

In The High Court of Uganda at Kampala

(Commercial Court)

High Court Civil Suit No. 394 of 2019

ROBERT KALANZI ..... PLAINTIFF

10

VERSUS

1. EQUITY BANK (U) LTD

2. MOSES SENDEGE

3. FEMISA INTERNATIONAL (U)LTD

4. WAMONO FESTO

15

5. MWAMBU ALLAN

6. BASAJJAKAMBWE HUDDU

7. PAUL LULE

..... DEFENDANTS

BEFORE: HON. JUSTICE DR. HENRY PETER ADONYO

20

JUDGMENTBackground:

On the 15<sup>th</sup> day of September 2005, the plaintiff purchased from the second defendant a "kibanja" interest measuring approximately (40 x 64)



5 feet in the suit property now comprised in LRV 3940 Folio 2 Kyadondo Block  
273 plot 5225. He took possession thereof and developed a three storied  
building on it. The other three quarters part of the suit property was sold  
to one Brian Muwonge by the second defendant who also took possession  
and established a storied building g on it. Sales agreements to the effect  
10 were executed.

A certificate of title to the above land was issued by the office of Kabaka of  
Buganda in the names of the 2<sup>nd</sup> defendant on 19<sup>th</sup> January 2009 long after  
the plaintiff had purchased and taken full possession of the land. Around  
June, 2009 the 2<sup>nd</sup> defendant handed over the said certificate of title to the  
15 plaintiff who later handed the certificate to the 7<sup>th</sup> defendant, a lawyer at  
then practicing law with M/s Luba & Co. Advocates for the suit property to  
be subdivided and to eventually create respective individual certificates of  
tittle for both Brian Muwonge and the plaintiff, the purchaser there of.

The 7<sup>th</sup> defendant through his aforesaid firm of advocates (having received  
20 the tittle to the suit property) indeed issued a receipt for processing of a  
land tittle in respect of the plaintiff interest and also retained M/S Geo  
Earth Consult Surveyors to open up boundaries in respect of the plaintiff  
interests.

The said 7<sup>th</sup> defendant is said to have failed to execute his expected  
25 instructions and kept informing the plaintiff that the process was underway,



5 which eventually turned out to be not true.

Frustrated, the plaintiff was eventually forced to conduct a search on the title on 17<sup>th</sup> June 2013. The said search revealed that the suit property had been deceitfully mortgaged to Equity Bank(U) Ltd as a security for a borrowing to the 3<sup>rd</sup> Defendant without neither the plaintiff's nor the  
10 Kabaka of Buganda's consent which was contrary to clause 2(c) of a copy of the lease agreement.

Thus, the plaintiff realised that the defendants had all acted negligently and fraudulently in having the suit property mortgaged to the 1<sup>st</sup> Defendants without recourse to either him or the Kabaka of Buganda.

15 The plaintiff was aggrieved with the actions of the defendants and filed this suit in the Land Division of this court which suit was later transferred to this court since it involved a mortgage.

In his suit the plaintiff seeks for the following orders and declarations that:

a) the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants acted fraudulently by  
20 covenanting the certificate of title for the suit property to the 1<sup>st</sup> defendant as security for borrowing.

b) The 1<sup>st</sup> defendants mortgage is null and void and that an order for cancellation of the 1<sup>st</sup> defendant's mortgage registered over the suit property be issued by this court.





5 c) The plaintiff also seeks a permanent injunction restraining the 1<sup>st</sup>  
defendant and or his agents or servants from dealing with the suit property  
in a way including sale or otherwise.

d) The plaintiff also seeks an order for delivery of the certificate of title for  
the suit property to him free from any encumbrances and, or alternatively,  
10 an order directing the 1<sup>st</sup> defendant to deposit the certificate of title in  
court pending the determination of the suit.

e) The plaintiff also sought for an order of special and general damages,  
interest thereof and costs of the suit.

