THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 88 OF 2015

(ARISING FROM HIGH COURT CIVIL APPEAL NO 064 OF 2011 AND ARISING FROM MBR – 00 – CV- CS – 005 OF 2002)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

1. KAYABURA ENOCK }
2. KATONGOLE JULIUS}
3. LUKYAMUZI STEVE} .....APPELLANTS

VERSUS

JOASH KAHANGIRWE} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA, JA

The appellants were dissatisfied with the decision and decree of the High Court on appeal from the decision of the Chief Magistrates Court of Mbarara. This is a second appeal from the decision of the High Court arising from the Plaintiff's appeal from the decision of the Chief Magistrates Court of Mbarara to the High Court whereupon the High Court allowed the appeal. The respondents in the High Court who were the defendants in the trial Court were dissatisfied with the High Court decision and appealed to the Court of Appeal.

The background to the appeal

The respondent to this appeal, Mr Joash Kahangire, had filed Civil Suit No. 005 of 2002 against the appellants to this appeal in the Chief Magistrates Court. The facts are that the respondent bought property from Mr. Nyakaana and Lukyamuzi and the sale of the property to the respondent Mr. Joash

Kahangire was contested by the family of the Late Yeremiah Mugenyi who claimed that it was property of the estate of the deceased and had not been administered or distributed to the beneficiaries thereof. The matter was reported to the Local Council 1 of the area and the plaintiff who is the respondent to this appeal, was summoned by the Local Council Chairman of Katoojo Village to appear to resolve the case but wrote back stating that he would appear on 26th August 1986. The respondent had replied by letter and stated that he was unable to appear at the time required due to government engagements. Apparently, he had been told that his money should be refunded.

The respondent kept away and later in August 1999 filed a suit against the appellants and the basis of the suit as stipulated in the plaint was that he was a customary owner of the suit property and the appellants who were the defendants had trespassed on the suit property by excavating sand therefrom. It was further averred that the plaintiff who is now the respondent to the second appeal had applied to have the land registered under the Registration of Titles Act. It transpired that while the dispute was ongoing, the plaintiff had applied to have the land registered in his names as the proprietor thereof. The plaint was subsequently amended twice. The suit turned on what interest the respondent who was the plaintiff first asserted in the plaint. The bone of contention relates to whether the respondent could have asserted registered title when he did not plead it and when the land had been unregistered. Secondly, the question was whether there could be a valid sale of the estate of a deceased person without authority of court to administer the estate first having been obtained.

The amended plaint indicates that the plaintiff's claim against the defendants jointly and severally is for general damages for trespass, a permanent injunction and costs. Secondly, it is pleaded in paragraph 4 as far as the facts in support of the cause of action is concerned that the plaintiff owned land

at Katojo, Nyakoyojo, Rwampara. It is further pleaded that in May 1999, the defendants without any colour of right and without the plaintiff's consent wrongfully entered into part of the suit land, asserted ownership on part thereof and started excavating sand therefrom thereby causing loss and damage to the plaintiff. The other material pleading is that the value of the property is less than Uganda shillings 50,000,000/= which brought the suit within the pecuniary jurisdiction of a Chief Magistrate's Court.

The plaintiff in the trial court and now the respondent to this appeal sought a declaration that the land the subject matter of the suit belongs to him. Secondly, he prayed for a permanent injunction restraining the defendants (who are now the appellants to this appeal), their servants, agents, workmen or employees from further and future acts of trespass onto the suit property. Thirdly, he claimed general damages for trespass as well as for costs of the suit. In the list of documents accompanying the plaint includes a certificate of title for Plot 177 Rwampara Block 2. The last amended plaint was filed on 21st of February 2007. By this time the plaintiff in the trial court had been registered as proprietor of the Plot 177 Rwampara Block 2 way back in 2003.

The written statement of defence to the last amended plaint denied the allegations in the plaint and asserted in paragraph 4 that the defendants who are the appellants in this appeal excavated sand from land which belonged to their deceased father and grandfather respectively which land had been in their occupation at all material times and as such they had never trespassed on the plaintiffs land or laid it to waste. The defendants prayed for dismissal of the suit with costs.

The cause of action of the plaintiff is repeated in the plaintiff's written submissions at page 36 of the record. The issue that was framed for determination is whether or not the suit property belonged to the plaintiff/the respondent to this appeal. The issue of ownership of the property was of crucial relevance in the determination of the suit. This is also

partly because the defendant never contested that they were using the suit property. The remedies sought in the plaint related to whether the defendants to the suit in the original court were trespassers or owners of the suit property.

On 5th October, 2011, the plaintiff's suit was dismissed with costs by the trial Chief Magistrate's Court. The plaintiff who is now the respondent to this appeal, appealed to the High Court at Mbarara. The first appellate court allowed the appeal and held that the plaintiff was the registered proprietor with conclusive evidence of title in the form of a certificate of title to the suit property. The gist of the appeal in the High Court revolved on a matter of fact that the learned trial magistrate expunged from the record exhibit P2 which is a copy of the registered title stated to be of the suit property. 9 grounds of appeal were preferred from the decision of the learned Chief Magistrate and I need only to reproduce the first three grounds of appeal. The first three grounds of appeal to the High Court from the decision of the learned Chief Magistrate are that:

1. The learned trial Magistrate erred when he expunged from the record evidence which had been admitted without any objection from the respondents and their counsel which led him to make a wrong finding that the suit property did not belong to the appellant which has occasioned a miscarriage of justice.
2. The learned trial Magistrate erred when he held that the appellant was not the owner of the suit land when the evidence on record showed that he was.
3. The learned trial magistrate erred when he held that the certificate of title was introduced at the hearing and that the adducing evidence of such certificate of title was a departure of pleadings and an ambush whereas not.

The learned first appellate court judge found that there was a clear irregularity in that no scheduling conference was held before the trial. He further held that the consideration of ground 1 of the appeal would invariably determine the entire appeal. The contention of the defendants was that the introduction of a certificate of title said to be for the suit property

took them by surprise and they never had a chance or opportunity to respond to it in their pleadings. One the other hand, it was contended that expunging evidence regarding the certificate of title was erroneous because the title was actually referred to in the pleadings. The issue *inter alia* in the first appellate court was whether it was averred in the pleading that the suit property was registered property having a certificate of title. The record clearly indicates that the certificate of title was admitted without objection. The certificate of title was introduced in evidence by PW1. The question was whether this was a departure from the pleadings contrary to Order 6 rules 7 of the Civil Procedure Rules.

The learned first appellate court judge held that the certificate of title was admitted with no objection from the opposite party and was marked as exhibit P2. It was therefore strange for the trial magistrate to expunge the certificate of title exhibited from the record on the ground that it violated Order 6 rule 6 of the Civil Procedure Rules. The learned first appellate judge found that there was no departure from the pleadings because the production of the certificate was made pursuant to the provisions of Order 17 rule 14 (2) of the Civil Procedure Rules. He further found that the certificate of title was included in the list of documents accompanying the amended plaint. The first appellate court judge held that the respondent to this appeal duly complied with the procedural law and the certificate of title formed part of the evidence on court record as it had been admitted as exhibit P2. Evidence was led by the plaintiff regarding possession of the certificate of title. It followed that the trial court was not entitled to expunge the document from the record.

On the question of whether the evidence adduced in respect of the certificate of title was a departure from the pleadings, he found that the document was listed on the list of documents of the plaintiff accompanying the plaint. He held that the list should be considered as forming part of the pleadings. It

followed that the respondents who are the appellants in this appeal were not surprised by the evidence adduced of PW1 who produced a copy of the certificate of title. Last but not least the learned first appellate court judge held that, had the certificate of title not been expunged from the record, the respondent to this appeal would have been entitled to judgment in his favour. He based his decision on section 59 of the Registration of Titles Act (Cap 230) and held that the respondent to this appeal is the registered proprietor of the suit property with indefeasible title and entitled to judgment in his favour. He allowed ground 1 of the appeal and set aside the suit dismissing the appellant's suit. Consequentially, the learned first appellate judge issued the declarations sought in the plaint that the suit property belongs to the appellant who is now the respondent to this appeal. He also issued a permanent injunction against the defendants/appellants to this appeal restraining them from trespassing on the suit property.

The appellants were aggrieved by the decision of the first appellate court and lodged 11 grounds of appeal against the decision. The record of appeal shows that the appeal came for hearing on the 5 April 2016 before Justices Remmy Kasule, Richard Buteera and Cheborion Barishaki. The appellants counsel applied for and was granted leave to amend the grounds of appeal to variously take out the words "and fact" so that the appeal reads as an appeal on points of law only. The court granted leave to amend the grounds of appeal with reasons to be given in the final judgement. The main reason for amendment is that even though the appellant purported to appeal against errors of law and fact, the grounds of appeal actually disclose matters of law. The following are the amended grounds of appeal namely:

1. The learned appellate judge erred in law when he ignored all the issues of appeal and resolved only one issue thereby arriving at a wrong decision and to the prejudice of the appellants.

