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

CIVIL APPEAL NO. 230 OF 2018

1. **AKETA FARMERS & MILLERS LTD**
2. **MOHAMOOD NOORDIN THOBANI..... APPELLANTS**

VERSUS

VYAS CHINTAN .....RESPONDENT

CORAM : Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Ezekiel Muhanguzi, 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 The Hon. Mr. Justice Christopher Madrama, JA. I agree with him that this appeal ought to succeed for the reasons he has ably set out in his Judgment. I also agree with the orders he has proposed.

Hon. Justice Ezekiel Muhanguzi agreed with the draft Judgment but was unable to sign it, as he had been elevated to the Supreme Court at the time the final draft was ready.

The final orders therefore, are as set out in the Judgment of Madrama JA. It is so ordered.

Dated at **Kampala** this 28th day of Feb 2020.

.....
Kenneth Kakuru
JUSTICE OF APPEAL

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(CORAM: KAKURU, MUHANGUZI, MADRAMA, JJA)

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JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

This is appeal arises from the ruling and orders of the High Court by Luswata, J delivered on 1st February, 2018 in High Court Miscellaneous Application No 333 of 2015 between the respondent and the 1st and 2nd Appellants, Turyamureeba M. Milton and Kanubhai G. Patel arising from High Court Civil Suit No 241 of 2006 between the first appellant and Turyamureeba M. Milton and another. The application had been lodged in the High Court by the respondent for review to set aside the judgment in Civil Suit No 241 of 2006 whereupon the learned trial judge allowed the application and ordered that:

1. The judgment and decree entered by the High Court in Civil Suit No 241 of 2006; Aketa Farmers & Millers Ltd vs Turyamureeba M. Milton and Kanubhai G Patel, be reviewed and set aside.
2. Execution of decrees and orders arising from the above Civil Suit No 241 of 2006 be stayed/set aside.
3. An injunction to issue against the respondent prohibiting them from ever dealing in, wasting, alienating, transferring, damaging, and/or trespassing on the applicant's land comprised in Freehold Register Volume 1360 Folio 8 Plot 19 McKenzie Vale Kampala Kyadondo issued under Instrument No 480626 measuring approximately 0.117 hectares and later rectified to a new title measuring approximately 0.161 hectares.

4. The respondents meet the costs of the application.

The appellants were aggrieved by the orders and lodged an appeal in this court on five grounds namely:

1. The learned trial judge erred in law and fact when she wrongly set aside the judgment and decree in HCCS No 241 of 2006; Aketa Farmers and Millers Ltd v Turyamureeba M. Milton and Another.
2. The learned trial judge erred in law and fact when she wrongly awarded the respondent the reliefs he sought in HCMA No 333 of 2015; Vyas Chintan v Aketa Farmers & Millers Ltd and others.
3. The learned trial judge erred in law and fact when she conferred ownership of the suit property to the respondent.
4. The learned trial judge erred in law and fact and law when she, in deciding the application in favour of the respondent, entertained new evidence and also relied on a Freehold Certificate of Title for the suit property which, at the time judgment in HCCS No. 241 of 2006 was delivered, did not exist and/or was not registered in the names of the respondent.
5. The learned trial judge erred in law and fact when she failed to hold that the temporary injunction order in HCMA No. 296 of 2006 arising from HCCS No. 241 of 2006 and the judgment in HCCS No 241 of 2006 Aketa Farmers and Millers Ltd v Turyamureeba M. Milton and Another were an order and judgment in *rem* respectively which were both binding upon third parties including the respondent.

The appellants pray that the appeal is allowed, the ruling and orders set aside and judgment and decree in HCCS No. 241 of 2006 be reinstated. They also pray for the costs of this appeal.

At the hearing of the appeal, learned Counsel Mr. George Omunyokol appeared for the appellants while learned counsel Dr. James Akampumuza appeared jointly with learned Counsel Mr. Fox Odoi for the respondent.

The advocates of the parties agreed to address the court in written submissions.

Submissions of the appellant's counsel

The appellants advocate submitted that in 1972 before the non-citizen Asians were expelled by the Idi Amin regime, the second appellant, Mohamood Noordin Thobani and his brother Zulfika Moordin Thobani (now deceased) purchased land comprised in LRV 446 Folio 22 Plot 19 Mackenzie Vale, Kampala (herein after called "the suit property") from **Roshan Aman** as joint tenants at a consideration of Uganda shillings 150,000/= (Uganda Shillings One Hundred and Fifty Thousand Only). Following the expulsion of non-citizen Asians by the Government of Uganda, the Certificate of Title for the suit property save for the transfer deed, got lost. The suit property was taken over by the Government of Uganda and vested in the Departed Asians Property Custodian Board. After the fall of the regime of Idi Amin, the suit property was still occupied by officers of Government.