## 2. Representation:

15 a. M/s MMAKS Advocates represented the plaintiff.

b. Legal Department of Equity Bank represented the 1<sup>st</sup> Defendant.

c. Despite service of process on the 2<sup>nd</sup> to 7<sup>th</sup> defendants, they did not file  
their respective defences and were unrepresented and as such the  
proceeded against them *ex parte*.

## 20 3. Witnesses:

### a) Plaintiff's:

i. Robert Kalanzi- (PW1)

ii. Brian Muwonge- (PW2)

iii. John Mulindwa Muwonge- (PW3)



5        b) Defendants'

i. Farouk Bukenya- (DW1)

4. Plaintiff's Case:

Upon completion of the hearing of the testimony of the plaintiff witnesses,  
counsel for the plaintiff filled a written final submission in which two issues  
10 were raised as below.

The first issue was whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants  
acted fraudulently by pledging the certificate of title for the suit property  
to the 1<sup>st</sup> defendant as security for a borrowing? Or whether the 1st  
defendants mortgage was unlawfully registered and if so, whether the  
15 same should be cancelled. That, the 1st defendant cannot be a bonafide  
mortgagee for value without notice. Counsel referred to *Yafesi Luganda V*  
*Stanbic Bank Uganda Limited HCCSNo.166 of 2016* where Justice Kwesiga  
on page 8 of his judgment defines a bonafide purchaser or mortgagee as  
one who "buys something for value without notice of another claim to the  
20 property and without actual or constructive notice of any other defects in  
or informalities, claims or equities against the seller's title, one who has in  
good faith paid valuable consideration for the property without notice of  
prior adverse claims. That, the defendant has a burden to prove that he  
paid valuable consideration, that he had no notice of the fraud of previous  
25 proprietor, that in the purchase he acted in good faith. The other



5 requirements are that he carried out a due diligence search and had no way of finding a defect in the previous owner titles.

Counsel argued, that in the circumstances, the 1<sup>st</sup> defendant's defence cannot stand. Counsel pointed out that the lawyers of the plaintiff wrote to the 1<sup>st</sup> defendant bringing to the bank's attention "NOTICE OF FRAUD ON  
10 THE SUIT PROPERTY" wherein the plaintiff was asking the 1<sup>st</sup> defendant bank to deliver up the certificate of title as a fraud had been committed and that the matter had been reported to the Uganda Police vide LLPU-GEF/482/2013. The letter was received by the department legal officer Jowelia Mukalazi, on the 1<sup>st</sup> October 2013.

15 That, the loan was extended on 30<sup>th</sup> November 2013, after the plaintiff's letter had been received by the bank on the 1st October 2013, and that in such circumstances, the bank had notice of the fraud but went ahead and extended this loan, almost 60days after the letter from the plaintiff, thus the defence of bonafide mortgagee for value is not available to the bank.

20 It was also argued for the plaintiff that even on the 28th April 2014, the 1<sup>st</sup> defendant wrote to the 3<sup>rd</sup> defendants varying the terms of the loan facility and indicating that "All other terms and conditions of the facilities shall remain the same as contained in the said offer letters and any other related documents prepared and executed by the parties." Under the above point,  
25 counsel for the plaintiff submitted that no prudent banker upon learning of





5 the fraud on 1st October 2013 would go ahead to extend a loan facility on  
30th November 2013 and later vary the terms on 28th April 2014. Instead,  
counsel submitted, the bank would have demanded another security from  
the 3rd defendant as the one which a loan was being extended was in  
contention and a fraud reported.

10 Further, that on the aspect of fraud on the 2<sup>nd</sup> and 7<sup>th</sup> defendant, the 2nd  
defendant having sold the suit property had no right to mortgage the  
property to the bank thus his acts were fraudulent.

That, the 4<sup>th</sup>-6<sup>th</sup> defendants are the directing minds and will of the 3<sup>rd</sup>  
defendant and through them, the title was pledged to the 1<sup>st</sup> defendant for  
15 a borrowing in favor of the 3<sup>rd</sup> defendant hence their acts were acts of the  
3rd defendant perpetuating the fraud.

