IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0939 OF 2019

In the matter between

NAMAYEGA BARBRA **PLAINTIFF**

And

1.ETOT DENIS
2.MOOLI ALBERT SIBUTA **DEFENDANTS**
3.WALUKU RONNY WATAKA P/a
WALUKU, MOOLI & CO. ADVOCATES

Heard: 25 October, 2024
Delivered: 29 January, 2024

Advocate-Client relationship *— impostor fraud during transactions of sale/purchase of land - An advocate-client relationship is formed when an advocate agrees to provide legal assistance to someone seeking the advocate's services — Even if there is no express retainer between a client and his advocate the court may find that one could be implied if the parties acted as if such a relationship existed. — the duty of care owed by an advocate to their client will be extended to third parties where the advocate undertakes responsibility for certain acts which he knows will be relied on by the non-client.*

Due diligence in land transactions *— The role of the vendor's advocate can no longer be just to affix his or her signature on transactional documents, they are responsible for understanding how their clients are using their legal services and whether others might be defrauded or injured in some other way by the client's use of those legal services.*

JUDGMENT

STEPHEN MUBIRU, J.

The plaintiff's claim:

[1] Sometime during the month of August, 2019 the plaintiff picked interest in the purchase of land comprised in Kibuga Block 23 Plot 612 at Busega, for which purpose she engaged the services of a private law firm, M/s Mukiibi, Sentamu & Co. Advocates to undertake a search of title at the Land Registry. It was confirmed to her, as a result of that search, that the land was registered to a one Nanfuka Kintu Bakia. The plaintiff then contacted the person who identified herself by that name and who claimed to be the registered proprietor of the land. That person advised the plaintiff that her duplicate certificate of title to the land was in the custody of the 3rd defendant law firm, which firm she preferred to conclude the transaction of sale. At that law firm, the plaintiff met the 1st defendant who at the time was one of the advocates practicing law in the 3rd defendant law firm, together with the person who had claimed to be Nanfuka Kintu Bakia.

[2] The 1st defendant proceeded to prepare an agreement of sale of the land which the plaintiff signed as buyer and the person who had claimed to be Nanfuka Kintu Bakia signed as the seller. The 1st defendant signed as a witness to the agreement. The 1st defendant caused the signing of the transfer instrument which he handed over to the plaintiff together with the duplicate certificate of title and a photocopy of the seller's national identity card. The plaintiff paid a sum of shs. 62,000,000/= in cash as the agreed purchase price for the land. Thereafter the plaintiff took the agreement to her advocates M/s Mukiibi, Sentamu & Co. Advocates to witness her signature.

[3] The following day the seller became evasive and did not hand over vacant possession of the land to the plaintiff contrary to what had been agreed. It later

transpired that the duplicate certificate of title was forged and the person who had claimed to be Nanfuka Kintu Bakia was an impersonator. The plaintiff contends the defendants were in breach of a duty they owed her when they facilitated or connived with the impersonator to defraud her, for which reason they should refund her money, pay her general damages and the costs of the suit.

The defendants' defence;

[4] By their joint written statement of defence, the defendants denied liability for the plaintiff's claim. They denied ever having had in their possession the duplicate certificate of title to the land. Their first sight of the title deed was at the time of the transaction. The defendants' first time to meet the person who had claimed to be Nanfuka Kintu Bakia was when she went to their chambers together with the plaintiff seeking their services for drawing the agreement of sale of land. The defendants had no previous dealings with the person who had claimed to be Nanfuka Kintu Bakia, before the transaction now in issue. She was a walk-in-client who came together with the plaintiff. The plaintiff had in her possession a draft purchase agreement prepared by her advocate M/s Mukiibi, Sentamu & Co. Advocates and said they needed the services of the 1st defendant, only because the person who had claimed to be Nanfuka Kintu Bakia too needed an advocate to advise her during the transaction. The seller paid shs. 2,000,000/= as the fee for their services. At all material time the duplicate certificate of title was in the possession of the seller and it is her who handed it over to the plaintiff at the conclusion of the transaction. They denied having aided or connived with any impersonator to defraud the plaintiff, nor were they negligent at all.

The questions for determination;

[5] In the joint scheduling memorandum filed on 29th April, 2021 and as modified in Court, the parties agreed on the following issues for the Court's determination, namely;

1. Whether the defendants, as advocates, owed a duty of care to the plaintiff.
2. Whether the defendants are in breach of that duty.
3. Whether the parties are entitled to the remedies sought in the pleadings.

Counsel for the plaintiff's final submissions;

[6] Counsel submitted that Advocates are described as "Accountable Persons" within the meaning of *The Anti–Money Laundering Act, 2013*. The provisions of the Act are mandatory. They create an obligation on advocates engaged in land conveyancing practice to ascertain the genuineness of the identity of the seller. Advocates are required to undertake customer due diligence measures and to keep records of that. The guidelines and Regulations made under the Act required an advocate to identify and to verify the identification documents of a client. In *Mody Nohou Barry v. United Bank for Africa, H. C. Civil Suit No. 19 of 2012* where the plaintiff was scammed though an account opened by a fraudster with the defendant bank which had not complied with "know your customer" requirements of *The Financial Institutions (Anti-Money Laundering) Regulations, 2010* the bank was held liable in negligence. The Court found that the bank owed a duty of care of diligence, to the plaintiff. The Bank had breached that duty when it opened an account for a customer whose identity it had not verified. It was foreseeable that failure to discharge that duty would expose third parties to the risk of fraud. In the instant case the 1st defendant admitted having acted on basis of a coloured photocopy of a national identity card presented to him by the fraudster, whose authenticity he never verified. The defendant never opened up a file for their client nor kept any records of her at all.

[7] The fraudster insisted on transacting in the presence of the 1st defendant and provided his phone contact to the plaintiff. When the plaintiff called the 1st defendant he confirmed that indeed the fraudster was his client. Had the 1st defendant not made that confirmation; the transaction would not have taken place.

The plaintiff was technically the defendants' client. In drawing up the agreement of sale, the defendants acted for both the buyer and the seller. The plaintiff relied on the defendants' knowledge and skill, and thus they owed her a duty of care. The defendants are liable to the plaintiff in negligence. It was not the first time that a person was defrauded in a similar manner in a land sale transaction handled by the defendants. The defendants should be ordered to refund the shs. 62,000,000/= the plaintiff lost, and pay general damages of shs. 40,000,000= and punitive or exemplary damages of shs. 30,000,000/= as well as the costs of the suit.

Counsel for the defendants' final submissions;

[8] Counsel submitted that this is a case where the purchaser conducted her personal due diligence, negotiated the terms of the contract with the vendor, undertook a search at the Land Registry and only appeared before the 1st defendant for preparation of an agreement of sale, a process that was undertaken in consultation with her own lawyer. The plaintiff is a victim of her own misadventure. The vendor too was a walk-in client whose only need was for helping her draft the sale agreement, since she had already negotiated the terms with the plaintiff. The draft was shared electronically with the plaintiff's advocate who furnished his input before fair copies were printed out for signing. The vendor's signature was witnessed by the 1st defendant whereupon the plaintiff took the agreement to her lawyers for signing. Shortly thereafter she returned the duly signed copies and then proceeded to the bank from where the payment was made. It is the vendor who met the legal fees for preparation of the agreement.

[9] The defendants were not negligent at all. The standard of care expected is that of an ordinary skilled man exercising and professing to have that special skill. The seriousness of an accusation of professional negligence requires very cogent evidence. This is not a case of money laundering and the Act does no create private rights. It only creates a role for advocates in the fight against money laundering. After conducting a search at the Land Registry, it is the purchaser's

duty to verify the identity of the seller. Neither the plaintiff nor her advocate made the necessary inquiries with the neighbours and the local authority let alone verification of the vendor's identity with any government department. It is expressly stated in the agreement that the transaction proceeded on basis of the due diligence carried out personally by the plaintiff. The 1st defendant having looked at a photocopy of the vendor's national identity card and received confirmation from the plaintiff that she had undertaken her own due diligence, he too believed the vendor was the genuine proprietor of the land. He duly executed his obligation of explaining each clause of the agreement to the parties before they signed it. He was never instructed to undertake any due diligence. It is not the defendants that received the purchase price and therefore they cannot be directed to refund it. The refund sought is only recoverable from the vendor who received the cash but the plaintiff chose not to join her to the proceedings. She is not entitled to any of the other reliefs sought and the suit should therefore be dismissed with costs to the defendants.

