear **on line 11 on page 16 of the record of Appeal** that *"That I know the defendant because I'm the one who sold to the defendant. I sold to her in 2018"*.

DW3 Abaliwano David who wrote the Sale Agreement also confirmed **on line 1-4 on page 18 of the record of Appeal** that *"I know the defendant is the owner of the land. When she was renting she bought land from DW2, I was present"*.

In lines **12-16 on page 18 of the record of Appeal**, he confirmed that *"I wrote the agreement, the Plaintiff was not around. I did not know him. The defendant was renting near me, but I don't know the Plaintiff. I the writer of the Agreement"*.

Secondly, it is not disputed that the Respondent/ Defendant single handedly constructed a house on the suit land. The point of contention here is that the Appellant/ Plaintiff claims that he extended to her money to buy both the land and build as his then cohabitee, however, he has not led any evidence to prove his claim.

On the contrary, the evidence reveals that the Respondent/ Defendant acquired thereon several loans from UGAFODE MICROFINANCE LTD and used the same to pay for both the suit land and construction of the house as per the Loan Agreements and repayment schedule **B1, B2, B3 and B4, B5, B6 and B7** respectively supported by the loan repayment details.

While the Plaint in paragraph 4(C) states that the Plaintiff used to transmit money to the Respondent/ Defendant through mobile money transfer, since he was working far from home, there was no proof of this whatsoever and it is a notorious fact that such transactions leave a track record that if this was true would easily have been retrieved by the Appellant/ Plaintiff from his Phone Company. His witness **PW1 Kulata Alex in paragraph 24-25 on page 5 of the record of Appeal** in a contradiction of the pleadings stated that the money was given to the Defendant while they were in their house alone.

His other witness **PW2 Sempa Paul** also contradicted the pleadings when in **paragraph 8-9 on page 8 of the record of Appeal** stated that *"The way I followed this matter, the house belongs to both of them because they were building it together because both of them were on the site."*

The above is a clear contradiction of the pleadings where it is stated that the Appellant/ Plaintiff was not around and used to work far from home.

Further, while learned counsel for the Appellant/ Plaintiff put up spirited arguments that the money came from the Appellant/ Plaintiff, the receipts that were presented as **D. Exhibits C1, C2, C3, C4 and C5** in respect of buying the materials used in the construction all reveal that they were solely in the names of the Respondent/ Defendant. Although **Exhibit 'C2'** have 'musawo' as the buyer, I find this trivial bearing in mind that the Respondent/ Defendant dated that she is a nurse and in vernacular a nurse or any medical worker is translated as 'musawo'.

Further, while learned counsel for the Appellant/ Plaintiff argued that the Defendant does not anywhere provide explanation for the discrepancies, inconsistencies and contradictions in her evidence and even the receipts she exhibited as her evidence for materials she purchased for the construction of the house bear the name "2 Ways Guest House" which name is crossed and replaced with "Yesu Amala Hard Ware", I find this very narrow minded bearing in mind that these are just receipts for buying materials for the construction of the house and what is material and important on them is that they bear the names of the Respondent/ Defendant.

Having critically analyzed all the above evidence of both sides, and in absence of any evidence to the contrary, I'm left with no doubt that the Respondent/ Plaintiff is the rightful owner of both the suit land and the house she constructed thereon.

As to whether the suit property qualifies as a matrimonial home for the parties, it is there clear that there was no valid legal marriage between the Appellant/ Plaintiff and the Respondent/Defendant to qualify them as owning a matrimonial home.

The position of the law is that cohabitation regardless of how long parties have done so can never amount to a legal marriage.

The case of **Hyde vs Hyde (1863) LR P&D 130** which was noted with approval in **Alai vs Uganda (1967) EA 416** held that marriage as the voluntary union of one man and one woman to the exclusion of all others the case of **Ayoub vs Ayoub {1967} EA 416**, provides that marriage under the **Marriage Act** is partially monogamous and in the instant case there has never been any legal marriage. There is even no proof whatsoever of a customary marriage between the parties in this case,

As to whether the lower court therefore erred in law and fact when it ruled in favour of the Respondent/Defendant, **the amendment of Article 31(1) of the Constitution of Uganda (1995) [now Article 31 (1) (b)]** provided as follows:

“Men and women of age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.”