Counsel argued that the role of the 7<sup>th</sup> defendant was that he had custody  
of the title and issued receipts to the plaintiff indicating receipt of the title  
and also undertaking to process or subdivide the property in favor of PW1  
20 and PW2. Counsel pointed out that the title went missing and next it was  
seen mortgaged to the 1<sup>st</sup> defendant. It was the contention of counsel that  
the 7<sup>th</sup> defendant colluded with the 1<sup>st</sup> defendant and the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and  
6<sup>th</sup> defendants to cheat the plaintiff of his interest. Additionally, that was  
also no consent obtained from the Buganda land board which was contrary  
25 to the D4 (lease agreement) clause 2(c) that requires the lessee (Moses



5    Sendege) to obtain consent from Buganda land board prior to mortgaging.

In conclusion, it was argued that the defendants fraudulently acted when they pledged the certificate of title for the suit land and therefore, the defendants mortgage is unlawfully registered as it is tainted with fraud

The second issue raised is whether there are any remedies available. The  
10    plaintiff prayed for special damages as pleaded in para 8 of the plaint totaling to UK pounds 5,826.21 or UGX 27,114,321/= spent on tickets while spent a total of UK pounds 300 (or the equivalent of UGX 1,440,000/=) on visa fees; general damages of UGX 400,000,000/= arising from inconvenience and general suffering, living in fear of his property being sold  
15    any time by the bank for the last 7 years. The plaintiff also sought punitive damages of UGX 100,000,000 against the 7<sup>th</sup> defendant for breach of trust as an advocate; nullification of the 1<sup>st</sup> defendant's mortgage; return of the certificate of title to the plaintiff; interest of 22% on special and general damages and a permanent injunction restraining the 1<sup>st</sup> and other  
20    defendants from dealing with the suit property.

**6. 1<sup>st</sup> Defendant's Case:**

On the issue of whether the 1<sup>st</sup> defendant's mortgage was unlawfully registered and if so whether the same should be cancelled, counsel submitted that before the bank accepted the suit land as security for the  
25    loan, it carried out diligence on the property, and also engaged a firm of





5 professional valuers, known as CMT REALTORS LTD to inspect and value the  
property and made a report marked D6 to the 1st defendant trial bundle  
where it was reported that the suit land belonged to 2<sup>nd</sup> defendant, Mr.  
Moses Sendege. It was submitted further that the person who presented  
the land tittle to the 3rd defendant was the registered proprietor of the  
10 said suit land comprised in LRV 3940 Folio 2, Kyadondo Block 273 plot 5225.

Counsel also argued that the 1<sup>st</sup> defendant was not aware of any  
agreements signed between Robert Kalanzi and Moses Sendege and that  
the 1<sup>st</sup> defendant actually doubts if Moses Sendege ever sold the disputed  
land to the plaintiff. that in the circumstances, the 1<sup>st</sup> defendant was in no  
15 way part of the fraud and it was not aware or involved in any arrangements  
between the plaintiff and the 2<sup>nd</sup> defendant and is therefore a bonafide  
mortgagee for value.

Also, counsel submitted that the 1<sup>st</sup> defendant did not have notice of any  
3<sup>rd</sup> party interest on the property. That the title to the suit land did not have  
20 any encumbrances and the Registrar of titles duly registered the bank's  
mortgage thereon vide instrument number 474257 of 6<sup>th</sup> September 2012  
as noted in a copy of tittle marked D4. Counsel cited section 59 of the  
Registration of Tittles Act cap 230 which provides that a title is conclusive  
evidence of ownership further section 176(c) which accords protection to  
25 a registered proprietor on registered land. On this point, counsel relied on