The decision;

[10] In all civil litigation, the onus is on the plaintiff to prove to court on a balance of probabilities, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of her claim, or cause of action, in order to recover. In other words, the persuasive burden is cast upon the plaintiff to prove to the court why the defendant is liable for the relief claimed. The plaintiff has to prove in this particular claim that; (i) the defendants owed her a duty of care; (ii) the defendants breached that duty of care; and (iii) as a result of which she suffered loss.

First issue; whether the defendants, as advocates, owed a duty of care to the plaintiff.
Second issue; whether the defendants are in breach of that duty.

[11] The case at hand brings into focus a phenomenon in a not so isolated volume of claims involving impostor fraud during transactions of sale/purchase of land, where

an imposter poses as the true owner of a property and seeks to sell it. It raises questions as to who is liable to the buyer after the fraud is identified and the buyer realises that they have not obtained title to the property they planned to buy. The buyer will have lost the purchase money and the question which the court has to consider then is whether the buyer has any basis to recover from that money, from the imposter's advocate or the imposter's estate agent. The court is being asked to reach what counsel for the defendant described as a difficult decision with wider ramifications in legal practice. In order to resolve this broad issue, the Court proceeds to consider the incidence of that liability within the context of the relevant duties owed by advocates to clients and third parties.

i. Liability to a client is primarily contractual.

[12] Advocates are prohibited from acting for any person unless they have received instructions from that person or his or her duly authorised agent (see Regulation 2 (1) of *The Advocates (Professional Conduct) Regulations).* An advocate-client relationship therefore is formed when an advocate agrees to provide legal assistance to someone seeking the advocate's services. The scope of the representation depends on the terms of the agreement. The advocate may agree to undertake a specific matter for the client, in which case the relationship terminates once the matter is resolved. Alternatively, the advocate may agree to represent someone for all matters of legal consequence which may arise, which creates an open-ended and ongoing advocate-client relationship. The relationship may be express or implied.

[13] There are many aspects of the advocate-client relationship which are governed by The Advocates (Professional Conduct) Regulations. The two most basic duties of the advocate are the duties of competent representation and diligent advocacy (see Regulations 2 (2) and 12). Reasonable diligence is understood to mean acting with commitment and dedication to further the interests of the client, and to proceed with zeal in advocacy on the client's behalf. An advocate is required to

provide competent representation for a client. To meet this duty, an advocate must employ the legal knowledge, skill, thoroughness and preparation necessary for representation.

[14] In general, an advocate only owes a duty of care to their client. The source of this duty is the contract of retainer that governs the advocate-client relationship, and the core content of the duty is to carry out the service that the advocate has agreed to carry out for the client with skill and care. Like anyone else providing a professional service, the advocate *prima facie* impliedly agrees to carry out that service with reasonable care and skill. It is therefore obvious why, in general, advocates owe no equivalent duty of care to third parties: they have not agreed to provide a service to third parties and so they owe no obligation to perform any such service with skill and care. An advocate who agrees to do something for a client has to attain a minimum level of competence in doing what he has agreed to do. Implicit in the retainer is that the advocate will advise on matters reasonably incidental to the work they have agreed to carry out.

[15] The skill and care competence requirement does not mean that an advocate must have special training or prior experience in a specific area of law before agreeing to represent a client in a matter pertaining to that area of law. An advocate cannot be liable for any reasonable error of judgement or for ignorance of some obscure point of law. He may, however, be liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice when discharging his or her duties to a client (see *Champion Motor Spares Limited v. Y.V. Phadke and Others (1968) EACA 11).* Advocates may be found guilty of negligence in the performance of their professional duties as to make them liable in damages to their clients. “Client” in its ordinary signification, must therefore be regarded as referring to a person who, in respect of some legal matter within the scope of professional services normally provided by lawyers, has, with the consent of a lawyer, come to stand in a relationship of trust and confidence to the lawyer entailing duties of the lawyer to promote the person’s interests, to protect the person’s rights and to

respect the person's confidences (see *Apple Computer Australia Pty Ltd v. Wily [2002] NSWSC 855)*. That relationship may be created expressly, or inferred from objective facts.

a. The express retainer;

[16] The client will normally pay the advocate a retainer fee to secure the advocate's representation. However, an advocate-client relationship may be formed even without any fee changing hands and without a signed agreement. If an advocate gives legal advice to another seeking such advice, and the advocate can reasonably foresee that the prospective client will rely on that advice, or the client reasonably believes he was being represented by the advocate, an advocate-client relationship is formed. Express retainers are usually manifested in an engagement letter or retainer agreement. A retainer agreement serves as an invaluable tool in protecting the advocate against client grievances, setting reasonable client expectations and generally helping to ensure the collection of outstanding fees. A contract between an advocate and a client for provision of legal service must be proved like any other contract (*see Wong v. Kelly (1999) 154 FLR 200).* There is no proof of an express retainer in the instant case between the plaintiff and the defendants.

[17] While one who consults with an advocate does not necessarily become a client, the advocate nevertheless assumes some duties towards the individual immediately as a prospective client. Specifically, any information the prospective client reveals to the advocate pertaining to his or her legal circumstances cannot be revealed and may not be used to the disadvantage of the prospective client at a later time. A prospective client is a person who is about to retain or employ the advocate or the law firm. In the instant case, the plaintiff never approached the defendants with such an intention. She only went to the defendants because the impostor insisted the transaction had to be concluded there. The defendants therefore did not owe the plaintiff any duty as a prospective client.

a. The implied retainer;

[18] Even if there is no express retainer between a client and his advocate the court may find that one could be implied in situations where, if viewed objectively the parties acted as if such a relationship existed, but there must be objective evidence to demonstrate that there was an agreement to enter into a contractual relationship. An implied retainer can only arise out of necessity when that is the only explanation for the parties' conduct, where on an objective consideration of all of the facts and circumstances an intention to enter into such contractual relationships ought fairly and properly to be imputed to the parties (see *Blyth v. Fladgate [1891] 1 Ch 337; 60 LJ Ch 66; Beach Petroleum NL v. Kennedy and other (1999) 48 NSWLR 1, 53 [1]; Apple Computer Australia Pty Ltd v. Wily [2002] NSWSC 855, [7]-[8] and Pegrum v. Fatharly 14 WAR 92).*

[19] Although no express retainer may have been given, the relation may subsist, and its existence may be inferred from the acts of the parties. The court will readily imply a retainer if, viewed objectively, the parties' conduct is consistent only with the advocate being retained to act for the respondent. Mere silence though will not be enough. In *Empirnall Holdings Pty Ltd v. Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523,* it was held that;

> Silence is usually insufficient to create any contract - the objective theory requires some external manifestation of consent. Convenience requires communication, and silence is usually seen as rejection. But the offeror can be bound if communication is dispensed with. Where an offeree, with a reasonable opportunity to reject the offer of goods or services, takes the benefit of them under circumstances which indicate they were to be paid for, the tribunal of fact may hold that the offer was accepted according to its terms. A useful analogy is found with the ticket cases. The case is not so much one of acceptance by silence, as of taking the benefit of an offer with knowledge of its terms and knowledge of the offeror's reliance on payment being made in return for the work being done.

[20] Similarly in *Pegrum v. Fatharly (1996) 14 WAR 92,* it was held that; “a contractual relationship of solicitor and client will therefore be presumed if it is proved that the relationship of solicitor and client existed de facto between a solicitor and another person. Upon proof of that kind it would not be necessary to prove when, where, by whom or in what particular words the agreement of retainer was made.” Proof of an implied retainer rests on proof of facts and circumstances sufficient to establish a retainer. It is a multi-factorial consideration and is largely fact specific. The court should ask: “Was there conduct by the parties which was consistent only with the firm being retained as solicitors for the claimants?” (See *Caliendo v. Mischon de Reya [2016] EWHC 150 (Ch).* The court may be prepared to find that there existed an implied retainer if, viewed objectively, the parties acted as if such a relationship existed. A person may become a client of an advocate if the manner in which the advocate conducts himself towards that person gives rise to such a relationship. This is so even if there was originally no express intention to create a retainer. An “implied retainer” is said to arise in such circumstances.

[21] The key ingredient is agreement to enter into a contractual relationship. An implied retainer exists where one party expresses an offer to contract to the other party who subsequently accepts through his acts of acquiescence (see *Parrott v. Echells (1839), 3 J.P. (Eng.) 771 and Pinley v. Bagnall (1782), 3 Doug. K.B. 155).* It has been inferred in a number of situations, for example; *Gray v. Wainman (1823), 7 Moore C.P. 467* (receipt of payment out of court); *Cameron v. Baker (1824), 1 C. & P. 268* (failure to repudiate employment by third party); *Hall v. Laver (1842), 1 Hare, 571; Reynolds v. Howell (1873), L.R. 8 Q.B. 398* (action commenced without authority); *Parrott v. Echells (1839), 3 J.P. (Eng.) 771* (leaving papers with solicitor); *Anderson v. Boynton (1849), 13 Q.B. 308* (consent to consolidation order); *Southall v. Keddy (1858), 1 F. & F. 177* (authorising solicitor to conduct suit though not a party); *Blyth v. Fladgate, [1891] 1 Ch. 337* (investment of funds by solicitor trustee).