2. The learned appellate judge erred in law when he failed to exercise his powers and duties as an appellate court to re-evaluates the evidence on file adduced at trial and subject it to fresh and exhaustive scrutiny.
3. The learned appellate judge erred in law when he failed to find the respondent fraudulent in acquiring the land and processing of the certificate of title despite the overwhelming evidence on record.
4. The learned appellate judge erred in law when he failed to properly apply the law in respect of the discarded certificate of title by the Chief Magistrate and concluding that the same formed part of the pleadings whereas not.
5. The learned appellate judge erred in law when he allowed the certificate of title respect of the suit land in evidence on the basis of the fact that the matter had not been scheduled and for that matter appellants were to blame the ambush by the respondents.
6. The learned appellate judge erred in law when he held that the third appellant and another was is now deceased could legally pass on good title to the respondent even when he did not have letters of administration to the estate of the late Yeremiah Mugenyi.
7. The learned first appellate court judge exhibited bias when he descended into the arena and took it upon himself to show in his judgment that the failure to include a certificate of title in the respondents plaint was due to sloppy 'draftsmanship' on the part of the counsel for the respondent and subsequently shifted the burden of disproving the existence of the title to the appellants.
8. The learned appellate judge erred in law when he held that the respondent's certificate of title in respect of the suit land was indefeasible by virtue of the Registration of Titles Act.
9. The learned appellate judge erred in law when he held that the knowledge by the appellants that the respondent was processing a title

was proof that they had knowledge of the existence of a certificate of title and that therefore implied in the pleadings.

10. The learned appellate judge erred in law when he limited the appeal to only one ground of appeal leaving out the other grounds of appeal thereby reaching a wrong conclusion to the prejudice of the appellants.

11. The learned appellate judge erred in law when he awarded costs against the appellants.

The appellant's prayer is that the appeal is allowed and the orders of the High Court set aside and substituted with the orders of this court. Secondly, that the costs of this appeal and costs in the lower courts be granted to the appellants.

At the hearing of the appeal Mr Jude Akampurira, learned counsel appeared for the appellants while Mr Ngaruye Ruhindi Boniface, learned Counsel, appeared for the respondents. Both counsel with leave of court adopted their written submissions on record as their submissions in the appeal.

Submissions of Counsel

Ground 1

The learned appellate judge erred in law when he ignored all the issues of appeal and resolved only one issue thereby arriving at a wrong decision to the prejudice of the appellants.

Submissions of the Appellant on ground 1

The appellant's counsel submitted that it is the duty of the first appellate court to re-evaluate the evidence adduced at the trial by subjecting it to fresh scrutiny and weighing the evidence and drawing its own conclusions. He submitted that the respondent who was the appellant in the first appellate court raised the main grounds of appeal which were all agreed upon by the

parties to the appeal. The first appellate judge however found it prudent to only focus on the fourth ground of appeal which is to the effect that: "the learned trial magistrate erred when he expunged from the record evidence which had been admitted without any objection from the respondent and the counsel which led him to make a wrong finding that the suit property did not belong to the appellant, which occasioned a miscarriage of justice."

The appellant's counsel submitted that the learned judge only focused on the above grounds which was not even the main *ratio decidendi* in the decision of the trial court and thereby arrived at a wrong conclusion. He contended that, had the first appellate judge considered the other 8 grounds of appeal, the court would definitely have arrived at a correct and different decision. The fact that the learned appellate judge focused only on one ground which touched the alleged expunging of the document from the record of proceedings demonstrated that he had bias in the sense that he only looked at one point of view and miserably failed to undertake his cardinal role as the first appellate court.

The appellant's counsel by way of demonstration submitted that the other grounds of appeal are that:

"The learned trial magistrate erred when he held that the appellant was not the owner of the suit land when the evidence on record showed that he was".

He submitted that it was a well-founded decision of the trial court that the plaintiff did not own the suit property based on evidence adduced by defence witnesses. He relied on the decision of the trial court to the effect that it was not disputed that the suit property originally belonged to the late Yeremiah Mugenyi and that the purchaser bought the property from the family of the deceased. Secondly, there was no evidence adduced that anyone had letters of administration to the estate of the deceased which had never been distributed in accordance with the Succession Act Cap 162.

Thirdly, Mr Lukyamuzi and Mr Nyakana who sold the suit property to the respondent did not have letters of administration and as such did not have authority to sell the suit property to the respondent. Fourthly, due to lack of the authority to sell, the purported sale was a nullity and void *ab initio.* On the above ground, the learned trial magistrate arrived at the correct decision.

The appellants counsel submitted that the respondent did not adduce any evidence at the trial that the person from whom he bought the property had authority to sell. In the premises, the appellants counsel submitted that the sale was void *ab initio.*

He further relied on the decision of the Supreme Court in **Makula International vs. His Eminence Cardinal Nsubuga Civil Appeal No 4 of 1981** for the proposition that illegality once brought to the attention of court overrides all matters of pleadings, including any admissions made thereon. He further relied on **Scott v Brown (1892) 2 QB 724** for the proposition that no court ought to enforce an illegal contract or allow itself to be used as an instrument to enforce obligations arising out of a contract which was illegal.

The appellant's counsel submitted that the appellants were in occupation of the suit property and this evidence is on record. He relied on the decision of the Supreme Court in **Uganda Posts and Telecommunications v Abraham Kitimba Peter Mulangira SCCA No 36 of 1995** for the proposition that a person who purchases an estate which he knows to be in occupation of another person other than the vendor is bound by all equities which the parties in such occupation may have in the property.

He concluded that the overwhelming evidence on court record which was not controverted by the respondent shows that the first appellate court failed in performing its traditional role of subjecting the evidence to fresh scrutiny and in the re-evaluation. He invited the court to set aside the decision of the High Court and maintain the decision of the trial court to the effect that the

suit property did not belong to the respondent but rather to the estate of the deceased where the appellants are beneficiaries among others.

Submissions of the respondent in reply to ground 1

In reply Mr. Ngaruye submitted that the respondent (who was the appellant in the lower court) had preferred 9 grounds of appeal but this had not been agreed upon as submitted above. While there were 9 grounds of appeal in the first appellate court, the appeal was opposed by the Respondents thereto, (who are the current appellants in this court).

Secondly, in reply to the submission that the 1st Appellate court only focused on ground 4 of the appeal, the respondent's counsel submitted that this was untrue. Ground 4 of the appeal was that the learned trial Magistrate erred when he ignored the evidence of DW2 to the effect that the land he sold to the Appellant had been given to him by his father. He submitted that the 1st Appellate court resolved ground 1 and not ground 4. Ground 1 was that the learned trial Magistrate erred when he expunged from the record evidence which had been admitted without any objection from the Respondents and their counsel which led the court to a wrong finding that the suit property did not belong to the Appellant and this occasioned a miscarriage of justice.

On the issue of whether the learned first appellant court judge was biased, the respondent's counsel submitted that bias is not one of the grounds of appeal raised in this appeal and even if it was, it could not be sustained because bias has to be raised before the judge accused of bias to enable him or her to disqualify himself or herself from hearing the matter. He submitted that this was not done and bias cannot be raised belatedly on appeal.

Mr Ngaruye further submitted that the first appellate court considered and resolved the first ground of appeal and this had the effect of disposing the appeal so that to determine the rest of the grounds would be an academic exercise. He relied on **Uganda Corporation Creameries Ltd & Another v**

Recreation Ltd 1998-2000 HCB 44 for the proposition that courts do not adjudicate on academic issues.

Further, he contended that it was not the respondents who had lodged the grounds of appeal in the High Court and they had no standing to complain that the grounds of appeal had been ignored. The grounds were those of the Respondent who was the Appellant in the 1st Appellate court and only he had the standing to could complain that his grounds of appeal had not been considered. The Respondent had succeeded in the appeal on the basis of the resolution of ground 1 in his favour and the decision of the court of first instance was set aside so he was not aggrieved.

Further, the respondent's counsel submitted that ground 1 of the appeal is not arguable. A second appeal is governed by section 72 of the Civil Procedure Act and should only be on points of law. However, the appellant averred in ground 1 of the appeal that the learned Judge erred in law and fact when he ignored all the issues of appeal and resolved only one issue there by arriving at a wrong decision and to the prejudice of the Appellants. The respondents counsel submitted that a ground of appeal attacking a find of fact cannot be sustained. He contended that ground 1 of the appeal alleges that the trial Judge erred in law and in fact. The only basis for any second appeal is that the decision is contrary to law or to some usage having the force of law; or that the decision has failed to determine some material issue of law or usage having force of law; or that a substantial error or defect in the procedure provided by the Civil Procedure Act or by any other law for the time being in force, occurred which may possibly have produced error or defect in the decision of the case upon the merits. The respondents counsel submitted that ground 1 of the appeal as framed does not comply with the requirements of the law and prayed that it is struck out.