5 the case of ***Adrabo Stanley Versus Madira Jimmy HCCS No.24 of 2013***

In response to the plaintiff's claim that the 1<sup>st</sup> defendant failed to carry out due diligence during the valuation of the property, the 1st defendant's counsel submitted that the 2nd defendant upon presenting the title to the bank of the entire land comprised in LRV 3940 folio 2, Kyadondo Block 273, Plot 5225, he did not inform the bank that the title had any bibanja interests. The 2nd defendant was also the 1st owner to the said plot. On the claim that the 1<sup>st</sup> defendant did not obtain consent from Buganda Land Board as required by the lease agreement before mortgaging the disputed land, counsel submitted on the aspect of doctrine of privity of contract wherein the 1<sup>st</sup> defendant was not party to the lease agreement signed between the lessee (Moses Sendege-2nd defendant and the lessor - (Buganda Land Board). Lastly, that fraud cannot be proved merely by a letter and one must first register a caveat on the title.

The second issue in regards to the remedies available to the parties.

20 In response to special damages pleaded by plaintiff, the 1<sup>st</sup> defendant opposed the remedy and submitted that the plaintiff have not strictly proved them as was laid out in ***Luzinda Marion Barbirye (suing through her lawful attorney) Wasswa Luke versus Ssekamatte and Others Civil Suit No. 366 of 2017*** where court stated "it is indeed trite that special damages must not only be specifically pleaded but strictly proved too.





5 On the award of general damages, counsel argued that suffering of loss or inconvenience as a result of the action has to be showed as was held in the case of *Mwesigye Warren vs. Kiiza Ben High Court Civil Suit No. 320 of 2015*. That the plaintiff did not prove that he suffered loss or inconvenience as a result of the 1<sup>st</sup> defendant actions.

10 **8. Decision of Court:**

I have taken into account the pleadings, the presented case of the plaintiff and 1<sup>st</sup> defendant and the evidence on record.

My duty is now to determine whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants acted fraudulently by vouchsafing the certificate of title for the  
15 suit property to the 1<sup>st</sup> defendant as security for a borrowing or whether the 1<sup>st</sup> defendant's mortgage was unlawfully registered and if so, whether the same should be cancelled.

This suit is based on Fraud which is defined in common parlance as wrongful or criminal deception intended to result in financial or personal  
20 gain.

Legally, fraud is defined as *"a false representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or  
25 his legal injury.*



5 *See: <https://legal-dictionary.thefreedictionary.com/Fraud>*

Fraud is commonly understood as dishonesty calculated for advantage. A person who is dishonest may be called a fraud. In the Ugandan legal system, fraud is a specific offense with certain features. Fraud is mostly manifested in in Uganda in the buying or selling of property, including real estate,  
10 personal property and intangible property such as stocks, bonds, and copyrights. The Penal Code criminalizes fraud, but not all cases rise to the level of criminality. Prosecutors have discretion in determining which cases to pursue. Victims may also seek redress in civil court, like it is here.

Fraud must be proved by showing that a defendant's actions involved five  
15 separate elements which are;

- a. A false statement of a material fact,
- b. Knowledge on the part of the defendant that the statement is untrue,
- c. Intent on the part of the defendant to deceive the alleged victim,
- d. Justifiable reliance by the alleged victim on the statement, and  
20 e. Injury to the alleged victim as a result.

These elements contain nuances that are not all easily proved.

First, not all false statements are fraudulent. To be fraudulent, a false statement must relate to a material fact. It should also substantially affect a person's decision to enter into a contract or to pursue a certain course of

5 action. A false statement of fact that does not bear on the disputed transaction will not be considered fraudulent.

Second, the defendant must know that the statement is untrue. A statement of fact that is simply mistaken is not fraudulent. To be fraudulent, a false statement must be made with intent to deceive the victim. This is  
10 perhaps the easiest element to prove, once falsity and materiality are proved, because most material false statements are designed to mislead.

Third, the false statement must be made with the intent to deprive the victim of some legal right.