[22] An implied retainer "[can] only arise where on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties" (see *Dean v. Allin & Watts [2001] 2 Lloyd's Rep 249)*. The word "impute," as used in this context, signifies the attribution of an intention to enter into a contractual relationship, rather than the fact of the existence of such an intention. Imputation involves concluding what the parties would have intended, whereas inferences involve concluding what they did intend. In assessing whether an implied retainer arises in a particular case, the test is whether an objective consideration of all the circumstances, both from the client's and the advocate's perspective, is such that "an intention to enter into such a contractual relationship ought fairly and properly to be imputed to all the parties.

[23] For mutual intention, the ascertainment of such intention can be by way of express or implied reading of the contractual terms. In contrast, for an imputation of intention, the concern is with the imputation of what the court believes to be reasonable in the circumstances, as an approximation to what the parties ought to have intended (see *Chan Yuen Lan v. See Fong Mun [2014] 3 SLR 1048 at [111] and Stack v. Dowden [2007] 2 AC 432 at [126])*. The fundamental question is thus whether, on an objective analysis of the circumstances from the perspectives of both the putative advocate and the putative client, an intention to enter into an advocate-client relationship should be attributed to the parties. In this regard, it is important to note that the putative client's subjective understanding of his relationship with the putative advocate is not determinative of whether an advocate-client relationship should be imputed in the circumstances.

[24] An advocate cannot serve two clients with competing interests or a client whose interest conflicts with the advocates' duty. However, there is no general rule against acting for different parties in the one transaction because there may well be instances where separate clients may be willing (and perhaps prefer) to look after their own interests, or there may be no actual conflict between the clients' interests. There is, of course, a risk involved in acting for both parties because

predicting how interests may in fact conflict is fraught with difficulty. Where a party is clearly looking to an advocate for guidance or advice, especially where there is no other legal representative involved, prudence dictates any impression that he or she is in any way taking responsibility for protecting a party's interest to be unambiguously dispelled to avoid creating a false expectation.

[25] In the case at hand, the agreement itself indicates that it was drawn by two law firms; M/s Waluku, Mooli & Co. Advocates as well as M/s C. Mukiibi Sentamu & Co. Advocates. It was signed by counsel from both law firms. Had there not been any participation of another law, firm on the plaintiff's' behalf, the 1st defendant would have been required to either fully discharge his professional responsibilities to both or to make it clear that the plaintiff was not accepted as a client and should not rely on him to advise or protect her interests. On the facts of this case, that was unnecessary because it is highly unlikely that an implied retainer will form between an advocate and a third party, where the third party receives independent legal advice throughout their involvement with the advocate. There is therefore no basis from which objectively it may be inferred that the plaintiff entered into an advocate-client relationship with the defendants.

ii. Tortious liability to third parties arises only in exceptional cases.

[26] The courts are reluctant to extend an advocate's duty of care to beyond their client, unless it can be demonstrated that the advocate expressly accepted a duty of care towards a third party. This is true even in cases where the advocate's actions may have caused loss to a third party. It has long been considered that, except in extreme circumstances, the liability of an advocate extends only to his or her client, and not also to any third party who may have an interest in the completion of the advocate's instruction (see *Metropolitan Venues Ltd v. Watson Burton LLP [2014] EWHC 883)*. Under this rule, even advocates who perform their duties negligently cannot be held liable to anyone other than their clients.

[27] At common law, an advocate serves as an agent of his or her client; the advocate's acts are the acts of the principal, the client, and all duties of diligence are owed to the client (see *Ross v. Caunters [1980] Ch 297 at p 322 and White v. Jones [1995] 2 AC 207 at 256B).* The imposition of liability in negligence towards a third party who is not the advocate's client requires something more than it being foreseeable by the advocate that loss will be caused to the third party by a lack of care on the advocate's part in carrying out whatever is the relevant task (see *Northern Rock Asset Management (NRAM) plc v. Jane Steel And Bell & Scott Llp [2018] UKSC 13; [2018] 3 All ER 8; [2018] 1 WLR 1109).* Nor is it sufficient that the test of proximity is satisfied whether by an actual assumption of responsibility or by the existence of a direct interest on the part of the third party in the product of the advocates' instructions.

[28] Assumption of responsibility is the foundation of liability in negligence in cases against advocates by third parties (for example where the instructions which the advocate received were intended to benefit both the advocate's own client and the third party with the expectation that the arrangements the advocate was instructed to put in hand would enure for their mutual benefit, or where the purchaser asks the vendor's advocates to give undertakings or assurances that they had properly carried out the necessary due diligences, or where the advocate voluntarily assumed duties to non-clients knowing that they were likely relying on his or her services), or in situations where the advocates warrant that they are acting on behalf of the rightful owner of the property. In the absence of a contract between an advocate and a representee, a duty of care in making a representation arises only if the advocate assumed responsibility for it towards the representee (see *Al-Kandari v. J R Brown and Co [1988] QB 665).* The responsibility should have been voluntarily accepted or undertaken. The assumption of responsibility could be express or implied from all the circumstances. The representee must have reasonably relied on the representation and the advocate must have reasonably foreseen that the representee would do so (*see Dean v. Allin and Watts [2001] EWCA Civ 758; [2001] 2 Lloyd's Rep 249; Ashraf v. Lester Dominic Solicitors and*

others [2022] EWHC 621; [2023] EWCA Civ 4 and Smith v. Eric S Bush [1990] 1 AC 831). The reasonableness of the plaintiff's reliance and of the defendant's foreseeability of it comprise the special feature which gives rise to the liability.

[29] Alternatively, liability to a third party arises in situations where the third party is in as proximate a position to the advocate as he would have been had he been the advocate's client, such as where the advocate acts for both parties to the transaction, in which case it is reasonable in itself for the purchaser to have relied on the vendor's advocates and agents, to have acted competently in that regard. The Court is deciding whether to treat the advocate as having assumed legal responsibility to the third party, non-client, for his or her actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.

[30] Courts therefore have shown willingness to extend the duty of care owed by advocates beyond their client where they step outside of their role as advocate for that client and instead assume a role to act for the benefit of third parties, whether intentionally or not. In most of the aspects of this transaction though, the vendor and the purchaser were very much at arm's length and their respective advocates owed no duties to anyone but their client when acting in relation to the transaction. Any checks the defendants generally may have been required to carry out before accepting instructions as a part of the transaction would not be designed to benefit the purchaser.

[31] The 1st defendant testified that the plaintiff and the seller went to him in a manner that indicated to him that they knew one another. He had never met the vendor before the date of the agreement. The vendor had called him during the month of June but she was not a client of the firm; she was a walk-in client. When the plaintiff called him asking whether he knew the impostor, he had replied that she had called him once, three months before. The following day the two of them went to his

chambers. Before preparing the agreement, he asked the vendor to produce her documents like her national Identity Card, passport photo and the original title. He examined the national Identity Card, which was a coloured photocopy and asked for the original. The vendor said it was misplaced but she would bring it later. The image on the photo was that of the vendor. He only looked at it and from what he saw it bore resemblance to her appearance and the details. He did not verify her residence nor the national Identity Card. He only asked his former client, a one Olobo Lameck, if he knew Nanfuka and he told him he knew her and had ever done some work for her as a bailiff.

[32] To the contrary, the plaintiff testified that with the aid of a land broker, he met the impostor for the first time at "Antonio's Grill" at the Pioneer Mall where they negotiated the price. The impostor gave her a photocopy of the title deed on basis of which her advocate Mr. Cornelius Mukiibi on 20th August, 2019 conducted a search at the Land Registry which confirmed the land was registered in the name Nanfuka Kintu Bakia (exhibit P. Ex.1 also marked as exhibit D. Ex.2). Upon obtaining the report she contacted the impostor to arrange a meeting with her to conclude the transaction. The impostor told her the sale agreement had to be drafted by her lawyer who also keeps her title with him. The impostor said her lawyer was the 1st defendant and she gave her his phone contact number. The plaintiff then called the 1st defendant and briefed him about the proposed transaction. The 1st defendant told her he knew the lady and he would prepare the agreement. He asked the plaintiff for more details to include in the agreement; the plaintiff's full names as spelt on the national identity card; her place of residence, postal address and the plaintiff sent the details to him. The 1st defendant said he would make provision for the plaintiff's lawyer to sign.