In addition Mr. Ngaruye contended that ground 1 of the appeal is imprecise and raises three separate complaints. These are that the trial Judge ignored

all the issues of appeal and resolved only one issue. Secondly, that the judge arrived at a wrong decision and thirdly, the Judge's approach was to the prejudice of the appellants.

The respondent's counsel submitted that Mr Katembeko who represented the Appellants in the 1st Appellate Court raised an issue that the grounds of appeal as formulated were too general and that they offended the provisions of Order 43 r 1 (2) of the Civil Procedure Rules and the 1st Appellate Court answered the issue in the negative.

Mr Ngaruye contended that once the appellant's counsel alleged that the 1st Appellate Judge resolved only one issue and it implied that after resolving the issue of whether or not the grounds of appeal offended the provisions of Order 43 r 1(2) of the CPR, he did nothing more. However, after resolving that issue the learned Judge went ahead to determine the appeal on merits and in so doing resolved five other issues. Moreover, no issues for determination of the appeal were framed before the appeal was heard and the grounds of appeal were argued as presented. Mr Katembeko added another ground on propriety.

The 1st Appellate Judge found that ground 1 raised several issues whose resolution would determine the appeal and he stated so. The issues arising were the following:

a) Whether or not the trial Magistrate could properly expunge from the record evidence in respect of the Certificate of Title which was admitted with no objection from the opposite party.

b) At what stage should Court expunge evidence from the record of the suit?

c) Whether or not the evidence adduced in respect of the Certificate of title by the Plaintiff was a departure from the pleadings and whether it surprised the Defendants.

d) Whether or not the decision of the trial Court would remain the same if the evidence in issue had not been expunged from the record of evidence.

Following the framing of issues, the first appellate court found that the evidence of the certificate of title was erroneously expunged from the record for the reasons stated in the judgment which included inter alia the fact that it had been admitted as exhibit P2 without objection from the appellants to this appeal and formed part of the evidence on record. The court also considered at what stage evidence should be expunged from the record and held that it should be at the time when evidence is being adduced and not unilaterally by the court at the time of writing judgment. To expunge evidence at that stage amounted to condemning parties unheard.

On the issue of whether the evidence adduced of the certificate of title to the suit property surprised the appellants, the learned first appellate court judge held that the evidence was not a departure from pleadings as held by the trial magistrate. The learned Chief Magistrate had held that the certificate of title asserted by the plaintiff was a departure from pleadings. The learned first appellate court judge held that had the document which is a copy of the certificate of title for the suit property not been expunged from the record, the respondent to this appeal would have been entitled to judgment in his favour. Having reversed the judgment of the trial Chief Magistrate on the issue of expunging the evidence of the certificate of title, the learned first appellate court judge admitted the same as conclusive evidence of title to the property. He held that:

> The net effect is that had the order expunging evidence in respect of the Certificate of title had not been made, the Appellant would have been entitled to a judgment in his favour.

The respondent's counsel submitted that from the foregoing it is not true that the first appellate court Judge resolved only one issue and that he did in fact resolve five issues.

He conceded that the learned first appellate court judge held that consideration of the issues raised in ground 1 of the appeal would invariably determine the entire appeal and rendered a detailed consideration of the other grounds an academic exercise in futility. The learned first appellate court judge accordingly held that the suit property belongs to the respondent and set aside the dismissal of his suit.

Mr Ngaruye submitted that no injustice would be caused to the Appellants herein even if the rest of the grounds were not tackled because it was not they who had complained and raised those grounds.

Further, that the rest of the submissions of counsel for the Appellants on ground 1 are totally irrelevant to ground one as presented in the memorandum of appeal. He submitted that the 1st Appellate Judge did nor err and his decision should be upheld.

Submissions of the appellant on grounds 4, 5 and 7

The appellant's Counsel argued **grounds 4, 5 and 7** together. He submitted that the trial court in deciding that the respondent did not own the suit land, held that the certificate of title thereof was introduced in evidence when it had not been pleaded that the plaintiff had possession thereof. No certificate of title was attached to the plaint. He submitted that the introduction of a certificate of title was a departure from the pleadings and ambushed the defendants who could not have responded to it in their written statement of defence or filed a counterclaim for cancellation of title. The suit was originally filed on 25th August, 1999 when the title was not in existence. The title was subsequently issued on 1st December, 2003. The plaint disclosed that the plaintiff had applied for registration but by subsequent amendment on 21st February, 2007 dropped this pleading. The appellant's counsel submitted that the plaintiff by proceeding the way he did violated the provisions of Order 6 rule 6 of the Civil Procedure Rules which requires a party to plead

new facts so as not to take the opposite party by surprise. Further, that On the basis of the above, the trial court expunged the evidence of the certificate from the record and held that the plaintiff did not prove that he was the owner of the suit property. The appellants counsel submitted that the holding of the trial magistrate specifically demonstrates his reasoning for not considering the evidence of the certificate of title in arriving at a decision.

The appellants counsel further submitted that though the evidence was expunged from the record, it remained part of the record physically. Therefore the court used the word "expunge" in the sense of ignoring or discarding the evidence of the certificate of title. The appellants counsel contends that the first appellate court judge considered the certificate of title as a piece of evidence whereas it had been expunged from the record.

With regard to grounds 5 and 7 the appellant's counsel submitted that it is true that the appellant's counsel at the trial did not object to admission in evidence of the certificate of title but reserved his objection to the title in the submissions in reply. What is material is that the appellants in the trial court discredited the title in their submissions. He submitted that the learned judge misdirected himself by finding that by agreeing to have the document admitted in evidence, the appellants had admitted the contents of the document. He contended that the fact that the certificate of title only came to light at the hearing was a matter of ambush and as such could not have permitted the defendant to reply to the same as required by the law and defeated the defendant's rights to a fair hearing which cannot be derogated from according to the provisions of the Constitution of the Republic of Uganda 1995.

The appellants counsel further sought to demonstrate through the pleadings that the plaint did not disclose that the plaintiff had a certificate of title and therefore the defence related only to the pleadings where the defendants denied the contents of the plaint. Moreover, in the year 2007, the plaintiff

applied for amendment of the pleadings to indicate that he was in the process of procuring a certificate of title for the suit property. Furthermore, there was no proper description of the suit property in terms of Order 7 rule 3 of the Civil Procedure Rules whose terms are mandatory. He submitted that the plaint did not contain sufficient description of the property sufficient to identify it. The lease was applied for on 14th September, 1998 but no evidence of the application was exhibited. He submitted that the failure to do so offended Order 7 rule 3 of the Civil Procedure Rules. Further, the plaintiff concealed the information in order to ambush the defendants at a later stage. The plaintiff acquired title on 1st December 2003 but amended the plaint in 2007, five years later.

The Appellant relies on **Ndaula Ronald v Hajj Abdu Naduli; Court of Appeal Election Appeal No. 20 of 2006** for the holding that it makes good logic to recognise that rules are made to be observed and should not be taken for granted. Non-compliance with both substantive law and procedural rules is an illegality that cannot be overlooked as a mere technicality. In the premises the appellant's counsel submitted that non observance of Order 7 rule 3 of the Civil Procedure Rules was an illegality and the trial court rightly condemned the respondents for it. He submitted that the plaintiff/respondent to this appeal concealed a very important and relevant fact from the defence and as such should not benefit from it. The appellants counsel further relied on the case of **Musisi Dirisa and 3 Others v Sietco (U) Ltd; Civil Appeal No 24 of 1993 [1993] IV KALR 67** on the issue of departure from pleadings. It was held in that case that the first appellant's evidence was clearly at variance with his pleadings. Appellants counsel submitted that similarly, there was a glaring disparity between the respondents pleading that he owned land without giving disclosing its size, tenure and only testified being a registered proprietor. The defendants rightly replied by denying the fact of ownership of land at Katojo by the respondent. To be specifically recognised as the registered proprietor, the

plaintiff ought to have pleaded the fact and described the property. This would have given an opportunity to the appellants to either admit his proprietorship or specifically plead fraud among other things.

The appellants counsel further submitted that the inclusion of Plot 177 Rwampara Block 2 on the list of documents accompanying the plaint was insufficient and the learned first appellate judge misdirected himself when he relied on Order 7 rule 14 (2) of the Civil Procedure Rules to justify the listing of the document as rectifying the problem of non-disclosure in pleadings. He submitted that the claim has to be stated in the plaint and not in the list of documents as the document itself is not clear to support the claim which is non-existent. For instance a document such as a certificate of title cannot be used to support a claim for a kibanja.

Ground 5

The appellant's counsel submitted that the learned appellate judge correctly condemned the trial magistrate for proceeding with the hearing without first conducting a scheduling conference but erred to blame the defendant for it. This is because holding a scheduling conference to iron out points of agreement and disagreement is the duty of both parties to the suit. He reiterated submissions that the plaintiff had concealed his possession of a certificate of title and this facilitated the ambush of the defendants with the evidence. The first appellate trial judge ought to have held that the certificate of title was improperly brought into evidence and agreed with the trial judge.