Fourth, the victim's reliance on the false statement must be reasonable.  
15 Reliance on a patently absurd false statement generally will not give rise to fraud; however, people who are especially gullible, superstitious, or ignorant or who are illiterate may recover damages for fraud if the defendant knew and took advantage of their condition.

Finally, the false statement must cause the victim some injury that leaves  
20 her or him in a worse position than she or he was in before the fraud.

A statement of belief is not a statement of fact and thus is not fraudulent. Winded, or the expression of a glowing opinion by a seller, is likewise not fraudulent. For example, a car dealer may represent that a particular vehicle is "*the finest in the lot.*" Although the statement may not be true, it  
25 is not a statement of fact and a reasonable buyer would not be justified in



5 relying on it.

The relationship between parties can make a difference in determining whether a statement is fraudulent. A misleading statement is more likely to be fraudulent when one party has superior knowledge in a transaction, and knows that the other is relying on that knowledge, than when the two  
10 parties possess equal knowledge. For example, if the seller of a car with a bad engine tells the buyer the car is in excellent running condition, a court is more likely to find fraud if the seller is an auto mechanic as opposed to a sales trainee.

Misleading statements are most likely to be fraudulent where one party  
15 exploits a position of trust and confidence, or a fiduciary relationship. Fiduciary relationships include those between attorneys and clients, physicians and patients, stockbrokers and clients, and the officers and partners of a corporation and its shareholders.

A statement need not be affirmative to be fraudulent. When a person has  
20 a duty to speak, silence may be treated as a false statement. This can arise if a party who has knowledge of a fact fails to disclose it to another party who is justified in assuming its nonexistence.

For example, if a real estate agent fails to disclose that a home is built on a toxic waste dump, the omission may be regarded as a fraudulent statement.  
25 Even if the agent does not know of the dump, the omission may be





5 considered fraudulent. This is constructive fraud, and it is usually inferred when a party is a fiduciary and has a duty to know of, and disclose, particular facts.

Fraud is an independent criminal offense but it also appears in different contexts as the means used to gain a legal advantage or accomplish a  
10 specific crime. For example, it is fraud for a person to make a false statement on a license application in order to engage in the regulated activity. A person who did so would not be convicted of fraud. Rather, fraud would simply describe the method used to break the law or regulation requiring the license.

15 Fraud resembles theft in that both involve some form of illegal taking, but the two should not be confused. Fraud requires an additional element of false pretenses created to induce a victim to turn over property, services, or money.

Theft, by contrast, requires only the unauthorized taking of another's  
20 property with the intent to permanently deprive the other of the property. Because fraud involves more planning than does theft, it is punished more severely.

Fraud has also been defined by courts in various cases such in the case of *Fredrick J.K Zaabwe vs Orient Bank Ltd Civil Appeal No. 4 of 2006* in which  
25 the Supreme Court of Uganda defined it as;



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

In order to prove fraud, a plaintiff must demonstrate that the acts of the  
20       defendants were dishonest, were aimed at a willful perversion of the truth,  
misrepresentation and were intended to deprive the plaintiff of his legal  
rights. In the case of *Kampala Bottlers Ltd vs Damanico (U) LTD SCCA No.22  
of 1992* court pointed out that fraud must be strictly proved with the  
burden being heavier than one on balance of probabilities generally  
25       applied in civil matters. The court also noted that *"the party must prove that  
the fraud was attributed to the transferee. It must be attributable either*



5 *directly or by necessary implication, that ism the transferee must be guilty of  
some fraudulent act, or must have known of such act by somebody else and  
taken advantage of such act."*

Referring the above to the instant matter, in the evidence in chief of Robert  
Kalanzi (PW1) testified that he and Mr. Muwonge purchased the suit  
10 property from the 2<sup>nd</sup> defendant on 15<sup>th</sup> September 2005 and that both of  
them took possession of the suit property and erected structures thereon.  
The sales agreements are respect of the purchases were exhibited in court  
as PExh 1 and PExh 3.