[33] On the day the agreement was signed, i.e. 22nd August, 2019 it is the 1st defendant who gave her directions to where the offices of the firm were situated. Shortly after her arrival and as she waited at the reception, the impostor arrived too and the 1st defendant then showed both of them the draft agreement. They confirmed the

content as correct. The impostor produced a copy of her national identity card. The plaintiff told the 1st defendant she was to make the payment in cash at the bank. They signed the agreement and the 1st defendant signed as a witness. The 1st defendant handed to the plaintiff a copy of the agreement, the transfer instrument, the title deed, and the impostor gave her a photocopy of her national identity card. The 1st defendant then drove both of them to the Speke Road Branch of her bank where the plaintiff also worked. The plaintiff withdrew the money and gave it to the impostor in the presence of the 1st defendant. The plaintiff thereafter scheduled a meeting with her lawyer Mr. Mukiibi to sign as a witness and to help her handle the transfer.

[34] It emerges from the two versions that although the 1st defendant had initially, while under cross-examination, denied any previous knowledge of the impostor, in paragraph three of his witness statement, and in the later part of his cross-examination, he admitted having received a call from her during the month of June, 2019 in relation to her need for preparation of a land sale agreement. Later in August is when the plaintiff contacted him as well and he told her he had received a call there months before from the impostor. There is no evidence to show that the plaintiff or her advocate took the opportunity to check out the true identity of the impostor. The only time the impostor was ever required to present her identification documents was at the signing of the agreement, at the instance of the 1st defendant who undertook a perfunctory examination of the document and then went ahead with the transaction. Clause 6.0 of the agreement states as follows;

> The purchaser has carried out a physical inspection of the land, done a search at the Land Registry, and satisfied herself that the vendor is the registered proprietor of the property and that there are no third party claims.

[35] The question then is whether or not in the totality of events the 1st defendant stepped outside of his role as advocate for his client (the impostor) and instead

assumed a role to act for the benefit of the third party (the plaintiff), whether intentionally or not, so as to give rise to a tortious duty of care as a foundation for his liability to the plaintiff in negligence. The test for this is laid out in *Northern Rock Asset Management (NRAM) plc v. Jane Steel And Bell & Scott Llp [2018] UKSC 13; [2018] 3 All ER 8; [2018] 1 WLR 1109,* as follows;

> The defendant solicitor or other professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because the solicitor or other professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.

[36] Liability therefore arises where the advocate undertakes responsibility for certain acts which he knows will be relied on by the non-client; when it is clear to both the advocate and the non-client, that the non-client is relying on the special legal skill and knowledge of the advocate, and that the advocate knows or ought to have known that the non-client was relying on this skill or knowledge. A fundamental element is the advocate's knowledge that the non-client is reasonably relying on the advocate's skill and knowledge, and is likely to suffer serious loss if the advocate acts negligently. It is sufficient if there is proof that a reasonable person would have been materially influenced by, or changed their position based on the inaccurate information. Generally, the fact that an aggrieved party may have been able to discover the truth does not make the negligent act any less impactful nor mean that it cannot be relied on.

[37] Although in most of the aspects of this transaction the vendor and the purchaser were very much at arm's length, that was not so in respect of one critical detail. In the first place, clause 6.0 of the land sale agreement defines the scope of due diligence undertaken by the plaintiff, which does not include verification of the seller's true identity as having been part of what the plaintiff had undertaken. The plaintiff's attempt to verify the identity of the vendor was when a day prior to the transaction, she called and asked the 1st defendant whether he knew the seller and his response was that he had known her three months before when she called him. This put the 1st defendant on notice the day before the transaction that the plaintiff needed to verify the seller's identity. The second attempt was undertaken by the 1st defendant when he asked to see the seller's document of identification and he examined it in the presence of the plaintiff. The 1st defendant thereby took a pivotal position in that endeavour. There is no evidence on record to show that the plaintiff ever undertook, independent of the 1st defendant's information and actions, any steps of her own to verify the seller's identity. It is evident on basis of the evidence on record that the plaintiff relied entirely on what the 1st defendant told her on phone the day before, and what she saw him do as verification of the impostors' identity on the day the agreement was signed.

[38] Although any prudent advocate representing a buyer taking the most basic precautions would have checked the authenticity of the document of identification submitted by the vendor, there is no evidence before Court that the advocate for the plaintiff was given, demanded for or ever got the opportunity to verify the document of identification submitted by the impostor to the 1st defendant. It was therefore reasonable for the 1st defendant to have foreseen that the plaintiff was relying entirely on his representation by conduct that the document was genuine or reliable as a basis for the transaction to proceed, and it was reasonable for the plaintiff to have relied on the representation without checking its accuracy. In those circumstances, the 1st defendant stepped outside of his role as advocate for the seller. It was clear to both the 1st defendant and the plaintiff that the plaintiff was relying on the special legal skill and knowledge of the1st defendant. Alternatively,

it gave rise to a relationship of trust and confidence. The 1st defendant knew or ought to have known that the plaintiff was reasonably relying on his skill or knowledge, and was likely to suffer serious loss if the 1st defendant acted negligently. A reasonable person would have been materially influenced by, or changed their position based on this inaccurate information.

[39] The plaintiff was justified under the particular circumstances of this case in believing that the 1st defendant had known the seller before the transaction, coupled with his examination of the seller's coloured photocopy of her national identity card in her presence, and thereafter going ahead with the transaction. I therefore find that circumstances exist in this case on basis of which attribution can be made to the 1st defendant of an assumption of responsibility for the representation concerning the authenticity of the impostor's document of identification, and hence her identity. The 1st defendant voluntarily assumed responsibility to the plaintiff for the adequacy of this aspect of due diligence which he carried out personally and gave personal assurances of.

iii. Liability under a cautious incremental development of the common law principle.

[40] At common law, in normal conveyancing transactions an advocate acting for the seller does not generally owe a duty of care to the buyer (see *Gran Gelato Ltd v. Richcliff Group Ltd [1992] Ch 560)*. Accordingly, a vendor's advocate does not owe a duty to the purchaser to take reasonable care to establish the identity of his client (see *P & P Property Ltd v. Owen, White & Catlin LLP [2018] EWCA 1082; [2019] Ch 273; [2018] 3 WLR 1244*). There is usually nothing in a classical arm's length transaction that make it objectively reasonable to assume that the vendor's advocates have undertaken a through identity check of his or her client and that they should be legally accountable to the purchasers for the consequences.

[41] In is nevertheless counsel for the plaintiff's argument that there is now a statutory obligation that gives rise to such liability. Indeed, section 9 of *The Anti–Money Laundering Act, 2013* imposes "know your customer" (KYC) obligations upon transactional lawyers, which obligations start when a new client approaches the firm and continue throughout the advocate's relationship with the client. These are mainly obligations about verifying key details and keeping an eye on potentially suspicious activity so that it can be flagged early on. A key element in these obligations is the collecting and verifying of identification details and other key information for every client. When gathering KYC information, there are four primary objectives: identification of the client, verification of the client's true identity, understanding the client's, activities and monitoring the client's activities. Understanding a client's background is imperative to risk management associated with fraudulent activities or overall suspicious behaviour.

[42] By reason *The Anti–Money Laundering Act, 2013*, it goes without saying that advocates acting for vendors must be far more diligent about the checks they undertake to satisfy themselves as to the identity of their client and be able to demonstrate the steps undertaken, but that does not of itself impose a statutory duty owed to third parties. The impact of the money laundering legislation was for example considered *in Dreamvar (UK) Ltd v. Mishcon de Reya and Mary Monson Solicitors [2018] EWCA Civ 1082; [2018] 4 All ER 277;[2018]3 WLR 1244;[2018]Lloyd's Rep 445* where it was held that the requirements of money laundering legislation apply irrespective of whether the advocate has any reason to suspect that his client is involved in money laundering or to doubt the veracity of any documentary or other information relied on by the client for the purposes of identification. Client due diligence includes identifying the client and verifying his or her identity on the basis of documents (and for the documents supplied to be appropriately verified), data or information obtained from a reliable and independent sources. The justices held;

> They operate by requiring professionals and financial institutions to identify and verify the identification of their clients on the basis that those relevant persons can be relied upon to carry out their duties under the regulations honestly and diligently and that the transparency which this will bring to the transaction will be sufficient to deter and prevent criminal activity. The MLR do not, however (and are not intended to), create a statutory liability on the part of solicitors and estate agents towards innocent third parties such as the purchasers in the present cases who are the victims of fraud. Although the carrying out of the necessary AML checks in the present cases may have deterred or prevented the frauds from taking place, that is not the purpose behind the MLR and any civil liability which attaches to the solicitors and agents who act for the fraudster must therefore be established under the general law. The existence of the MLR and the obligations they impose may, however, be important background features in determining what liability (if any) should be imposed on solicitors and agents who undertake the sale of property on behalf of a client who turns out to be an imposter.