Ground 7

The appellants counsel submitted that the learned first appellate judge descended into the arena by downplaying the relevance of the legal requirement to specifically pleaded particulars of the claim or specificity of the property an holding that it was just a case of sloppy summons on the part of counsel not to specifically mention the certificate of title in the main

body of the amended plaint. He further held that Mr Katongole knew about the title but the evidence is clear that he got to know about it in 2002. However, the title was issued on 1st December, 2003 and it was erroneous to impute knowledge on DW1 even when he attached the certificate of title which was not in existence at the time he testified. Failure to include the particulars of title was not merely a case of sloppy drafting but a fundamental issue. The amended plaint did not disclose any material facts in respect of customary ownership or registered interest in the suit property. In the premises, the plaint disclosed no cause of action according to the requirements of Order 6 rule 1 of the Civil Procedure Rules and the definition of a cause of action in **Auto Garage v Motokov (1971) EA 514.**

Reply of the respondent to grounds 4, 5 and 7

Mr. Ngaruye submitted that he had difficulty reply to the rest of the grounds argued by the appellant's counsel namely; grounds 3, 4, 5, 7and 8, Mr Ngaruye because they are jumbled up. For example the Appellants argued grounds 4, 5 and 7 and he later again repeated arguments on ground 5-7 and yet again argued ground 5 and again later ground 7. He submitted that those grounds as presented are not arguable as they are not concise and prayed that those arguments are rejected.

Reply to ground 4

In reply Mr Ngaruye submitted that it is not true that the 1st Appellate Court failed to properly apply the law in respect of the discarded certificate of title by the Chief Magistrate nor did the court err to conclude that the same formed part of the evidence.

Reply to ground 5

In reply, Mr Ngaruye submitted that ground 5 is not concise and prayed that it is struck out. He submitted that the 1st Appellate Court was right when it found that the trial Court was wrong to expunge the evidence relating to the

Certificate of title and the 1st Appellate Court did not err when it took evidence into account after restoring it. Further, he contended that it could not be argued that the Appellants were taken by surprise and prejudiced when the certificate of title was tendered in evidence because they were asked whether they had any objection to the certificate of title being tendered in evidence and they did not object. In any case they ought to have objected to it and the court would have ruled at that stage whether to admit it or not. The fact that the defendants did not object is indicative of the fact that they were aware of the certificate of title listed as in the list of documents accompanying the amended plaint.

Reply to ground 7

On the issue of whether the first appellate court was biased, the respondent's counsel submitted that the 1st Appellate Court did not exhibit bias and in any case bias cannot be raised as a ground of appeal unless it was first raised as an objection to the Court presiding over the case. Secondly, he submitted that it is not true that the 1st Appellate Court descended into the arena or shifted the burden of disproving the existence of the title to the Appellants. The certificate of title was proved by the Respondent to be in existence and there was no need to shift any evidential burden on the Appellants.

Appellant's submissions on grounds 3 and 8

Grounds 3 & 8

The Appellants counsel that the learned first appellate judge erred in law when he failed to find that the respondent was fraudulent in acquiring the land and processing a certificate of title despite the overwhelming evidence on record. The learned trial judge erred in law to hold that the certificate of title was indefensible by virtue of section 59 of the Registration of Titles Act. He contended that fraud was apparent on the record of proceedings on how the respondent acquired the certificate of title.

While the trial court did not deal with the issue of fraud, the appellate judge made a pronouncement on it. The appellants clearly pleaded fraud in response to the first two plaints. The respondent however is a crafty man who opted to file an amendment when it dropped the line of argument in the clear departure from his former pleadings and this is a manifestation of concealment of fraud. He contended that fraud was clear in the following circumstances namely:

- Purchasing land from people without authority to sell realising the same at a later stage and continuing to bring a suit into the ambit of the Registration of Titles Act.
- Swiftly processing or bringing land under the Registration of Titles Act when there was a suit pending in court concerning the ownership of the land.
- The respondents were neighbouring the suit property. The agreement did not stipulate the boundaries. The other defendants though present did not sign the sale agreement. The respondent applied on 14 September 1998 for a lease of the land at Mbarara office but the land was not inspected by the land board.

He submitted that in the premises the respondent fraudulently acquired the land and also processed a certificate of title for the same. He contended that the process for bringing land into the realm of the Registration of Titles Act and the Land Act are clearly laid out in the Land Regulations. He contended that the respondents clearly contravened the process laid out in the regulations. The first appellate court judge held that the certificate of title could only be challenged if the appellants had pleaded fraud. However, the appellants could not plead fraud because the certificate of title was not pleaded. The appellants counsel contended that in the least, the first appellate court judge ought to have ordered a re-trial. He invited this court to order a re-trial.

Further, the appellants counsel submitted on the issue of indefeasibility of title that the learned trial judge never addressed his mind on the two interest in the suit property namely the customary ownership and the leasehold interest. Further, that the learned appellate judge did not addresses mind to the customary/equitable interest in the suit property now that the land was registered under contested circumstances. He submitted that there was overwhelming evidence that the estate of the late Yeremiah Mugyenyi owned the suit property and it was never sold to the respondent. The trial court made a ruling on the same and the appellate court did not refute it. The court did not resolve the issue of whether the sellers of the property legally passed any interest to the respondent. The respondent quietly and without consent of the appellants surveyed the suit property and acquired a certificate of title when the property was subject to existing customary interests.

In the premises, learned counsel for the appellants prayed that the court finds for the appellant on all the grounds of the appeal and to set aside the judgment of the appellate court and reinstate the decision of the trial court. In the same vein, this honourable court should order for the cancellation of the certificate of title respect of the suit property and order that the learned rightfully belongs to the appellants with costs in this court and in the courts below.

Reply of the respondent to grounds 3 and 8

Ground 3

The respondent's counsel submitted that the 1st Appellate Court made no error when it did not make a finding that the Respondent was fraudulent in acquiring the land and processing of the Certificate of Title. He submitted that fraud was never pleaded in the Written Statement of Defence of the Appellants and the Appellants could not prove what they had not pleaded.

Reply to ground 8

Mr Ngaruye submitted that the 1st Appellate Court made no error with regard to the Respondent's certificate of title. Secondly, the certificate was indefeasible by reason of the fact that the Appellants never filed any counterclaim and never pleaded fraud in their Written Statement of Defence and could not adduce evidence to support what they had not pleaded.

The respondents counsel further addressed court on grounds 2, 6, 9, 10 an 11:

Reply to ground 2

On ground 2 Mr Ngaruye submitted that the 1st Appellate Court properly re-evaluated the evidence before reversing the decision of court of first instance and it cannot be faulted in the re-evaluation exercise.

Reply to ground 6

The respondent's counsel submitted that ground six of the appeal is not concise and prayed that it be struck out. He submitted that the Respondent properly obtained title to the suit land and therefore owns it.

In reply to ground 9

Mr Ngaruye submitted that ground 9 is not concise and prayed that it is struck out. He submitted that the 1st Appellate Court made no error when it held that the Appellants had knowledge that the Respondent was processing a certificate of title but took no steps to lodge a caveat or apply for a temporary injunction and indeed they filed no counterclaim to challenge the Respondent's title and cannot be heard lamenting on appeal when no fraud was pleaded in the first place.

Reply to ground 10

Mr Ngaruye submitted that ground 10 lacks merit and is a replication of ground 1. He reiterated submissions on ground 1 of the appeal.

Reply to ground 11

In reply to ground 11, he submitted that costs follow the event unless there are compelling reasons to order otherwise. The Appellants had lost the appeal and there were no compelling reasons to deny the successful party the costs of the Appeal.

In the premises he submitted that the appeal has no merit and prayed that it be dismissed with costs.

Consideration of the appeal

I have carefully considered the grounds of the appeal, the submissions of counsel, laws cited, the applicable law generally as well as the record of appeal. This is a second appeal and is governed by the provisions of sections 72 (1) and 74 of the Civil Procedure Act, Cap 71 which in a nutshell provide that a second appeal shall lie to this court on points of law only. Section 72 (1) of the Civil Procedure Act that:

> 72. Second appeal.
>
> (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—
>
> (a) the decision is contrary to law or to some usage having the force of law;
>
> (b) the decision has failed to determine some material issue of law or usage having the force of law;
>
> (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

A point of law such as confers jurisdiction on this court may be a question of whether the decision is contrary to law or some usage having the force of law. Secondly, an appeal may lie from a decision on the ground that it failed to determine some material issue of law or some usage having the force of law. Thirdly, an appeal may lie where there is a substantial error or defect in the procedure provided for by the Civil Procedure Act or any other law which could possibly have produced an error or defect in the decision of the case on the merits. Section 74 of the Civil Procedure Act expressly stipulates that no appeal shall lie on any other ground except under section 72 as set out above except for third appeals which are separately taken provided for by section 73 of the Civil Procedure Act (which may hereinafter be referred to as the CPA). Section 72 of the CPA has been interpreted and applied by the East African Courts of Appeal in numerous decisions.