PW1 further testified that in the agreement it was agreed that he would  
15 receive the certificate of title in order to enable subdivision of the suit  
property into his names and that of Mr. Muwonge. The certificate of title  
was received and handed over to the 7<sup>th</sup> defendant for that purpose with  
proof of this contained in receipts exhibited as PExh4 and PExh5,  
respectively showing the plaintiff's interest therein.

20 However, the 7<sup>th</sup> defendant is said to have failed to carry out the sub  
division of the land and when the plaintiff conducted a search on the 17<sup>th</sup>  
June 2013 he was shocked to discover that the suit property has been  
mortgaged to Equity Bank(U) Ltd as a security for a borrowing from the  
bank by the 3<sup>rd</sup> Defendant without his knowledge or consent.

25 The plaintiff through his lawyers by a letter dated 30<sup>th</sup> September, 2013 and





5 exhibited as PExh14 informed the 1<sup>st</sup> defendant bank by letter that there was possible fraud given his interest in the suit property and also pointed out that the matter had been reported to the police. The said letter was received by the 1<sup>st</sup> defendant bank on 1<sup>st</sup> October 2013 yet on 30<sup>th</sup> November 2013, the 1<sup>st</sup> defendant even after receiving the notice from the  
10 plaintiff still proceeded to extend the loan which in April 2014 it varied its terms in favour of the 3<sup>rd</sup> defendant.

1<sup>st</sup> defendant denied allegations of fraud arguing that it was a *bonafide mortgagee* without notice given that the 2<sup>nd</sup> defendant did not disclose any "kibanja" interests on the suit land which upon inspection and valuation of  
15 was reported to belonged to the 2<sup>nd</sup> defendant.

From the evidence adduced in court especially the fact that the 1<sup>st</sup> defendant was by letter from the plaintiff's lawyers dated 30<sup>th</sup> September, 2013 and exhibited as PExh14, I would conclude that a big scam occurred in respect of the suit land given that the 1<sup>st</sup> defendant even after being  
20 notified of the interest of the plaintiff went ahead to grant a loan on the suit land several days after such notification which actions disproves its defence that it is a mortgagee without notice for the notice was well before it even offered the loan facility.

It should be recollected that land is a valuable asset and anyone dealing  
25 with it ought to make such exhaustive inquiries about its ownerships and

5 any interests in such so as to avoid consequences thereto requiring  
meticulous inquiries which I find the 1<sup>st</sup> defendant failed to do so as no due  
diligence apparently was carried out. Therefore, it cannot by any iota of  
imagination be stated that the 1<sup>st</sup> defendant was a bonafide mortgagee for  
value without notice.

10 Furthermore, the 2<sup>nd</sup> defendant, by mortgaging the suit property that he  
had earlier sold to the plaintiff and Mr. Muwonge to the 1<sup>st</sup> defendant bank,  
acted fraudulently in concert with the 4<sup>th</sup> to 6<sup>th</sup> defendant who are directors  
of the 3<sup>rd</sup> defendant company for whom the title was pledged for the  
purposes of borrowing loan sums from the 1<sup>st</sup> defendant bank which  
15 perpetuated the act of fraud.

On the other hand, I would find that the 7<sup>th</sup> defendant neglected his  
professional duties by not executing instructions given to him to have the  
main title sub divided so as to create therein the interests of the plaintiff  
and Mr. Muwonge but apparently connived instead with the 3<sup>rd</sup> defendant  
20 and 1<sup>st</sup> defendant to mortgage the suit property using the main certificate  
of title which was in his custody to accentuate fraud.

Based on the authorities cited and a review of the evidence on record, it is  
my considered view that that all the defendants acted fraudulently when  
they acted in concert and had pledged the certificate of title resulting in  
25 the execution of mortgage which ended up being unlawfully registered.