[43] Similarly in our case, the principal purpose of *The Anti–Money Laundering Act, 2013* is to deter money laundering and the financing of terrorism, rather than to combat identity fraud. It does not create a statutory duty which if breached gives rise to a cause of action at the suit of the defrauded third party. This is because the statutory duty was imposed for the benefit of society at large and not for any particular class of persons, such as the plaintiff in this case, who are likely to suffer loss if the vendor turns out to be an imposter. These requirements are designed to prevent the infiltration of illicit funds into the financial system. Advocates, as gatekeepers to various legal and often high-value financial transactions such as property sales, are integral in the fight against money laundering and other financial crimes.

[44] I have considered the decision in *Mody Nohou Barry v. United Bank for Africa, H.C.Civil Suit No. 19 of 2012* cited by Counsel for the plaintiff and found it distinguishable and therefore inapplicable to the case at hand. In that case, during the month of August, 2011 while in Nairobi, the plaintiff purchased two second-

hand vehicles worth US $ 21,000 using a website owned by M/s Annik Auto Care Ltd that purported to be selling second-hand vehicles, which company was a customer of the defendant. A person who claimed to be the manager of M/s Annik Auto Care Ltd, a one Kyagulanyi Jackson Duggar, advised the plaintiff to pay through an account No. 0116002011 with the defendant. The plaintiff wired the money from his Barclays Bank account in Nairobi to that of M/s Annik Auto Care Ltd's with the defendant in Kampala, but after about twenty days of that remittance, he realised that it was a scam. During police investigations undertaken at his instance, it was established that although Kyagulanyi Jackson Duggar's business premises were indicated on the account opening documents, the bank had not actually obtained the necessary information to establish its customer's whereabouts, but continued to transact business with him, yet he could now not be found. The plaintiff claimed that the bank was negligent, a fact which had occasioned him loss, and that it had failed in its duty to protect him as a member of the public. He claimed for recovery of the US $ 21,000 and an award of general damages.

[45] In a decision delivered on 7th December, 2015 it was held that as a financial institution, the defendant was by virtue of Rule 5 of *The Financial Institutions (Anti-Money Laundering) Regulations, 2020* under an obligation to implement a regime of "Know Your Client" protocols. By opening up an account for M/s Annik Auto Care Ltd, the bank had held out to the general public that the company was genuine customer of the bank. It turned out that during the KYC process, the relevant officers of the bank never visited the physical address of the company nor that of its manager. The bank failed to detect the variance in physical location indicated in the business name registration documents and those filled in the account opening documents; one in Makerere-Kikoni and the other in Seguku. The address of the beneficiary indicated on the SWIFT transfer was Clement Hill Road in Kampala. The transaction itself was suspicious considering how soon it occurred after the account was opened and the large sum of money involved. The bank owed the plaintiff a duty of care since the loss suffered was a foreseeable result of

the defendant's want of due care. The defendant went about the process of opening the account in a reckless manner. Since the plaintiff's loss was as a result of that conduct, the defendant was found liable.

[46] The case is distinguishable on the facts and the law for the reason that in that case the Court applied, by analogy, principles to be found in cases *like Lloyds Bank Ltd. v. E.B. Savory & Company, [1933] AC 201* where the diligence required in the process of opening an account was considered in the context of the rule that the banker is bound to make inquiries when there is anything to rouse suspicion that a cheque is being wrongfully dealt with in being paid into the customer's account. That was a case where a fraud had arisen through an employee stealing cheques from his employer and placing them into the credit of his account. It is a decision driven by the importance of, and the public trust placed in, the banking industry. Despite that, the Court though did not specifically hold that the "know your customer" obligations imposed by *The Financial Institutions (Anti-Money Laundering) Regulations, 2020* created a duty of care to the public rights enforceable by members of the public generally. It only took the obligations created by the Act into account.

[47] By enacting *The Anti–Money Laundering Act, 2013*, Parliament clearly never intended to create a private right of action for citizens injured by a failure to perform the "know your customer" obligations. The fact that the checks required by the "know your customer" obligations under the Act may have a deterrent effect on would-be fraudsters, is not enough in itself to create a private law right of action under the Act for the benefit of third parties (see *X (Minors) v. Bedfordshire County Council [1995] 2 AC 633 at p 731 and P & P Property Ltd v. Owen, White & Catlin LLP [2018] EWCA 1082; [2019] Ch 273; [2018] 3 WLR 1244)*. The Act has no direct application in deciding who, amongst a number of innocent victims of the imposter's fraud, should bear the loss.

[48] The question remains whether it should be the buyer to bear their own loss, when such a buyer has probably never met the imposter before the specific transaction in issue and could not realistically do anything to prevent themselves being a victim of the fraud. On the other hand, is the buyer's advocate, who many times has no prior contact with the imposter but probably had means of identifying that a transaction is fraudulent. Then there is the imposter's advocates, who often are the ones who have prior contact with the imposter, but are almost certainly entirely innocent victims of a sophisticated fraud where the imposter is able to produce convincing evidence of their identity. The question is whether a third party should be able to hold any of those persons liable for their failure to prevent imposter fraud from occurring through the cause of action of negligent enablement of imposter fraud.

[49] Principles of the common law fortunately are not static; the common law derives considerable strength from its versatility through incrementalism, adapting to changing circumstances and thereby gradually improving its outcomes, and advancing an anchored, purposive and progressive jurisprudence, while also being faithful to the promise of the constitutional mandate of the Courts, in achieving a balance between legal certainty and justice. Incremental development on a narrow case-by-case basis in common law is the gradual and cautious evolution of legal rules through the accumulation of precedents and the consideration of specific cases; the building up of its principles by accretion from case to case. Rather than making abrupt and sweeping changes to the law, Courts make marginal adjustments that are consistent with existing principles and precedents. This approach allows for the steady development of the law over time, even in the absence of new information. It also ensures that legal decisions are grounded in sound rhetoric and argumentation, shaping Courts' incentives and promoting efficiency in the legal system. Incrementalism is the touchstone of legitimate common law development. It is a form of adjudication involving the articulation of liability rules which are, at once, new (and, hence, can properly be

regarded as the fruit of judicial law-making) and yet are conditioned by pre-existing law.

[50] There are five situations though in which most judges would be reluctant to extend the scope of existing principles. Those situations are; first, where right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law. Secondly where a rule of law, which is accepted as defective, requires to be replaced by a detailed legislative code with qualifications, exceptions and safeguards, and that code requires research and consultation which judges are not equipped to perform. Thirdly, where the question involves an issue of current social policy on which there is no consensus in the community. Fourthly, where the issue is currently being addressed by Parliament, and fifthly, where the issue is far removed from ordinary judicial experience.

[51] There are two broad tendencies in incrementalism; if there is a lack of existing case law indicating a rule capable of extension to cover the novel scenario, narrow incrementalism denies any opportunity for extending the law. It results in the courts refusing to contemplate elaborating the law in novel situations. So, in a novel case, liability will be imposed only if a sufficiently “tight” analogy can be drawn with an existing liability rule. Conversely, if such an analogy cannot be found, there will be no liability and, crucially, no expansion of the law. On the other hand, the wide incremental (or principled) approach legitimises the court having regard to overarching principles in order to found novel principles, either in the complete absence of precedent, or where there are only hostile or unhelpful authorities.

[52] The facts of the case at hand do not trigger any of the five situations in which some judges would be reluctant to extend the scope of existing principles, particularly considering that there is no unanimity of view on some of those five points, rendering their importance mostly dependent on the temperament of the individual judges; some judges are more conservative than others in developing the common law. In a strongly novel claim, such as the one at hand, the court cannot avoid

adopting the wide incremental (or principled) approach by having regard to overarching or underlying principles and policies.