I will start by considering the case law on what amounts to a point of law. A pure point of law does not include a controversy of fact. In **Thiong'o v Republic [2004] 1 EA 333** the Court of Appeal of Kenya considered a second appeal from a criminal cause or matter and held that a second appeal can only be on matters of law by virtue of section 361 (1) of the Criminal Procedure Code (Chapter 75) Laws of Kenya. They further stated on exclusion of controversies of fact that:

> We would agree with the views expressed in the English case of Martin v Glywed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.

The material part of the holding is that a second appeal court should accept findings of fact of the trial court or that of first appellate court. Similarly, in

the case of **Githuku v Republic [2007] 1 EA 83**, the Court of Appeal of Kenya while dealing with a second appeal in a civil matter held that as a second appeal, the appeal could only be allowed if they find that the Superior Court erred on a point of law. These decisions are preceded by other decisions of the East African Court of Appeal. In **Shah v Aguto [1970] 1 EA 263** there was a second appeal in a civil cause and the Court held that a second appeal only lies on questions of law as set out in section 72 of the Civil Procedure Act. Section 72 of the Kenyan Civil Procedure Act is in *pari materia* with section 72 of the Ugandan Civil Procedure Act. The ground of appeal was that:

> The learned Judge erred in law in not directing himself sufficiently, properly or at all to the principles to be applied on an appeal against findings of fact of the Court of First instance.

The East African Court of Appeal held that the above ground was on a question of law. The question of law is whether the learned judge directed himself sufficiently, properly or at all to the principles to be applied on appeal against findings of fact of the court of first instance.

I have carefully considered the grounds of appeal and on the face of it they raise questions of law relating to procedure while some of them originally raised mixed questions of law and fact but this was amended to exclude reference to appeals on questions of fact.

There are 11 grounds of appeal which have been reproduced above. Grounds 1, 2, 3, 4, and 5 relate to the issue of the suit property being registered property and whether the certificate of title for the suit property was properly treated by the first appellate court when it had been expunged from the record by the trial court and allowed it to be reintroduced into evidence by the first appellate court. The consequence of allowing the certificate of title to be used in evidence was to consider it as a conclusive evidence of the title of the respondent to the suit property. Pursuant to the re- admission of the

certificate of title in evidence by the first appeal level, the learned first appellate judge set aside the dismissal by the Chief Magistrate and allowed the plaintiff's suit. I will first address grounds 1 and 10 of the appeal.

Grounds 1 and 10

Ground 1

The learned appellate judge erred in law when ignored all the issues of appeal and resolved only one issue thereby arriving at the wrong decision and to the prejudice of the appellants.

Ground 10:

The learned trial judge erred in law when he limited the appeal to only one ground of appeal leaving out the other grounds of appeal thereby reaching a wrong decision to the prejudice of the appellants.

Grounds 1 and 10 of the appeal are intertwined because they deal with the issue of the appeal in the High Court being determined on only one ground of appeal out of the 9 grounds of appeal in the memorandum of appeal. I agree with the respondent's counsel that it was the respondent who filed an appeal in the High Court against the decision of the Chief Magistrate and his appeal succeeded. There was no cross appeal. The appellant could not *per se* be aggrieved by the decision of the High Court to allow the appeal on only one ground of appeal. It is the respondent to this appeal who could have been aggrieved had the appeal not been allowed. As it stands, the respondent's appeal in the High Court was allowed with costs and the suit in the trial court which had been dismissed by the Chief Magistrate was allowed. I generally find no merit in ground one of the appeal except that there is an issue of whether the court had a duty to reappraise the evidence on record before making orders on ownership as it did and whether it was erroneous in the circumstances to proceed to determine the suit on the merits without considering other evidence.

Ground 2 of the appeal deals with the duty to re-evaluate the evidence. I will deal with this ground in considering other grounds of appeal. Suffice it to state that the decision of the first appellate court judge was based on a point of law as to whether it was erroneous to expunge the certificate of title for the suit property from the record after it had been admitted in evidence and marked as exhibit P2. The second conclusion flowing from the restoration of the evidence on record was the application of section 59 of the Registration of Titles Act whose provisions require the court to accept the certificate of title as conclusive evidence of title. On the face of it, the first appellate court judge could not be faulted for not re-evaluating the evidence on record because the matter he decided revolved on a point of law which are considered. However, other issues of law are disclosed and the conclusion of the learned first appellate court judge needs to be further interrogated. This can only be considered when dealing with the other grounds of appeal.

I shall further consider grounds of 3, 4, 5, 8 and 9 of the appeal together. Grounds 5, 8 and 9 are intertwined and deal with the certificate of title. Ground 6 shall be considered separately and deals with the question of whether the property, the subject matter of the suit belonged to the estate of a deceased person. Further, ground 7 of the appeal which deals with whether the learned first appellate judge was biased shall be considered separately. Finally, ground 11 deals with the issue of award of costs to the respondent.

Ground 3 of the appeal is that the learned trial judge erred in law and fact when he failed to find the respondent fraudulent in acquiring the land and processing of a certificate of title despite the overwhelming evidence on record.

Ground 3 of the appeal deals with the pleadings because there was no counterclaim by the defendants against the plaintiff in the last amended written statement of defence which responded to the last amended plaint.

However, the plaintiffs defence was that the property belonged to the estate of a deceased person. In any case, the chief magistrate had no jurisdiction under the Registration of Titles Act to cancel any certificate of title. Title can only be cancelled under the Registration of Titles Act on proof that it was obtained or procured fraudulently (see section 176 of the Registration of Titles Act, Cap 230 and decision of the Supreme Court in **Kampala Bottlers v Damanico (U) Ltd SCCA No.22/92**). Allegation of registration through fraud is a cause of action that can only be handled by the High Court in terms of jurisdiction for cancellation of a certificate of title. In any case, title can only be impeached for fraud under section 59 of the Registration of Titles Act. However, the learned trial magistrate and dismissed the plaintiff's suit and the first appellate court judge could not do otherwise than either uphold the dismissal or set it aside. Ground 3 of the appeal has no merit and is accordingly disallowed.

Ground 4 of the appeal is that the learned trial judge erred in law and fact when he failed to properly apply the law in respect of the discarded certificate of title by the learned Chief Magistrate and concluding that the same formed part of the pleadings whereas not.

Ground 5 of the appeal is that the learned trial judge erred in law and fact when he allowed the certificate of title in respect of the suit land in evidence on the basis of the fact that the matter had not been scheduled and for that matter the appellants were to blame the ambush by the respondents.

Ground 8 is that the learned trial judge erred in law and fact when he held that the respondent's certificate of title in respect of the suit land was indefeasible by virtue of the Registration of Titles Act.

Ground 9 is that the learned trial judge erred in law and fact when he held that the knowledge by the appellants that the respondent was processing

title was proof that they had knowledge of the existence of the certificate of title and that therefore implied in the pleadings.

I have carefully considered the gist of the above grounds of appeal which in effect attack the decision of the first appellate court judge to reintroduce exhibit P2 which is the certificate of title in issue in this appeal and that had been listed as one of the documents the plaintiff sought to rely on in the plaintiff's pleadings in the trial court but was not part of the pleadings in the plaint. I have accordingly deemed it necessary to examine all the pleadings for purposes of understanding the chronology in the pleadings leading to as well as the last amended pleadings and the decision.

The first plaint of the respondent was signed by counsel on 23rd of August 1999 and was filed on 25th August, 1999. The cause of action of the plaintiff was in trespass. What is of particular relevance is paragraph 4 of the plaint where it was averred that the plaintiff is a customary holder and user of a parcel of land situated at Katojo, Nyakayojo Rwampara. It is further pleaded that the plaintiff had applied to have the land registered under the Registration of Titles Act and that the process was in advanced stages. Subsequently, by a written statement of defence dated 14th November, 1999, the defendants averred in paragraph 4 that the application for registration was in the personal knowledge of the plaintiff and in reply thereto the defendants contended that if there was any such process of registration, the same is riddled with fraud. They provided the particulars of fraud in paragraph 4 of the written statement of defence.

By another amended plaint filed in the civil registry on 16th November, 1999, the respondent introduced another paragraph 4 which provided as follows:

> The plaintiff is a customary holder and user of a parcel of land situated at Katojo Nyakayojo Rwampara part of which was acquired by purchase. The plaintiff has applied to have the land registered under the Registration of Titles Act and the process is in advanced stages.

The amended written statement of defence of the defendants was filed on court record on 9th December, 1999 and repeats the earlier written statement of defence in paragraph 4 thereof.

Finally, the plaintiff amended the plaint again and the amended plaint was filed on 27th February, 2007. Paragraph 4 of the amended plaint only avers as follows:

> The plaintiff owns land at Katojo, Nyakayojo, Rwampara.