5 Given the above findings, I am satisfied that the 1<sup>st</sup> defendant is not a  
*bonafide mortgagee* for it totally failed in its fiduciary duties in making  
appropriate inquiries even when it had been put on notice by a letter  
indicating the plaintiff's "kibanja" interest thereon on the suit land which  
notice was given in time which act of neglect rendered all action thereafter  
10 null and *void ab initio* for the 1<sup>st</sup> defendant even after being put on notice  
by a letter from the plaintiff opted to not exercise due diligence and thus  
acted negligently and should face the consequences of such ineptitude.

Having found and concluded as above, I do make finding that acts of fraud  
did occur and were perpetuated by the defendants which resulted in  
15 depriving the plaintiff of his legal rights in the suit land.

Given this scenario, I am constrained to nullify all and any action which  
were illegally and fraudulently taken in respect of the suit land after due  
notification of the interest of the plaintiff which notification was ignored  
and yet thereafter a mortgage was issued out by the 1<sup>st</sup> defendant which  
20 further perpetuated the fraud. That being so the said mortgage would in  
the result be illegal and is thus nullified and cancelled accordingly.

#### 9. Remedies:

The plaintiff prayed for a number of remedies including the cancellation of  
the mortgage, special damages and general damages, and costs of this suit.  
25 I have already dealt with the issue of the mortgage which I have found was



5 originally issued by the 1<sup>st</sup> plaintiff fraudulently and I have cancelled the same. I would now turn to other claims made by the plaintiff in his plaint.

a. Special damages:

The plaintiff prayed as pleaded in paragraph 8 of his plaint totaling to UK pounds 5,826.21 or UGX 27,114,321/= spent on tickets and a total of UK  
10 pounds 300 (or the equivalent of UGX 1,440,000/=) spent on visa fees as special damages.

The legal position is that a claim for special damages must be specifically pleaded as was held in *Gapco (U) LTD vs A.S Transporters (U) Ltd CACA No. 18 of 2004*. This means that any person who has a claim in court for special  
15 damages has to prove both the item of loss and its value with the court only awarding such losses as are proved. Where a plaintiff fails to prove an item of expenditure, the court will either not award it or will award such sum as it thinks would have been reasonable in the circumstances. The plaintiff herein through exhibits PExh10 (travel receipts) and PExh 17  
20 (copies of passport) tendered in court presented proof of travel and his expenses in form of documents which are air tickets and passport pages which on their face showed the stated expenses claimed which I would find sufficient as proof of travel.

He also claimed for visa fees which I find appropriately expended and  
25 reasonable given that he holds a United Kingdom of Great Britain and



5 Northern Ireland passport No. GBR 507749455 which is foreign passport  
and whose pages indicated as per plaintiff's trial bundle pages 13 and 14  
that indeed he expended monies for securing visa for entry into Uganda for  
the purposes of this suit which documents satisfactorily proves that indeed  
special damages expenses were incurred. That being so I would award the  
10 plaintiff special damages amounting to UGX 27,114,321/= spent on air  
tickets and special damages amounting to UGX 1,440,000/= spent on visa  
fees.

**b. General damages:**

General damages are what the law presumes to be a direct, natural or  
15 probable consequences resulting from a defendant's breach of the fact  
complained of. These include loss of use, loss of profit, physical  
inconvenience, mental distress, pain and suffering as was pointed out in  
the case of *El Termewy vs Awdi & Others Civil Suit No. 95 of 2012*.

The plaintiff claimed for general damages and in support of this adduced  
20 evidence in court that as a consequence of the joint and several action of  
the defendants, he did suffer inconvenience, mental distress and pain given  
that his kibanja interest in the land was alienated and he had to suffer  
several days and years out in addition to filling this suit to try to establish  
his interests which had been fraudulently alienated by the defendants ants  
25 yet he had from the beginning made known to the defendants his interests



5 especially the 1<sup>st</sup> defendant yet the defendants in concert went ahead to alienate his interests thus resulting to loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering for which he had to seek this court's intervention.

In my view the plaintiff steps taken by the plaintiff is sufficient proof that  
10 he did suffer general damages which were a direct result of the defendants' actions.