Commenting on this article in relation to property rights of married persons, Twinomujuni, J.A. observed as follows:

“In 1995, for the first time in our history, the Constitution of Uganda clearly put into reality the equality in marriage principle contained in Genesis Chapter 2 verse 24(supra) and what those who choose to contract marriage under the Marriage Act undertake to practice. My conclusion is that matrimonial property is joint property between husband and wife and should be shared equally on divorce, irrespective of who paid for what and how much was paid. Very often, the woman will find a husband who is already wealthy and has a lot of property. If that property belongs to the man at the point of exchanging the vows in Church, that property becomes joint property. These days it is normal for a woman to come into marriage with wealth such as houses, land, cows and other properties from her own sweat, her parents, relatives and friends. If at the time of the Church vows, they are solely owned by the woman, they become joint matrimonial property. From then onwards, the fact that they are registered in the names of the wife or husband is not relevant. It belongs to both. Therefore on separation, they should be equally divided and shared to the extent possible and practicable.

Article 31(1) of the Constitution of the Republic of Uganda, 1995 (as amended) provides for the equality of men and women and their rights in marriage and its dissolution; and this was elaborated upon in the case of ***Muwanga vs Kintu, High Court Divorce Appeal No. 135 OF 1997***, where **Justice Bbosa** defined matrimonial property that each spouse is entitled and each party chooses to call home and which they jointly contribute to.

Further, according to ***Basheija Jane vs Basheija Geoffrey & Another-Divorce Cause no.12 of 2005 & Rwabinum vs Ahimbisibwe Civil Appeal No. 10 OF 2009***; the courts have held that “where the spouse makes substantial contribution to the property it will be called matrimonial

property. That the contribution may be direct or monetary or indirect and non-monetary”.

Am alive to the fact that have adopted a wider view of non-monetary indirect contribution and stated that a wife or a spouse indirectly contributed towards payments of house hold expenses, preparation of food, purchase of children clothing, organizing children from school and generally enhanced the welfare of the family and that amounts to substantial contribution to the property; in this particular case, matrimonial property and/or family land according to the provisions of the **Section 38A and 39 Land Act of 2004 (as amended)** is particular. It does not matter whether the either party is maintaining the other. What is of importance is proof of the fact that the land in question constitutes ‘*family land*’ within the premise of **Section 38A (4)**. It provides:

“Family land” means land -

- a. *On which is situated the ordinary residence of a family;*
- b. *On which is situated the ordinary residence of the family and from which the family derives sustenance;*
- c. *Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b);*

Or

- d. *Which is treated as family land according to the norms, culture, customs, traditions or religion of the family;*

“Ordinary residence” means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

“Land from which the family derives sustenance” means-

- a. *Land which the family farms ; or*
- b. *Land which the family treats as the principal place which provides the livelihood of the family; or*
- c. *Land which the family freely and voluntarily agrees, shall be treated as the family’s principal place or source of income for food.*

1. *For the avoidance of doubt, this section shall not apply to spouses who are legally separated.*”

From the above definition it is clear that the suit land in this case does not fall into the definition of family land.

Further, matrimonial property was well defined in the case of ***Katuramu vs-Katuramu High Court Civil Suit NO. 026 OF 2017***, where the court held that the two properties which the parties acquired during the subsistence of marriage, the land on which the parties have a matrimonial home and the family derived sustenance by cultivation on the same constituted matrimonial property.

Also in the celebrated decision in the case of ***Julius Rwabinumi vs Bahimbisomwe, Civil Appeal No. 10 of 2009*** Justice Esther Kisakye cited with approval the case of ***Muwanga vs. Kintu (supra)*** in which Justice Bbosa J as he was then observed that;

“Matrimonial property is understood differently by different age people. There is always property which the couple chose to call home. There may be property, which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which parties chose to call home and which they jointly contribute to.”

Further, court held that *“where the spouse makes substantial contribution to the property it will be called matrimonial property. That the contribution may be direct or monetary or indirect and non-monetary”*.

The same was elaborately discussed in the case of ***Yayeri Musaija vs-Musaija Gideon and 5 Others HCT -01-LD-0078 OF 2016***, where court found that *“the suit land was family land as well as matrimonial property that was jointly owned by the appellant and the 1st respondent thus could not be sold without the consent of the appellant as provided for in **Section 39** of the land act as amended”*.