The other paragraphs introduced the cause of action of trespass alleging that the defendants had trespassed on the suit property and started excavating sand therefrom thereby causing loss and damage to the plaintiff. On the list of documents attached to the last amended plaint are the following documents:

- Sale agreement between Nyakaana, the fourth defendant and the plaintiff dated 2nd August, 1986.
- Certificate of title for plot 177 Rwampara Block 2.

The last amended written statement of defence responded to the amended plaint is dated 21st March, 2007. It has a receiving stamp of court dated 12th April 2007. In reply to paragraph 4 of the last amended plaint, the defendants averred as follows:

> Paragraph 4 of the amended plaint is denied in toto and the plaintiff shall be put to strict proof thereof.

It is clear that the plaintiff only asserted that he is the owner of the suit property. On the other hand the defendants averred that the property belonged to their deceased father and grandfather respectively.

The submissions of the plaintiff in the trial court clearly bring out the issues arising from the pleadings which are:

1. Whether or not the suit land belongs to the plaintiff?

2. Whether the defendant trespassed on the suit land?
3. What remedies are available to the parties?

According to Order 15 rule 1 of the Civil Procedure Rules, issues are framed from the pleadings. The said rule is reproduced for ease of reference:

> 1. Framing of issues.
>
> (1) Issues arise when a material proposition of law or fact is affirmed by the one party and denied by the other.
>
> (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence.
>
> (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
>
> (4) Issues are of two kinds: issues of law and issues of fact.
>
> (5) At the hearing of the suit the court shall, after reading the pleadings, if any, and after such examination of the parties or their advocates as may appear necessary, ascertain upon what material propositions of law or fact the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
>
> (6) Nothing in this rule requires the court to frame and record issues where the defendant at the hearing of the suit makes no defence, or where issue has been joined upon the pleadings.

There was no material proposition of fact in the plaint showing that the plaintiff was the registered proprietor of the suit property. The original material proposition of fact was that the plaintiff was a customary owner of the suit property. The other material proposition was that there was an application for registration of the suit property. I also note that it was previously pleaded that the plaintiff's cause of action was in trespass on part of the land of the plaintiff. Apart from location, there is no description or sketch map of the land.

Further Order 15 rule 3 of the Civil Procedure Rules permits the court to frame issues from other materials as follows:

> 3. Materials from which issues may be framed.
>
> The court may frame the issues from all or any of the following materials—
>
> (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;
>
> (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and
>
> (c) the contents of documents produced by either party.

It may be contended that issues could be framed from the contents of documents produced by the parties. However, the plaintiff had not attached the certificate of title which was only on the list of documents to be adduced at the trial. To frame issues from the contents of documents would require the documents to be first adduced in evidence.

For purposes of resolving issue number 1, the plaintiff relied on the certificate of title. Secondly, the plaintiff also relied on section 59 of the Registration of Titles Act. The defendants on the other hand hinged their defence on whether the property (part of the property) was lawfully sold to the plaintiff by one Nyakaana on the ground that it formed part of the estate of the late Yeremiah Mugenyi. The question was whether he had authority to do so.

I have further carefully considered the judgment of the learned Chief Magistrate on the subject of the certificate of title in the names of the plaintiff (the respondent to this appeal). There was a sale agreement admitted in evidence as exhibit P1 and the certificate of title was admitted as exhibit P2. He found that it was not disputed that the suit property originally belonged to Yeremiah Mugenyi (deceased). He considered the issue of whether one Lukyamuzi and Nyakaana had any legal authority to sell the property of the late Yeremiah Mugenyi (hereinafter referred to as the deceased). He also

found as a matter of fact that nobody had applied for letters of administration to the estate of the deceased. On the issue of the certificate of title, he held that it was only introduced in evidence. It was not pleaded in the plaint that the plaintiff was in possession of a certificate of title nor was it attached to his plaint. He held that to introduce it at the hearing was not only a departure from previous pleadings but also an ambush on the defendants who could not have responded to it in the defence or filed a counterclaim for its cancellation. He held that it was a departure from the pleadings and expunged it from the record.

It is clear from the chronology of events that the plaintiff originally pleaded that he was in the process of applying for a certificate of registration to the suit property. Secondly, it is clear from the facts on record that the property in contention only formed part of the property comprising the certificate of title. Thirdly, it is also clear from the above chronology of events that the suit was decided on the basis of a procedural point as to whether it was proper for the learned trial magistrate to expunge the certificate of title which had been admitted in evidence as exhibit P2 from the record. In terms of section 72 (c) of the CPA the issue for consideration is whether a substantial error or defect in the procedure provided by the Civil Procedure Act or any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits.

The first problem that is clearly discernible from the record is the conclusion that the certificate of title is conclusive evidence of title. While the application of section 59 of the Registration of Titles Act for purposes of the evidence of the description of the land and the area it covers cannot be faulted, the problem is whether the certificate of title concerns the disputed portion of the property. Paragraph 5 of the amended plaint clearly indicated that in May 1999 the defendants entered part of the land. The plaintiff's claim was for general damages for trespass, a permanent injunction and costs. The

decision of the learned Chief Magistrate depended on whether the portion of the property belonged to the estate of the late Yeremiah Mugenyi. It is quite clear from the record that the root of title of the plaintiff was derived from a sale agreement according to the testimony of PW1. He bought it from one Lukyamuzi and Nyakana and the sale agreement was tendered in evidence as exhibit P1. The testimony of PW1 clearly indicated that after buying the property, they were summoned by the LC 1 of the area on the ground that the property belonged to the estate of Mugenyi. The learned trial magistrate relied on a letter from the plaintiff to the local Council of the area which was translated by Makerere University as follows:

> 21/8/86
>
> The Chairman
>
> Katoojo R. Council
>
> Katoojo
>
> Thank you for the letter you wrote to me on 17/8/1986, calling me to settle the issues concerning the land which Messrs Nyakaana and Rukyamuzi sold to me.
>
> Those people lied to me that the land belonged to them; and because there was not much time, I hurriedly paid.
>
> Therefore, let me plan to come there on 26/8/86. I am not able to come now because there are government matters that I am currently engaged with.

The above document was signed by the plaintiff. It clearly is evidence that there was a problem with the purchase of the suit property. The certificate of title that was tendered in evidence has clear evidence on the face of it that it was issued with a term commencing 1st of December 2003 for five years. It was registered on 1st December, 2003. The lease was signed on 2nd December 2003. Another important fact is that the lease was applied for from Mbarara District Land Board under the provisions of the Land Act Cap 227. The application and the certificate of title was therefore made under the

provisions of article 237 of the Constitution of the Republic of Uganda and the Land Act Cap 227. The original plaint had been filed in 1999 indicating that an application had been made for a certificate of title. The defendants denied that such an application had been made and averred that, if so, it was only in the personal knowledge of the plaintiff. The second amended plaint was also filed before any certificate of title had been obtained. It is the third amended plaint which kept silent on the issue and only averred that the plaintiff owns the land. This was consistent with the previous pleading that the plaintiff was the customary order of the suit property. It is only the list of documents that includes a sale agreement dated 2nd August, 1986 and a certificate of title for plot 177 Rwampara Block 2. The defendants merely denied that the plaintiff was the owner of the land.

By relying on a certificate of title, the real question in controversy was never determined. The application for a certificate of title had been made and considered when there was a suit between the parties. In any case, exhibit P2 which had been admitted indicates that the lease was issued with effect from 1st of December 2003. Prior to that, the plaintiff alleged that he was a customary owner of the suit property. The defendant's contested the sale of the suit property. Because there was a dispute concerning ownership of the property and with a suit pending in court, the certificate of title was erroneously issued.

The application was allegedly made in 1998 which according to the pleadings was when the plaintiff was the customary owner of the suit property. However it is clear from the Land Act Cap 227 and section 1 (l) that "customary tenure" means the system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidence of which are described in section 3. This should be read together with this section 1 (s) which defines "leasehold land tenure" which means the holding of land for a given period from a specified date of

commencement, on such terms and conditions as may be agreed upon by the Lessor or Lessee, the incidence of which are described in section 3, and includes a sublease. The incidents of customary tenure under section 3 (1) (h) of the Land Act is defined as land tenure which is owned in perpetuity. On the other hand section 3 (5) of the Land Act includes in the incidents or forms of tenure for leasehold a characteristic where one person namely the landlord or Lessor grants or is deemed to have granted to another person known as the tenant or lessee exclusive possession of land. The exclusive possession is also granted for a fixed period of time. A customary owner already owns the land and can only have it converted into freehold which is also defined as land which is owned in perpetuity by section 3 (2) of the Land Act. A customary owner can grant a lease to any person he or she wishes for a fixed term or period.