In the circumstances of the case, I would award the plaintiff the sum of Uganda Forty-Five Million Only (Ug. Shs. 45,000,000/=) as against all the defendants in equal amounts as being appropriate for the physical  
15 inconvenience, pain and suffering they caused him.

**c. Punitive damages:**

The plaintiff also sought punitive damages of UGX 100,000,000 against the 7<sup>th</sup> defendant for breach of trust as an advocate. Punitive damages are legal recompense that a defendant found guilty of committing a wrong or  
20 offense is ordered to pay on top of compensatory damages. It thus a sum of money which is of a penal nature awarded to a plaintiff for pecuniary loss and mental suffering. They are deterrent in nature and are awarded with the aim of avoiding repetition of the offending act as was pointed in the case of *Oketha vs Attorney General Civil Suit No. 69 of 2004*.

25 From the analysis of the evidence of record, this is a proper case for the

5 grant of punitive damages as against the 7<sup>th</sup> defendant for he failed to act as was required of a professional but apparently acted in concert with the other defendants to fraudulently deny the plaintiff his right to property given.

Given that such disreputable, nefarious and reprehensive conduct not only  
10 brings odium and shame to the legal profession but lowers the public trust in lawyers generally, I would consider that the request for punitive damages is well placed and would award in favour of the plaintiff as against the 7<sup>th</sup> defendant an amount of Uganda Shillings Thirty Million Only (Ug. Shs. 30,000,000/=) which in my view would be sufficient.

15 **d. Interest of 22% on special and general damages:**

Section 26 (1) of the Civil Procedure Act Cap. 71 grants a court the powers to award interest. The award of interest on general damages is discretionary and its basis is that a defendant kept a plaintiff out of his/her money and as such ought to be compensated accordingly as was discussed  
20 in *Oketha Dafala Valente vs The Attorney General of Uganda HCCS No. 69 of 2004*.

In the present case, the plaintiff claims for 22% which I find to be on the higher side and is not commensurate with the prevailing economic situation in the country which has shown marked improvement in  
25 economic performance with relatively reduced Bank of Uganda lending





5 interests over the years with any award in excess of what is economically prudent result in unjust enrichment of the plaintiff, I would award an interest rate of 18% per annum on general damages from the date of judgement until payment in full for that rate is the average prevailing commercial bank rate.

10 As regards special damages I would award an interest of 10 % on special damages from the date on they were incurred till payment in full.

In conclusion, this honourable court finds that the plaintiff has proved his case as against all of the defendants and I do accordingly declare him the successful party here make orders as below.

15 **10. Declarations and Orders:**

The plaintiff being the successful party here, this court issues the following declarations and orders.

a. The plaintiff is awarded special damages amounting to UGX 27,114,321/= spent on air tickets and UGX 1,440,000/= on visa fees as  
20 against the 1<sup>st</sup> defendant only.

b. The Plaintiff is awarded general damages amounting to the sum of Uganda Shillings Forty-Five Million Only (UGX 45,000,000/-) as against all the seven defendants to be paid in equal amounts.

d. I do award to the plaintiff an interest of 10% on the Special Damages in



5 (a) above.

e. I do award an of interest of 18% on the General Damages in (b) above from the date of this judgment till payment in full is made.

f. I do award in favour of the Plaintiff Punitive Damages, of Uganda Shillings Thirty Million Only (UGX 30,000,000/=) as against the 7<sup>th</sup>  
10 Defendant with no interest thereto.

g. I order the cancellation of the 1<sup>st</sup> defendant's mortgage as regards the suit land.

h. I hereby doth issue a permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants refraining them from doing anything on the suit  
15 land.

i. I do hereby by this judgment order the return of the certificate of title to the plaintiff for the purposes of sub-division of the suit property between himself and one Brian Muwonge.

I so order.



20

Dr. Henry Peter Adonyo

Judge

30<sup>th</sup> March 2021