[53] It is already part of the common law that there are occasions when, in addition to the named client, there are also others who will foreseeably be harmed by the negligence of the advocate. In such cases a duty may exceptionally be owed to them too. If one then adopts the wide incremental approach and on basis of the truism that there is no single test that applies to all claims in the modern law of negligence (see *Robinson v. Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595; [2018] AC 736*), then where established principles or previous cases do not already establish whether there would be a duty of care, the court would be entitled to go beyond these principles to decide whether to find one in a novel type of case, but acutely aware at the same time that adjudication is a process undertaken in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with notions of what is fit and proper. This might involve matters of public policy, convenience, efficiency, financial concerns, moral inclinations, and so forth (the list is not exhaustive). Principles result from a process of interaction and mutual adaptation of different values and private and public interest objectives. In case-specific situations, where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.

[54] Starting from the general rule that an advocate in a conveyancing transaction does not normally owe a duty of care to anyone but his own client, except where the advocate assumed legal responsibility to the third party non-client for his or her actions, but also considering that an advocate may not knowingly participate in or assist illegal conduct of a client, and further that advocates will be held liable for

aiding and abetting their clients' wrongful conduct, then it seems to me that knowing or negligent advocates representing fraudulent property vendors should share responsibility along with those representing the duped buyers for any resulting losses.

[55] The vendor's advocates have potential liability to the purchaser if they have not carried out sufficient client checks because the vendor's advocate is in the best position to carry out reasonable due diligence in investigating to verify the vendor's identity and ownership of the property for sale. In view of the many parallels between criminal and tort law over the concept of aiding and abetting, civil liability for aiding and abetting is not out of place. In the law of torts an agent who assists another agent or the principal to commit a tort is normally himself liable as a joint tortfeasor for the entire damage, just as in criminal law those who give knowing aid to a person committing a crime, with the intent of facilitating that crime, may themselves be charged as criminal principals.

[56] There is an old credo that the client shouldn't pick the lawyer; the lawyer should pick the client. An advocate should therefore take reasonable measures to ascertain their client's identity as soon as practicable before accepting instructions to act (see *Ford v. The Financial Services Authority Johnson [2011] EWHC 2583 (Admin) and Legal Services Commissioner v. Reid (No 3) [2017] QCAT 471)*. In the instant case, the 1st defendant described the impostor as a walk-in client. Walk-in clients are those clients who are previously unknown to the practitioner, particularly clients who walk in off the street, as opposed to referrals from relatives, a bank, or other established third party. They not only pose the highest risk factor but also are often shopping for the lowest fee.

[57] A firm that decides to take walk-ins must set up or have in place a screening process. Anti-money laundering compliance driven enhanced checks, help to identify and verify such clients, assess risk profiles, maintain records, monitor for suspicious activities, and report such activities to authorities. Compliance with

these requirements is not only a legal obligation but also crucial for maintaining the trust and confidence of clients, regulators, and the broader financial community in the provisions of legal services. These checks are essential to ensure that legal processes are not exploited for illicit financial gains and that the profession maintains its integrity. They enable advocates to implement risk-based approaches, applying enhanced due diligence measures when dealing with higher-risk clients or large transactions. Compliance with the requirements is also a testament to the commitment of the legal profession to ethical and transparent business practices.

[58] For that reason, thorough client identification and verification is more critical with walk-in clients due to the increased risk for money laundering or financial crime they pose. This is typically done through the collection and verification of identity documents to ensure they are authentic and up-to-date, more thorough background checks regarding their residence and business location, activity or reputation, their close associates. By embracing these checks, advocates contribute not only to the protection of their own interests, but also to the broader goal of creating a secure and resilient financial ecosystem. The role of advocates in compliance with the requirements remains pivotal in safeguarding the foundations of financial integrity.

[59] Impostors often rely on legitimate intermediaries. Advocates are thus at great risk of being used for fraudulent schemes. A perpetrator may seek legal assistance to appear legitimate in their illicit real estate transactions. A good number of fraudsters engaged in fraudulent land transactions often have knowing or negligent advocates working with or for them, and hope to obtain from their advocates some form of aid in the unlawful activity, or to use the firm’s professional status to enhance the legitimacy of a transaction. The expected response to that reality is to hold advocates accountable for providing such assistance, while at the same time allowing room within which advocates may maintain some distance between their legitimate representational duties and the illegal conduct in which their clients

engage. What is clear though is that current jurisprudence which appears to provide advocates almost unfettered permission to assist their clients in certain forms of lawbreaking activity, including crime and fraud, is unsustainable. Zealous advocacy must stop at the bounds of the law; an advocate may not knowingly or negligently assist a client with criminal, fraudulent or unlawful action.

[60] Although the practice of law cannot be said to be a calling to act as private detective in the prevention of all manner of fraud that may be involved in land conveyancing, there are a multitude of impostor frauds that can be prevented by advocates taking basic professional precautions. Although it may take multiple shapes, impostor fraud usually works in the same fashion: the fraudster is impersonating a trusted figure or entity, to convince a victim out of his or her money, or to get that person to do something on his or her behalf. The impostor will identify the figure that would have the most traction on the victim, then exploit human errors, behaviours, greed, and fears, emphasize on the urgency of a situation, or leverage his position of authority to conduct his or her fraud, leaving little room for the victim to think. Thus one of the red flags is unusual urgency infused into the transaction. An impostor's success largely relies on the vulnerabilities of the persons and institutions targeted.

[61] While our jurisprudence currently places the burden of due diligence in land transactions on the buyer and it has been famously stated that "lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the land but of the sellers before purchase," (see *Sir John Bageire v. Ausi Matovu, C.A. Civil Appeal No. 7 of 1996),* Courts are required to continuously examine a variety of public policy interests, such as who is in the best position to prevent the emerging harm, to determine if maintaining or extending the imposition of civil duties is necessary. By casting all duties of diligence in land transactions exclusively upon the purchaser in a bid to refine the doctrine of bona fide purchaser for value without

notice, that principle had inadvertently encouraged impostor fraud, yet the risk can be reduced significantly by extension of some of the obligations involved.

[62] The role of the vendor's advocate can no longer be just to affix his or her signature on transactional documents; although it is primarily to protect the client's interest, it is also to act as a filter against any reasonably avoidable or preventable irregularities in dealings. Advocates who choose to reduce their role in land transactions to a mere clerical one, of preparing, reading back and overseeing the signing of transactional documents and stamping them, thereby charging a fee, create one of the biggest vulnerabilities in the entire process of land transactions as they present impostors and scammers with a clean mechanism for stealing money from innocent buyers of land, and this has unwittingly, perhaps, enabled impostor fraud. A client represented by such an advocate in the course of a land transaction is as good as not having any legal assistance at all. We may now have turned the corner into a different landscape that requires more emphasis on shifting the prevention burdens onto those who are in a better position to mitigate impostor fraud damage.

[63] Because land conveyancing often requires the vendor to have a physical presence, many, if not most, impostor frauds in land transactions may be prevented by an advocate undertaking the implementation of robust KYC processes. The concept of advocates acting as gatekeepers by encouraging, or even requiring them to police lawbreaking among their clients, is not new to our jurisdiction. For example, Regulation 16 of *The Advocates (Professional Conduct) Regulations* requires an advocate, once he or she becomes aware that any person has, before the court, sworn a false affidavit or given false evidence, he or she to inform the court of his or her discovery. Similarly, as "accountable persons" within the definition of the Act, section 9 of *The Anti–Money Laundering Act, 2013* imposes a duty upon advocates to report suspicious or unusual transactions, which include transactions made on behalf of a person whose identity has not been established to the satisfaction of the advocate performing the transaction. Such

provisions have as their ultimate aim the minimisation of legal assistance to, or encouragement of, fraudulent activity, criminal activity, money laundering or other illegal activity.

[64] Advocates do not provide legal services in a vacuum. They are responsible for understanding how their clients are using their legal services and whether others might be defrauded or injured in some other way by the client's use of those legal services. This liability could exist for the advocate even though the advocate may never have had any actual direct contact or involvement with the third party. Pushing the cost onto the intermediary for negligently allowing the scammer to use their instrumentality and legitimacy to pull off the scam, seems to be a fair outcome. An advocate will not be liable though if the advocate exercises good faith and reasonable care, even if the advocate has acted erroneously. Advocates are privileged to perform honest legal services for their clients and they are protected as a matter of public policy from liability arising out of those honest legal services. However, since an advocate may not give legal services to clients who are going to engage in unlawful behaviour, especially crime and fraud, with the advocate as their accomplice, he or she must exercise the discretion to accept instructions, responsibly. An advocate who aids a client to commit a tort is not performing honest legal services that public policy would wish to protect. Failure to reasonably investigate all the material facts prior to initiating or facilitating the transaction, or offering legal services with knowledge that the client is involved in criminal or fraudulent conduct, renders the advocate complicit in the scam.