Again, The Supreme Court adopted the holding by Bbossa J (as she then was), in ***Muwanga vs Kintu High Court Divorce Appeal No. 135/1997*** and held that: - *“matrimonial property is understood differently by different people. There is always property which the couple chooses to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband may hold in*

*trust for the clan. Each of these should, in my view, be considered differently. **The property to which each spouse should be entitled is that property which the parties choose to call home and which they jointly contribute to.*** (Emphasis mine).

Relating the above to the evidence in this case, while it is the submission of the Appellant that the suit property is matrimonial home, a place where his family derives their livelihood, I have not found any substantial evidence to convince me that the Appellant/ Plaintiff contributed any money or other material property to the acquisition and development of the suit land. Instead, the evidence led before the trial court proves that the Appellant had no home whatsoever on the suit land.

Further, I have had occasion to critically examine the Exhibits relied upon by the Respondent/Defendant during the trial before the lower court and I have found that the Appellant/Plaintiff is not reflected anywhere. It also beats my understanding as to why the Respondent/Defendant would have borrowed money several times from a Finance Company if the Appellant/ Plaintiff was remitting any monies to her to acquire the suit land and construct as he alleges.

Further, I have had occasion to critically examine all the evidence led in this case and found that the suit property does not fit in the description of either family land or a matrimonial home. At page 5 of the record of proceedings the donee of the Power of Attorney of the Appellant, **PW1 Kulata Alex** in **lines 21-22 on pg.5 of the typed record of proceedings** stated:-

“...the agreement was not made in 2 names and it was only made on the names of the defendant... (herein the Respondent)” [Emphasis Mine]

At pg.12 lines 10-14, of the typed record of proceedings where the Respondent stated:-

“...I bought this land from Tuze Awaza on 2018 March,30th , the persons present were Tuze Awaza , Mutabaza Richard son of the wife of the seller. I have the sale agreement, I have a copy here. The original is in the bank in UGAFODE MICROFINANCE, I have a letter from the said microfinance, and then with the agreement, translation and letter from UGAFODE ...” tendered in court as DExh1 and letter from MDI is **DExh 2**.

This is corroborated by the evidence on chief of **DW2, Tuze Awaze at pg.16 line 12-17** where he stated:-

“... I know the defendant because I am the one who sold to the defendant. I sold to her in 2018. Land is at Namulesa, land is about 30ft to 50 ft., I don't remember well. I don't know their connection. But I sold to only defendant...”

Considering the evidence on record, as already noted in this Judgement, it is clear that the Appellant/Plaintiff led no evidence whatsoever of the wire transfers of the was sending money to the Respondent/Defendant to buy the land and construct a house thereon, but rather it is the Respondent through her own resourcefulness and efforts who borrowed money and armed with all the receipts in her names as regards to ownership, led convincing evidence that the suit property was hers personally.

Having reevaluated all the evidence in this case, I have found that the question of proof of ownership was therefore elaborately and exhaustively evaluated by the Trial Court and addressed by the learned trial Magistrate on the last page of the Judgement.

I have not found any merit in the arguments of the evidence led by the Appellant/Plaintiff in this case at trial or in the submissions of his counsel in this Appeal; but instead, it is clear that she applied the law to the evidence as presented before her.

As such, I cannot fault the Judgement and Orders of the learned Trial Magistrate in arriving at the decision she did given all the uncontroverted evidence led by the Respondent in this case; and I therefore agree with learned counsel for the Respondent in this case.

For all the reasons given above, the first two grounds of Appeal FAIL.

Ground 3: The Learned Trial Magistrate erred in law and fact when she adopted a wrong procedure while conducting the proceedings at the *locus in quo* which misdirection occasioned a grave injustice to the Appellant.

It was submitted by learned counsel for the Appellant did not submit on this ground of Appeal, this means that they may have abandoned it.

On the other hand, it was submitted by learned counsel for the Respondent that the learned trial Magistrate erred in law and fact when she adopted a wrong procedure while conducting the proceedings at the *locus in quo* which misdirection occasioned grave injustice to the Appellant.

They added that the Appellant will be tasked to prove the propriety of this ground as it is an open lie and failure to appreciate proceedings as was; and in the holding of court in **Dr. Louis Okio Talamoi v. Mathew Okello & Anor CA 22/2015**, Justice Stephen Mubiru succinctly elucidated on the purpose of the visit locus in quo thus:

"the purpose of visit to locus in quo, as has been repeatedly stated is not to recite the evidence already led but to clear doubt which might have risen as a result of conflicting evidence of both sides as to the existence or nonexistence of the state of facts relating to the land and such a conflict can be resolved by visualizing the object, the res, the material thing, the scene of the incident or the property in issue".