It follows that the certificate of title was erroneously issued if the original ownership as pleaded has its roots in customary tenure which title is held in perpetuity. Without going into the regulations for the registration of leaseholders, the matter was already sub-judice and therefore I agree with the appellants counsel that obtaining a certificate of ownership over disputed property which dispute is pending in court is a fraudulent act. In addition it was an absurdity for someone who owns land in perpetuity to apply to the controlling authority for a lease of it to himself. It is not only an absurdity, it is an illegality for the owner of property to lease to himself or herself. One cannot be a customary order as well as a leasehold over the same piece of land.

For that reason, the certificate of title exhibit P2 purporting to be a lease offer for a period of five years is a nullity. I further agree with the appellants counsel that failure to hear the defendants on the question of issuing a certificate of title to the property which they claim to own as family property subject to the laws of succession when the dispute was pending in court

between the parties violated their rights to hearing. The question of ownership was very much in dispute and pending in court but they were never heard it before a certificate of title was issued in 2003. The certificate of title was sprung into evidence after the year 2007 when the dispute in court was filed in August 1999. Moreover, the alleged sale took place in 1986. In the circumstances, the certificate of title cannot stand in light of the statutory law of succession.

While it is true that the defendants in the trial court (who are the appellants to this appeal) could have filed a counterclaim alleging fraudulent acquisition of title, it is clear that the basis of their defence was that the suit property was part of the estate of their deceased father, a fact which was not disputed. Secondly, a suit for cancellation of title could only have been filed in the High Court under section 177 of the RTA. Section 177 of the RTA a vests jurisdiction for cancellation of registered ownership on the High Court as far as the jurisdiction of courts of judicature is concerned. The plaintiff had proceeded in the Chief Magistrate's court and the cause of action was for trespass. The Chief Magistrate could not have determined any question as to cancellation of title, because he had no jurisdiction to do so. Secondly, the question of cancellation did not arise from the pleadings because the certificate of title was not pleaded as giving the respondent a right of ownership of the plaintiff. The basis of the respondents claim was that he had bought the property from the siblings of the appellants. Last but not least, the respondent acknowledged in a letter that he had been duped by the siblings of the appellants into buying the property hurriedly.

Order 6 rule 3 of the Civil Procedure Rules provides as follows:

> Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it.

The learned first appellate court judge held that there was no departure from pleadings. However, the plaintiff pleaded that he was the owner of the suit

property. He never pleaded the form of ownership. Historically, the plaintiff had also pleaded that he was the customary owner of the suit property. The evidence led at the trial showed that the plaintiff bought the property from the estate of a deceased persons through purported beneficiaries. It must be added that the plaintiff had also indicated that he had applied for a certificate of title to the suit property. The certificate of title was subsequently adduced in evidence after amendment of pleadings in 2007. Nonetheless, the fact that the property had been registered in the names of the plaintiff was not pleaded. Order 6 rule 1 of the Civil Procedure Rules requires every pleading to contain a brief statement of the material facts on which the party pleading relies for a claim or defence as the case may be. It was a material fact to plead that the plaintiff was now the registered proprietor of the suit property in light of the previous pleadings. Pleading that he was the owner of the suit property without indicating whether he was the customary owner as previously pleaded or the registered proprietor subsequently was deceptive.

The learned first appellate court judge was of the view that the defendant could have applied for further and better particulars because there was a list of documents indicating *inter alia* a certificate of title. This is based on the proposition that documents referred to in the list of documents accompanying the pleadings form part of the pleadings. The specific rule that deals with the list of documents is Order 7 rule 14 of the Civil Procedure Rules which provides that:

> 14. Production of documents on which plaintiff sues and listing of other documents on which plaintiff relies.
>
> (1) Where a plaintiff sues upon a document in his or her possession or power, he or she shall produce it in court when the plaint is presented, and shall at the same time deliver the document or a copy of it to be filed with the plaint.
>
> (2) Where a plaintiff relies on any other documents (whether in his or her possession or power or not) as evidence in support of his or her claim, he or she shall enter the document in a list to be added or annexed to the plaint.

The above rule does not detract from the provisions of Order 6 rule 2 of the Civil Procedure Rules which provides that every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on. The list of documents are supposed to support the pleadings. Order 7 rule 14 of the Civil Procedure Rules specifically deals with documents upon which a plaintiff sues or documents which a plaintiff relies on in support of his or her claim. Rule 14 (1) requires a plaintiff who sues upon a document which is in his or her possession or power to produce it in court when the plaint is presented. It is supposed to be filed together with the plaint. When does a plaintiff sue upon a document? Such a document could be for instance an acknowledgement of indebtedness.

It can be argued that the plaintiff did not sue upon a document because the document merely supported the claim. The problem is that to support the claim, the claim must be stated in the plaint. Secondly it is imperative that immovable property is described in terms of Order 6 rule 3 of the Civil Procedure Rules. It follows that the property had to be described in the body of the plaint with sufficient particularity to identify it. Putting the particulars of the suit property in the list of documents does not support the description of the property. Ownership of immovable property should be described in terms of whether it is a leasehold, freehold or any other form of land tenure. Historically the plaintiff had averred that he was the customary owner of the suit property. The defendants challenged his ownership and claimed ignorance about any application for registration. They averred in the written statement of defence that the application for registration was only in the personal knowledge of the plaintiff. In theory, an application for registration of land to bring it under the operation of the Registration of Titles Act for the first time cannot be without the knowledge of neighbours who are entitled to notice of such an application. As to what exactly happened is not in evidence and cannot be considered by this court. The application could not

have proceeded under the repealed Public Lands Act. What can only be considered is that the defendants were put on notice in the pleadings of the plaintiff that such an application for registration of title had been made. It can further be noted that the application was before the Mbarara District Land Board according to the evidence of the certificate of title exhibited.

The part of the property which forms the subject matter of the suit in terms of acreage or area covered is still unknown, except, perhaps to the parties. The record of the trial court is very clear that all proceedings took place in court. There is no evidence of any visit the locus in quo. The pleadings of the plaintiff clearly showed that it is only part of the property claimed by the plaintiff. There is no evidence to indicate that the certificate of title comprises part or the entire disputed property. The only possible evidence of the size of the land is exhibit P1 which is a sale agreement. However, the document itself does not have any specified measurements or size of the property. It is written in Lunyankole and there is no translation thereof. I requested a court official to translate the document in order to reach a conclusion on the matter. The court translated document shows *inter alia* that the vendors thereof sold half of their land in that area. The plot involved is that attributed to be a share of Mr Nyakana who has also passed away. The following is a translated copy of the agreement which contains a description of the contentious part of the land:

AGREEMENT

COMBE NO. 4

ENTEBBE – UGANDA

2ND AUGUST, 1986.

We, W. Nyakaana and S. Lukyamuzi of Katojo, Ruti Mbarara District have agreed to sell to Mr J. Kahangirwe of Katojo half of our land in that area.

We have agreed to sell to him at Shs. 5,000,000/= and he has paid to us Shs. 1,000,000/= the balance of Shs. 4,000,000/= will be paid to us in the month of August before the end of the year 1986.

The plot has that of Mr Nyakaana (where there's no house) and the one of Mr Lukyamuzi in the slope of Nyakaana till the plain land adjacent to Mr Twaha.

We are:

J. R. Kahangirwe (Buyer)

W. Nyakaana W.M.N Salongo (Seller)

S. Lukyamuzi (Seller)

Others: Mrs. Lois Bekunda

Mrs. Joy Kahangirwe.

I **Atwine Charity**, a Court Clerk in the Court of Appeal attached to Criminal Registry acknowledge this document to be the true translation of this land agreement from the language of Runyankore to English.

Dated this 13th day of November 2019

Signed

ATWINE CHARITY

To make matters worse, and as observed by the first appellate court judge, no scheduling conference had been conducted between the parties so as to set out points of agreement and disagreement. Secondly, it is clear that there was no locus visit to ascertain the area of dispute. There is no sketch map of the area alleged to have been encroached by the defendants out of the total

area claimed by the plaintiff. In a suit based on the cause of action in trespass, it is crucial to establish the area of the land trespassed by the activities of the defendants.

Even if it was assumed that the property trespassed formed part of the property described in the certificate of title, this had to be verified to ascertain the extent of the trespass. In any case, there was a claim for general damages which could only be assessed by examining the extent of trespass. Granted, there was a description in terms of ownership by the vendors.

The conclusion of the appeal on the basis of assumptions that the certificate of title represented the property trespassed upon by the defendants leaves a lot to be desired. Secondly, the defendants were indeed disadvantaged in the sense that they could not seek cancellation of title even though they asserted a point of law as to the property being the property of a deceased persons and the vendors thereof having no authority to sell the property. This aspect of the defence needed to be examined. In fact that the evidence on record clearly indicated that the subject matter of the suit only comprised the property which had been bought from one Nyakana and Lukyamuzi. The issue of having no authority to sell discloses a cause of action under the Succession of laws of Uganda.

Without concluding the point which requires evidence, the law can be referred to. Section 191 of the Succession Act Cap 162 laws of Uganda provides that:

> 191. Right to intestate's property, when established.
>
> Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction.