The Government of Uganda returned properties vested in the Custodian Board to their former owners and Mohamood Noordin Thobani and his deceased brother applied for and were allowed to repossess the suit property which was handed over to said second appellant in 1995. The second appellant in consideration for transport services rendered to the second appellant and his deceased brother by the first appellant in the seventies gave possession of the suit property to the first appellant company which effectively possessed it.

In 1998, Mohamood Noordin Thobani applied to the Registrar of Titles for a special certificate of title for the suit property to be issued in the names of Roshan Aman so that the suit property could be transferred into their names for further transfer by them into the names of Aketa Farmers and Millers Ltd. The Registrar of Titles issued notice in the Uganda Gazette of 29th June 2001 that upon expiry of the notice, the applicants would be issued a special certificate of title in respect of the suit property in the names of Roshan Aman, the original certificate having been lost.

The second appellant was not issued the certificate of title by the Registrar's office and was eventually informed that the file in respect of the suit property

was lost or misplaced. The appellants received a letter dated 9th May, 2006, from Turyamureeba M. Milton's lawyers alleging that Turyamureeba. M. Milton was the registered proprietor of the suit property and demanding, *inter alia*, that the first appellant vacates the suit property within 3 weeks.

The appellants jointly sued Turyamureeba. M. Milton and another in the High Court vide Civil Suit No. 241 of 2006 for, *inter alia* a declaration that the registration of the suit property in the names of one Kanubhai. B. Patel and its subsequent transfer into the names of Turyamureeba. M. Milton, was null and void and for an order directing the Registrar of Titles to cancel the names of Turyramureeba. M. Milton from the certificate of title issued in the names of the second appellant.

The first appellant also obtained a Temporary Injunction Order against Turyamureeba. M. Milton restraining him or his servants/agents from evicting the first appellant or interfering with the first appellant's enjoyment of the suit property pending determination of the main suit.

Mr. Turyamureeba Milton filed a Notice of **Motion in HCMA No. 968 of 2006** seeking for orders to review or set aside the Temporary Injunction Order and it was dismissed by the Court in 2007. On 7th December, 2012 Hon. Lady Justice Monica Mugenyi delivered judgment in Civil Suit No. 241 of 2006 in favour of the appellants and made *inter alia* the following orders and declarations:-

(a) A declaration granting the registration of the land comprised in LRV446 Folio 22 situated at Plot 19 Makenzie vale, Kololo- Kampala in the names of the 2nd defendant and the subsequent transfer thereof into the names of the 1st defendant was procured by fraud and is therefore null and void;

(b) An order to the Registrar of Titles is hereby ordered to cancel the names of the 1st defendant from the Certificate of Title in respect of the land comprised in the LRV446 Folio 22 situated at Plot 19 Makenzie vale, Kololo- Kampala and substitute it with the. Registration of the 2nd plaintiff as the registered proprietor thereof;

(c) A permanent injunction is hereby issued restraining the defendants by themselves or any of them, their servants or agents or any person acting under their authority from occupying or interfering with the plaintiff's quiet enjoyment of the suit property.

When the appellants, through their Lawyers Messrs GP Advocates, forwarded the decree to the Registrar of Titles for registration of the 2nd Appellant, as the registered proprietor of the suit property, the Registrar declined to do so.

On 8th April, 2015 Vyas Chintan, the respondent to this Appeal filed HCMA No.333 of 2015 in the High Court, seeking, among others, an order to review and set aside the judgment and decree entered by the High Court in Civil Suit No.241 of 2006 Aketa Farmers and Millers Ltd & Anor v. Turyamureeba. M Milton& Anor. On 21st February, 2018 the Hon. Lady Justice Eva K. Luswata ruled in favour of Vyas Chintan, the respondent herein and, *inter alia*, set aside the judgment of Hon. Lady Justice Monica Mugenyi and held that the suit property belongs to the respondent herein.

The appellants being dissatisfied lodged in this court **Civil Appeal No.230 Of 2018.**

The appellants counsel argued grounds 1 and 4 together and grounds 2, 3 and 5 together.

Grounds 1 and 4

Mr. Omunyokol submitted that the learned trial Judge erred in law and fact when she reviewed and set aside the judgment.

Firstly, the learned trial Judge relied on and used some facts and evidence that did not exist at the time the judgment was delivered. This includes a Freehold Certificate of Title registered in the names of the respondent on 25th January, 2013. Judgment was delivered on 7th December, 2012 though the Freehold title in question was issued in the respondent's names on 25th January, 2013. The trial Judge also held that the respondent was the owner of the suit property and proceeded to set aside the judgment that was delivered on 7th December, 2012.

The appellant's counsel submitted that by relying on a certificate of title that did not exist at the time of the trial and delivery of judgment in **HCCS No. 241 of 2006**, the trial Judge offended the conditions for review of a judgment under section 82 of the Civil Procedure Act (Cap 71) and Order 46 rule 1(1) (b) of the Civil Procedure Rules, namely:-

a) Discovery of new and important matter of evidence not in his/her knowledge after the exercise of due diligence;

b) A mistake or error apparent on the face of the record.