They submitted that it is to enable the trial court understand the oral evidence adduced in court better, by visiting the physical location to physically assess the status quo. Being demonstrative evidence therefore, it has no evidential value independent of the witness's testimony. This is because it is an extension of what transpired in court as a procedure arising under **Order 18 rule 14 of the CPR** as amended.

Further, that the land being an abstractive thing, the practicalities of such an exercise, mandate the interaction of the locals as circumstances require, limited to the purposes of testing the oral evidence already on court record.

That in **Kaggwa Micheal v Olal** notwithstanding, according to **section Mark & others (supra)**, Court held that **Section 166 of the Evidence Act**, the improper admission or rejection of evidence is not to be ground of itself for a new trial or reversals of any decision in any case if it appears to the court before which the objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence has been received, it ought not to have varied the decision.

Further according to **section 70 of the Civil Procedure Act**, no decree maybe reversed or modified or error, defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of court.

That in **Dr. Louis Okio Talamoi v. Mathew Okello & Anor (supra)**, Court observed that court will not set aside a judgment or an order or a new trial on ground misdirection or of the improper admission or rejection of evidence or for any error matter of pleadings or as to any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted into miscarriage of justice.

They were of the view that there was sufficient evidence to guide the proper decision of this case, independently the observations made at locus in quo.....".

That the plaintiff now appellant must prove that what transpired at the locus quo substantially affected the decision of court hence occasioning miscarriage of justice which the appellant has demonstrably failed to prove.

They submitted that there is sufficient evidence of **DW1, DW2** and **DW3** on which the learned trial magistrate relied on, considered and evaluated at pages 3, 4, 5 and 6 of the judgement before arriving at the decision.

That this court as the first appellate court has a duty to re-evaluate the evidence per the lower court record; and from the record of proceedings at pages 11,12, 13,14,15, 16,17 ,18 and 19, the defendant now respondent adduced evidence of three witnesses namely herself, Tuzze Awaza and Abaliwano David who all gave evidence and confirmed that the defendant now the respondent is the lawful owner of the suit land **DW2** is the one who sold the suit land to the respondent and **DW3** is the author of the sale agreement.

That the Sale Agreement was exhibited in evidence as **DEXh 2**. That **DW1** gave evidence that she acquired loans to finance the buying of the land from UGAFODE Microfinance and by the time she testified in court the original agreement was still held by the microfinance which confirmed that it had the original because she had not fully paid the loan.

That **DW1** further availed court with receipts from the hardware confirming that she is one who purchased the building materials used to build the house on the suit land.

They further added that, the above evidence was never controverted by the plaintiff now the appellant and from the record of proceedings at page 4, 5,6,7,8, and 9, **PW1** a one Kulata Alex the lawful attorney stated that the plaintiff now the appellant left money with the defendant now the respondent to purchase the suit land and he was not there when the plaintiff now the appellant was giving the respondent money to the buy the suit land.

That **PW2** states that the respondent bought the land from **DW2** and his evidence is hearsay as he was not there. The appellant alleges that he used to send the money through mobile money.

They therefore submitted that from the evidence on record adduced by the parties, clear that the defendant is the lawful owner of the suit land and house as the appellant failed to Controvert the evidence by either producing proof that he gave any money to the respondent to purchase the suit land,

build a house thereon and or produce a printout from telephone company to prove that he indeed sent the money to the respondent

That the decisions of **Kaggwa Micheal v Olal Mark & Others Civil Appeal NO.10 of 2017** and in **Dr. Louis Okio Talamoi v. Mathew Okello & Anor CA 22/2015**, court refused to set aside the lower court judgement on ground o existence of sufficient evidence, independent of observations at locus in quo, to uphold the decisions appealed against.

They submitted that Court be pleased to adopt the same approach above to find that the evidence adduced by the defendant now respondent is /was sufficient to lead to the conclusion that the defendant now respondent is the lawful owner of the suit land as rightly held by the learned trial Magistrate and disregard the observation at the locus in

They thus prayed that this appeal lacks merit and be dismissed with costs.

In resolving this ground, I have carefully addressed the position of the law as far as visiting the locus is provided in **Practice Direction on the issue of orders relating to registered land which affect or impact on tenants by occupancy, Practice Direction No. 1 of 2007**. The purpose of visiting the locus is to verify the evidence adduced by both sides to the hearing and although as spelt out in its long title, that practice direction pertains to orders in respect of registered land, it is now desirable to apply it to all land tenures.