[65] No purchaser who perceives that an advocate has been engaged for legal advice and technical assistance in a land transaction, would want to pay the full purchase price, let alone a deposit, only to discover the property does not exist, cannot be purchased owing to public policy, or that the vendor is a fraudster using another person's identity. In a society where fraud in land transactions is becoming more and more prevalent, public policy demands safeguarding innocent buyers' confidence in instructing advocates in their property transactions, especially

conveyancing transactions, but without turning the advocates involved in such transactions, into guarantors of the genuineness of the transactions. That balance is achieved when advocates who represent themselves as having authority to act on behalf of a seller are treated as warranting that they are acting for the "true seller." They should then be liable for breach of undertaking where their client is not who they claim to be; in cases of imposter fraud, and accordingly liable to the purchaser for any loss caused as a result of relying on that representation. Transactional advocates are the classic low-cost avoiders in this scenario and are often best positioned, at the very least, to make impostor scamming more expensive and difficult. Consequently, the responsibility to verify the seller extends to the vendor's advocates.

[66] By the nature of their services, transactional lawyers engage in proactive legal advice about future conduct and therefore they ought to take a more conservative stance regarding the potential for a client to cross the line demarcating permitted and forbidden conduct. While the actions of a litigator occur in public in circumstances where excesses are mitigated by the participation of an opposing advocate and the judicial officer, the activities of transactional lawyers mostly occur in private thereby inviting a heightened level of a principled and realistic approach to the legal services provided. A transactional lawyer usually does not merely give legal advice to a client about certain actions, but often proceeds to assist the client in achieving unlawful goals by creating documents, developing strategies, advocating on the client's behalf, and so forth, which may amount to actively assisting conduct that is criminal or fraudulent.

[67] KYC procedures allow law firms to identify high-risk clients and provide the opportunity to refuse or terminate their services if necessary. Transactional advocates must conduct deeper due diligence ensuring the client is real, their transaction is real, the money sitting at the table or elsewhere ready to change hands is real, legitimate and earned within the confines of all applicable laws. Procedures for identity verification include documents, non-documentary methods

(these may include comparing the information provided by the customer with public databases, among other due diligence measures), or a combination of both.

[68] Where there is legislation that requires or prohibits certain activities and limits what an advocate can do and must do, such as *The Anti–Money Laundering Act, 2013,* then that will be a factor in the consideration of what the advocate is reasonably expected to do while complying with that other legislation. Whether the advocate can control or influence a particular thing or the actions of another person, or any limits on their ability to control or influence, may be relevant to what the advocate can do, or what they may reasonably be expected to do. Actual knowledge of the risk involved in the transaction, how the harm could occur, and the likelihood and degree of harm occurring, and any ways of eliminating or minimising the risk, and what a reasonable transactional advocate would reasonably be expected to know and do, too will be factored in. What is available alongside what is suitable for the elimination or minimisation of risk, the choice and application of the most appropriate means to eliminate or minimise the risk in the particular circumstances, will also be considered. A risk control that may be effective in some transactions may not be effective or suitable in others. Although the cost of eliminating or minimising risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of sanctity of the transaction ahead of cost. The more likely the risk is, or the greater the harm that may result from it, the less weight should be given to the cost of eliminating or minimising it.

[69] Advocates have a general ethical responsibility not to facilitate or support illegal activities. Of course, not all clients with illegal activity in mind will disclose that when seeking legal advice and assistance from advocates. It is incumbent upon the advocates not to knowingly, or out of their negligence, allow themselves to be used for such purposes. The absence of any form of duty to undertake verification of vendor identity in land transactions creates a limitless opportunity for fraud. This Court takes the view that a special relationship exists where the injury is foreseeable and the vendor's advocate is in the best position to prevent the harm

from occurring, which gives rise to a traditional claim of negligence, attuned specifically to circumstances of imposter fraud such as those which arose in the instant case where the relationship is not too attenuated. Causation is established if the vendor's advocate's conduct was a substantial factor in bringing about the impostor's ability to pull off the scam. Imposing such a duty is also appropriate because it would not be too burdensome, and it is in the best interest of the public.

[70] The KYC obligations already require law firms to take reasonable steps to identify persons involved in certain categories of transactions. All that is required to establish that duty is to extend those obligations to the verification of the true identities of persons who claim ownership of property that is the subject of land transactions. Impostor fraud poses a significant risk in land transactions, as scammers attempt to pose as the true owners of a property. In some cases, such as the one at hand, properties have been sold without the knowledge of the true owners. Transactional advocates need always to make sure that all parties involved in a land sale/purchase contracts are who they claim to be; especially that the vendor is who they claim to be.

[71] What the advocate should reasonably have known is determined objectively. This means that the advocate must meet the standard of behaviour expected of an advocate of reasonable prudence and competence involved in such a transaction. In an ideal legal practice, there would be no risk but that's not practical; we do not live in an ideal world. Risks cannot be removed completely. There are risks involved in every transaction. Therefore, the Court must first consider what can be done, i.e. what is possible in the circumstances for ensuring a genuine identity, and then consider whether it was reasonable, in the circumstances to do all that is possible. In every case, it is the risk that has to be weighed against the measures necessary to eliminate the risk.

[72] This means that what can be done should be done unless it is reasonable in the circumstances for the advocate to do something less. To identify what is or was

reasonably practicable all of the relevant matters must be taken into account and weighed up and a balance achieved that will provide the highest level of protection that is both possible and reasonable in the circumstances. Some matters may be relevant to what can be done, while others may be relevant to what is reasonable to do. Only where the risk is insignificant in comparison with the sacrifice can the need for the measures and the duty to put them in place be discharged. Proportionality goes into the analysis of what measures would be reasonably practicable to implement. But unless the measures are grossly disproportionate and the risk insignificant in comparison, the weighting will always be in favour of putting the measures in place and reducing the risk.

[73] An advocate should not conclude an agreement, or assist a client in concluding an agreement, whom the advocate knows or reasonably should know is an impostor. "Reasonably should know" in this context means that an advocate of reasonable prudence and competence would ascertain the matter in question. An advocate knows or has reason to know if the advocate: has actual knowledge of the falsity, fictitiousness, or fraudulent nature of the identity; or acts in deliberate ignorance of the genuineness or falsity of the identity; or acts in reckless disregard of the genuineness or falsity of the identity of his or her client.

[74] It is evident in this case that the imposter did not produce convincing evidence of her identity yet without any form of verification, the 1st defendant created the impression that she had. The 1st defendant could have taken reasonable steps in verifying the vendor's true identity; such as insistence on production of the original national identity card, other original corroborative official documents of identification such as a passport or driving permit, undertaking and interface with persons of repute within the residential or business community of the individual for confirmation of her identity, and so on. Given the significantly increased use of technology for conducting searches through public data records to verify the identity of walk-in-clients, such as automated identity verification checks with the National Identification and Registration Authority (NIRA), know your customer

identity checks, are much faster than the situation was decades ago. Such measure are not too burdensome and neither do they increase the transaction costs prohibitively. In this context, the defendants' lack of appropriate procedures for walk-in client identity verification, enabled the imposter to succeed in assuming a false profile. The 1st defendant's negligence was the proximate cause of the plaintiff's otherwise foreseeable loss.

[75] In conclusion therefore, for having stepped outside of his role as the advocate for his client (the impostor), and instead assumed a role to act for the benefit of the third party (the plaintiff), whether intentionally or not, the 1st defendant assumed a duty of care which he then owed to the plaintiff, which duty he breached when he acted on unconvincing evidence of the impostor's prior phone call to him and a coloured photocopy of a document of identification, without any form of verification, thereby creating an impression, which was relied upon by the plaintiff, that she seller was the person she claimed to be, whereas not. In the circumstance of this case, the 1st defendant voluntarily assumed a duty of care to the plaintiff, of proper identification of the seller, knowing that she was likely to rely on his services in that regard. Secondly, as a matter of public policy, advocates who act on behalf of a seller in a land transaction are treated as warranting the true identity of the seller and are liable to the purchaser of land when the seller turns out to be an impostor, where the purchaser's loss is attributable to the advocate's failure to take reasonable precautions in verifying the vendor's true identity. The plaintiff has therefore proved the 1st defendant's liability for her loss, on the balance of probabilities.

Third issue; <u>whether the parties are entitled to the remedies sought in the pleadings.</u>

[76] A law firm as a professional association is liable on the same basis and to the same extent as a partnership. Consequently, every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership (see section 5 (1) of *The Partnership Act, 2 of 2010*). Hence, a partner embraces

the character of both, the principal and the agent. Therefore, if a partner acts for himself or herself and in his or her own interest in the common concern of the partnership, then he or she is acting as a principal. On the other hand, if he or she acts for and in the interest of his or her partners, then he or she is acting as an agent. It was observed by Lord Wensleydale in *Cox v. Hickman (1860) 8 HLC 268;*

> A man who allows another to carryon trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So if two or more persons agree that they should carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer.