Litigation involving property which formed part of an estate that has not been administered in accordance with law cannot bind the estate of the deceased. The flipside is that only the administrator of the estate of the deceased can be sued in any court of law for a judgment to have any effect on the estate. The only exception is that the trespasser can be sued by the one entitled to possession of the suit property. The law is further clarified by section 192 of the Succession Act which provides that:

> 192. Effect of letters of administration.
>
> Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his or her death.

Section 192 (supra) clearly makes it clear that letters of administration entitles the administrator to all rights vested in the intestate as if letters of administration had been granted at the moment after the death of the intestate. Moreover, the previous section 191 provided that no right to any part of the property of a person who has died intestate shall be established in any court of justice unless letters of administration have first been granted by a court of competent jurisdiction.

The question of whether the property belonged to a child of the deceased or to the deceased is a question of fact. The vesting of the property of the deceased in the administrator is by operation of law. The law vests legal title of the estate property in the appointed administrator in the character of a trustee liable to distribute the estate to the lawful beneficiaries in accordance with the law. If the property was settled by the children of the intestate, it can only be settled by the parties but once the matter is brought to the courts of law, the formal process of succession has to take effect. The formal process comes into operation upon grant of letters of administration or probate respectively vesting the estate on a trustee known as the administrator where the deceased died intestate or executor if there is a will. The formal process

of the law transmits the estate to an entitled a beneficiary under the law of intestacy or under the last testament of the deceased.

Last but not least, it is an offence under the Administrator Generals Act to intermeddle with the property of the deceased person without authority. Section 11 of the Administrator Generals Act provides that:

> 11. Intermeddling with property of deceased.
>
> (1) When a person dies, whether within or without Uganda, leaving property within Uganda, any person who, without being duly authorised by law or without the authority of the Administrator General or an agent, takes possession of, causes to be moved or otherwise intermeddles with any such property, except insofar as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects to deliver any such property to the Administrator General or his or her agent when called upon so to do, commits an offence; and any person taking any action in regard to any such property for the preservation of the property shall forthwith report particulars of the property and of the steps taken to the agent, and if that person fails so to report he or she commits an offence.
>
> (2) Any person who commits an offence under this section is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both, but without prejudice to any civil liabilities which he or she may have incurred.

The conclusion is that it was erroneous to conclude the appeal on the basis of admission of a certificate of title. In any case, there was no pleading which the defendant replied to indicating that the property in contention was registered in the names of the plaintiff. There was therefore an error of law in terms of section 72 (1) (c) of the Civil Procedure Act amounting to a substantial error or defect in the procedure provided by the Civil Procedure Act or any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits. The laws included sections 191 and 192 of the Succession Act, Order 6 rule 3 of the Civil Procedure Rules which require immovable property to be described

sufficiently to enable the defendant to respond to it as well as the error of considering a list of documents as forming part of the requisite claim necessary to be disclosed in a pleading. The list of documents only supports the pleading by the averment describing the suit property. The fact averred should include a fact that the trespass is on plot 177 Rwampara Block 2. Last but not least, the size of the property is unknown neither is the extent of the trespass, if any, determinable from the documents admitted or the evidence on record.

Some general conclusions can be made. Judgment that the plaintiff would have succeeded in the suit depends on the further assumption that the production of the certificate of title in terms of section 59 of the Registration of Titles Act would have entitled the plaintiff to judgment.

The question was whether it was necessary to further evaluate the evidence first before concluding that the certificate of title exhibit PE 2 was conclusive evidence of ownership of the suit property.

The question for determination was whether the plaintiff was the owner of the suit property. Could this question be answered without ascertaining the area covered by the description in the certificate of title exhibit PE 2? Moreover, it was crucial that the suit property had to be described so as to make it is ascertainable for purposes of Order 6 rule 3 of the Civil Procedure Rules. This would have enabled the defendants to specifically respond to the question of trespass in the area in contention. It was further crucial for the court to ascertain the extent of the trespass even if for purposes of ascertaining the quantum of general damages which had been claimed in the plaint. To visit the locus in quo was necessary to ascertain the part of the property which had been allegedly encroached.

It should be noted that the issue of the certificate of title being acquired came after the suit had been filed in fact four years later. The suit was filed

in 1999 and the certificate of title was issued in the year 2003. Moreover, the amendment to the plaint that brought about a list of documents which included the certificate of title came in the year 2007 about seven years later from the time the suit was filed. There was no description of title in the body of the plaint. Moreover the amended plaint in 2007 which is the last plaint to be considered and the only valid pleading reflecting the claim of the plaintiff dropped the description of land tenure from the original plaint and maintained silence about registration of the property. This pleading was deceptive in terms of what land tenure the respondent held. The appellants were under no obligation to first establish whether the listed certificate of title also covered the land in contention. This would be an assumption and in any case the matter in contention concerned land sold to the respondent which they disputed and not originally registered property.

In the premises, I would allow grounds 2, 4, 5, 8 and 9 of the appeal.

Ground 6 of the appeal has no merit because the learned first appellate court judge never determined whether vendors who sold the property to the plaintiff could legally pass valid title to the plaintiff. He concluded the suit on the basis of the certificate of title being indefeasible.

With regard to **ground 7 of the appeal**, I further agree with the respondent's counsel that there is no evidence that the learned first appellate court judge was biased and in any case the issue of bias has to be raised with the judge. Errors of law or in procedure is not necessarily evidence of bias.

Ground 8 of the appeal has been determined in the affirmative because it was erroneous to conclude the suit on the basis of the certificate of title.

Finally **ground 11 of the appeal** is that the learned first appellate court judge erred in law and fact when he awarded costs against the appellant.

The first appeal had been decided in favour of the respondent to this appeal. Costs follow the event and ground rule 11 of the appeal has no merit. It is accordingly disallowed.

In the premises, the appellants' appeal substantially succeeds. I would set aside the judgment and decree of the High Court and also set aside the judgment and decree of the Chief Magistrate. It should further be noted that the chief Magistrate's Court had no authority or jurisdiction to cancel the certificate of title. Furthermore, the High Court had no jurisdiction other than the jurisdiction of the chief Magistrate's Court. However, there is an illegality brought to the attention of the court in terms of the existence of a certificate of title contrary to the said provisions of the Succession Act as well as the Land Act as contained in my judgement above. This court cannot ignore an illegality brought to the attention of the court. It is therefore a proper case to apply the doctrine in Makula International v Cardinal Nsubuga (supra) to deal with the issue of who are the registered title that is an illegality and to exercise the inherent powers of this court under Rule 2 (2) of the Rules of this court to make appropriate orders necessary for obtaining the ends of justice. I would substitute the judgment of the High Court with this judgment. I would accordingly issue the following orders:

1. The appellants' appeal is allowed with costs in this court and the courts below.

2. The judgment of the High Court and that of the Chief Magistrate's Court are hereby set aside and substituted with this judgment.

3. It declared that the purchase of the suit property by the respondent is a nullity and the respondent derived no title, customary or otherwise from the purchase.

4. An order for vacant possession of the suit property issues in favour of the appellants.

5. The certificate of title described as Plot 177 Rwampara Block 2 is a nullity and is hereby cancelled and this order shall be served on the registrar to effect a formal cancellation of the certificate of title from the register.

6. The respondent is not precluded from applying for another certificate of title for the appropriate tenure to be issued in respect only of the portion of his land which is not the subject matter of this appeal or the suit originally filed in the Chief Magistrate's Court.

Dated at Kampala the 12th day of ~~November~~ Dec 2019

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 88 OF 2015

(Arising from High Court Civil Appeal No. 064 of 2011 and

Arising from MBR-00-CV-CS-005 of 2002)

1. **KAYABURA ENOCK**
2. **KATONGOLE JULIUS**
3. **LUKYAMUZI STEVE ..... APPELLANTS**

VERSUS

JOASH KAHANGIRWE..... RESPONDENTS

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Christopher Madrama, JA

I agree with his reasoning and the orders he has proposed, I have nothing else to add.

As Kiryabwire , JA also agrees, this appeal is allowed with orders as set out in the Judgment of Madrama, JA.

Dated at **Kampala** this .....12th.....day of .....Dec.....2019.

.....

Kenneth Kakuru

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 88 OF 2015

(ARISING FROM HIGH COURT CIVIL APPEAL NO 064 OF 2011 AND ARISING FROM MBR – 00 – CV- CS – 005 OF 2002)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA) 10

1. KAYABURA ENOCK
2. KATONGOLE JULIUS
3. LUKYAMUZI STEVE

APPELLANTS

VERSUS

JOASH KAHANGIRWE .....RESPONDENT

JUDGMENT OF HON. Mr. JUSTICE GEOFFREY KIRYABWIRE, JA

I have the opportunity to read the Judgment of my brother Hon. Mr. Justice Christopher Madrama in draft and I agree with it and have nothing more useful to add.

Dated at Kampala this 12th day of Dec 2019

Hon. Mr. Justice Geoffrey Kiryabwire, JA