There is evidence before the trial court as would suggest that the land in issue presently was unregistered land and it is undeniable that this Practice Directive has been applied by the courts in conducting visits to *locus in quo* in respect of all land tenure systems where there is a dispute.

In the case of **Yeseri Waibi vs Edisa Lusi Byandala [1982] HCB 28**, it was held that the practice of visiting the *locus in quo* is to check on the evidence given by witnesses and not to fill the gap for them or court may run the risk of making itself a witness in the case. There are established procedures and principles for guidance when conducting a visit to the *locus in quo*. **Practice Direction No. 1/2007** states that__

“During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there:

- a) *Ensure that all the parties, their witnesses, and advocates, if any, are present.*
- b) *Allow the parties and their witnesses to adduce evidence at the locus in quo.*

- c) Allow cross examination by either party, or his/her counsel.
- d) Record all the proceedings at the locus in quo.
- e) Record any observation, view, opinion, or conclusion of the court, including drawing a sketch map, if necessary.

Further, **2007 Practice Direction** was enacted to guide the trial courts and streamline how they handled visits to the locus. Previously, every trial court relied on its own procedure and in many cases; this frustrated the essence of a court's visit to the locus. The essence of visiting the locus is to check on the evidence given by the witnesses and not fill the gap for them.

Guidelines 3 (a), (b) and (c) of Practice Direction No. I/2007 provides for trial witnesses to substantiate the evidence they previously adduced in court.

Observations at the locus are provided for by **Guideline 3(e) of Practice Direction No. 1 of 2007**. In ***Erukana Jamagara v Obbo Ogolla [1976] HCB 32***, court relied on ***Fernandes v Noronha [1969] EA 506***, where it was held that the proper procedure when visiting the *locus in quo* is for the court to make a note of what took place during that visit in its records and this note should be either agreed to by the advocates or at least read out to them.

Further, in ***Kwebiha & Anor vs. Rwanga & 2 others Civil Appeal No.21 of 2011*** Justice Masalu clarified that the purpose of visiting *locus in quo* is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features such as graves and/or graveyards of departed ones on either side, to confirm boundaries and neighbors to the disputed land, to show whatever developments either party may have put up on the disputed land; and any other matters relevant to the case. **It is also during locus in quo that witnesses who were unable to go to court either due to physical disability or advanced age may testify.** ***[Emphasis Mine]***

The above is the desired norm of practice and if the trial court finds/or requires other independent witnesses to testify at the locus in quo, then all the relevant procedures must be followed. Such witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross-examination by the parties and/or their advocates. All evidence and proceedings at the locus in quo must be recorded and form part of court record.

It is also important to emphasize that evidence at the *locus in quo* cannot be a substituted for evidence already given in court; it can only supplement it; and evidence at locus cannot be considered in isolation from the existing evidence recorded in Court.

With the above elaboration, the *locus in quo* visit was carried out on 24th March 2023; and since it is clear that in this case the Appellant abandoned arguing this ground of appeal in their written submissions, save for clarifying on the law, I see no need to labor it since the Appellant abandoned it.

Having found as I have after subjecting all the evidence in this case to a fresh scrutiny, I cannot fault the findings of the learned trial Magistrate in the way the locus in quo was conducted; or the evaluation of the evidence presented before her. I cannot therefore fault her findings and resultant Judgement; and I uphold it in its entirety.

Finally, **section 27 (2) of the CPA** makes provision for interest on claims for monetary payment.

Further, it is now well established law that costs generally follow the event. See **Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC)** and **Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35**. Indeed, in the case of **Sutherland vs. Canada (Attorney General) 2008 BCCA 27** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.

In the instant case, the Respondent has succeeded in defending this Appeal and I see no justifiable reasons to deny her costs in this Court and the Court below; she is therefore awarded full costs.

In conclusion, I therefore agree with learned counsel for the Respondent and the law cited above and order as follows:-

1. The Appeal has no merit and it is accordingly dismissed.
2. The Judgment and Orders of the Trial Learned Magistrate Grade one in **Civil Suit No. 025 of 2023** are hereby upheld in their entirety.
3. The costs of this Appeal are awarded to the Respondent.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE

JUDGE
13/12/2023

This Judgment shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right to seek leave of appeal against this Judgment to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE
13/12/2023