[77] Each partner is both an agent of his or her fellow partners and, as a member of the partnership, a principal. In a general partnership, each partner is an agent of the partnership for the purpose of its business; each partner's acts that apparently carry on partnership business in the usual way bind the partnership. Every partner having the capacity to act as firm's agent, the act done by any partner renders the whole firm liable towards a third party. The whole of the firm, which means all the partners of the firm become liable for an act of the firm done by any partner.

[78] According to section 9 (1) of *The Partnership Act, 2 of 2010* a partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he or she is a partner. An act of a firm means any act or omission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. It, therefore, means that any act or omission which creates a right enforceable is an act of the firm. It may be a contract or a wrongful act, for example, fraud, negligence, misapplication of money, improper employment of trust property or any tort. All the partners are liable as much for the

wrongful act of any partner as they would be liable for a contract entered into by one of them on behalf of the firm. Thus a third party, if he or she so likes, can bring a suit against any one of them severally or against any two or more of them jointly. The firm is not liable only when the act is for a purpose apparently not connected with the firm's ordinary course of business.

[79] Partners are jointly and severally liable for partnership liabilities, which include loss or injury suffered by any non-partner caused by the wrongful act or omission of any partner acting either in the ordinary course of partnership business or with the authority of his fellow partners. This is because the principal is liable for the act of the agent if the act is within the scope of the agent's express, implied or ostensible authority even though the principal may not have knowledge of the transaction (see *Lloyd v. Grace, Smith & Co [1912] AC 716 and Hamlyn v. John Houston & Co [1903] 1 KB 8)*. While the firm is incurring a liability it can be assumed that all the partners were incurring that liability and so the partners remain liable jointly and severally for all the acts of the firm. The liability of all the partners is not only joint and several but is also unlimited. As against third parties, each partner is personally liable (jointly and severally with the others) for the debts of the firm regardless of which partner incurred the liability.

[80] The 2nd defendant testifying as D.W.2 identified the 1st defendant as an associate but not one of the partners in the law firm. He stated that as an associate, the 1st defendant had the authority to transact without consulting the partners, by the firm had never developed policies in relation to *The Anti-Money Laundering Act, 2013.* Consequently, the firm does not keep a file relating to the transaction because this was a walk-in client on a singular transaction. However, a partnership is liable for the negligence of its servants acting within the scope of their duty, in the course of their employment by the firm in the ordinary course of the firm's business. For that reason, all the defendants are jointly and severally liable to the plaintiff for her loss.

i. Recovery of shs. 62,000,000/= as special damages;

[81] The plaintiff seeks recovery of the sum of shs. 62,000,000/= being the price she paid for the land. The law is that not only must such a claim be specifically pleaded but it must also be strictly proved since it is a claim of special damages (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR; Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219).* Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995 and Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004).* This claim was specifically pleaded and it has been strictly proved. The plaintiff has on the balance of probabilities proved that the defendants should compensate her in that amount.

ii. An award of general damages;

[82] General damages are the direct and inevitable result or probable consequence of the wrongful act complained of (*see Robert Coussens v. Attorney General [1998-2000] HCB 26).* Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering (see *Assist (U) Ltd v. Italian Asphalt & Haulage and another, H. C. Civil Suit No. 1291 of 1999*). They must be pleaded and proved (see *Kisige Moses v. Muzakamu Batolewo [1981] HCB 66).* They are recovered as compensatory damages. The aim of compensatory damages is to put the injured party in a position substantially equivalent in a pecuniary way to that which he would have occupied had the tort not been

committed (see *Uganda Revenue Authority v. Wanume David Kitamirike C.A. Civil Appeal No. 43 of 2010).*

[83] Because the plaintiff is entitled to be made whole and nothing more, compensatory damages in tort should not confer a windfall on the plaintiff. The award of damages should not put the plaintiff in a better position than she was in before the tort, otherwise it would render the award something other than compensatory. Furthermore, the plaintiff cannot recover damages for economic loss in tort. A plaintiff can only bring a claim for economic loss if she had contractual privity with the defendants, so it is a claim in contract.

[84] Where the plaintiff has not proved any actual or specific loss or injury as a result of the defendant's violation, then the Court will award only presumed nominal damages. Since they are awarded for the purposes of declaring and vindicating legal rights, nominal damages do not require proof of harm. Unlike compensatory damages which are intended to compensate for injury, nominal damages are awarded to commemorate the plaintiff's vindication in court. Such damages are awarded when a plaintiff proves that their legal rights have been violated but does not demonstrate they are actually entitled to receive monetary compensation. The only natural and probable consequence that the court may presume without evidence in this case is that of mental and emotional distress and other intangibles such as annoyance, humiliation, upset, disappointment, frustration, anguish, or anxiety. The plaintiff testified that she made frantic efforts to trace for the impostor, including involvement of the police, without success. P.W.2 No. 37545 D/C Oromcan Patrick testified that the search for the impostor continues.

[85] The plaintiff further testified that in the first few months after the transaction she was depressed because she had saved so much and had topped it up by taking a loan from the bank. It was clear that she was deeply affected by the loss of her hard earned money with no avenues apparent to her, for its recovery for a considerable period of time. Though medical proof of mental distress would likely

function to increase quantum, most courts do not require such evidence before mental distress damages are available. Courts tend to be content to weigh the plaintiff's testimony on the emotional repercussions of the wrongful act, having regard to the common course of natural events and human conduct. The circumstances of this case suggest that the distress is real and more than fleeting. For this the plaintiff is awarded shs. 10,000,000/= as general damages for all the mental distress she has endured as a result of the defendants' tort.

iii. An award of aggravated / exemplary / punitive damages;

[86] An award of exemplary damages is envisaged in cases where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Punitive damages are proper when the defendant's conduct is outrageous, whether because of his evil motive or his reckless indifference to the rights of others. The aim of punitive damages is to punish and deter the defendant wrongdoer for his conduct and to deter him and others from committing similar conduct in the future, and denunciation. Wrongdoers may also be disgorged of profits via punitive damages where compensatory damages would not provide adequate deterrence for outrageous disregard of the legal or equitable rights of others.

[87] Aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen, that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence

on the plaintiff's life. The damage award is for aggravation of the injury by the defendant's high-handed conduct.

[88] As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account (see *Rookes v. Barnard and others [1964] A.C. 1129 and Fredrick J. K. Zaabwe v. Orient Bank Ltd and five others, S. C. Civil Appeal No. 4 of 2006)*. The only justification that was advanced by the plaintiff in this regard is that the 1st defendant did not treat her well, in her own word; "I was conned by a lawyer and his purported client." That is not justification enough for an award of this nature. This part of the plaintiff's claim is accordingly rejected.

iv. An award of interest.

[89] Although the plaintiff testified that she topped the amount required as purchase price for the land by taking a loan from the bank, which she has to pay back yet she did not use the money, she never disclose how much she borrowed and at what rate. She therefore cannot be awarded inters based on the coerced loan theory or by the attendant ordinary rule of compensation by way of interest which is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency.

[90] Instead, this is a case where the Court has to resort to the provisions of section 26 (2) of *The Civil Procedure Act* which empowers it, insofar as the decree is for the payment of money, to order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree. The plaintiff is accordingly awarded interest on the decretal sum at the rate of 12% per annum on the award of shs. 62,000,000/=, from the date of filing

the suit, i.e. 15th November, 2019 until payment in full, and at the rate of 6% per annum of the award of shs. 10,000,000/= from the date of this judgment until payment in full.

v. The costs of the suit.

[91] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule.

Order:

[92] Therefore in conclusion, judgment is entered in favour of the plaintiff against the defendants jointly and severally, as follows;

a) Payment of the sum of s 62,000,000/= as special damages.
b) Payment of the sum of s 10,000,000/= as general damages.
c) Interest on the award in (a) above at the rate of 12% per annum, from 15th November, 2019 until payment in full; and on (b) above at the rate of 6% per annum from the date of this judgment until payment in full.
d) The costs of the suit.

Delivered electronically this 29th day of January, 2024 …Stephen Mubiru……

Stephen Mubiru
Judge,
29th January, 2024.

Appearances

For the plaintiff : M/s Kyagaba & Otatiina Advocates

For the defendant : M/s Kigenyi-Opira & Co. Advocates