The learned trial Judge erred in law to impose facts to the case that were non-existent at the trial and use the facts as a ground for setting aside the judgment.

Secondly, the factual evidence relied on by the trial Judge had problems in that the alleged sale agreement between the respondent on the one hand and Arthur Busingye and Kwame Ruyondo on the other hand was executed in contravention of an injunction issued by the Court on 30th November, 2006 which had been issued prior in time. This made the purported sale invalid since the restraint order of injunction was made in rem and affected the suit property. The order was binding on third parties (See **Mansukhal Ramji Karia & Crane Financing Co. Ltd v. Attorney General & Ors Civil Appeal No. 20 of 2002**). The trial judge erred to rely on the evidence to set aside the judgment.

Thirdly, counsel submitted that the learned trial Judge re-evaluated the evidence on record and arrived at a different decision yet she was not supposed to do so in an application for review. For example the learned trial judge, contrary to the decision of the trial judge held that ownership of the suit land could be ascertained by a routine search at the land registry. Justice Mugenyi found in her judgment that the file in respect of the suit property was missing when the appellants sought to have a special certificate of title issued in the names of the 2nd appellant. Further the presence of the 2nd appellant's application for a Special Certificate of Title, a Gazette notice together with correspondence from Custodian Board to the Registrar of Titles

showed that, the office of the Registrar was on notice that the 2nd appellant had unregistered interest in the suit property. Further, Mugenyi J held that while the missing file could not be accessed by the first appellant the defendant had access to it. Exclusion of the appellants amounted to unfair play and showed fraud in the registration of the defendants on the certificate of title for suit property.

Mr. Omunyokol submitted that the learned trial judge entered judgment against the applicant with an order for his eviction when he was in possession contrary to the findings of Justice Monica Mugenyi that the 1st appellant had been in occupation of the suit property from 1998 to 2006 up to the time when the 1st defendant took possession thereof.

Mr. Omunyokol submitted that re-evaluating the evidence on record and arriving at a different decision that was definitive of ownership of the suit property is not permissible in an application for review because on making a final judgment, the court became *functus officio*. It was improper and irregular for the same Court to sit on appeal in its own judgment by reconsidering the evidence on record, re-evaluating it and coming to different conclusions (See **Apollo Wasswa Basudde & 2 others v Nsabwa Ham Court of Appeal Civil Appeal No. 288 of 2016).**

Submissions on Grounds 2, 3 and 5

The appellant's counsel further submitted that the learned trial Judge erred when she held that the suit property belonged to the respondent on the following grounds.

Firstly, the judgment in **HCCS No. 241 of 2006** settled the question of ownership of the suit property. The learned judge held *inter alia* that Turyamureeba, the defendant in **HCCS No. 241 of 2006** was fraudulent when he transferred the suit property in his names.

The trial Judge ordered, among others, for cancellation of the Certificate of Title in the names of Turyamureeba and the registration of the 2nd appellant instead. The judgment was a judgment in rem as opposed to judgment in

persona. It affected the suit property but not the respondent. It operates directly on the property and binds all persons even if they are strangers to the decision (See **Mansukhal Ramji Karia & Crane Financing Co. Ltd v. Attorney General & Ors Civil Appeal No. 20 of 2002).** Counsel submitted that the respondent too is bound by the judgment of the High Court in **HCCS No. 241 of 2006.**

Secondly, there was a Temporary Injunction Order restraining Turyamureeba and his agents from evicting the first appellant from the suit property or disturbing him from his quiet enjoyment thereof and Turyamureeba was aware of it and tried unsuccessfully to set it aside. He applied to the Court of Appeal for leave to appeal against the order and later withdrew the application from the Court of Appeal when he purported to sell the suit property from which the respondent derives his title. Counsel submitted that Turyamureeba was required to obey the injunction order and by disobeying it, he was guilty of contempt of Court. The subsequent sale of the suit property by Turyamureeba to Arthur Busingye and Kwame Ruyondo was null and void for being in breach of court orders. Similarly, the purported sale of the suit property by Arthur Busingye and Kwame Ruyondo to the respondent is also null and void because it was made in breach of Court Order.

The change of tenure of the suit property from Leasehold to Freehold was also a nullity for being in contravention of the judgment and order of Court. In **Housing Finance Bank & Anor v. Edward Musisi CAM A No.158 of 2010,** it was held that "a party who knows of an existing order, regardless of whether in the view of that party the order is null or valid or irregular cannot be permitted to disobey it."

The appellant's counsel concluded that the respondent's acquisition of title in the suit property was and is therefore null and void *ab initio* because Turyamureeba acted in contravention of the Court order when he purported to sell the property to third parties. Those third parties also acted illegally when they purported to sell the suit property to the respondent. The judgment in in HCCS No.241 of 2006 affected the suit property and was a judgment in rem.

In conclusion the appellant's counsel prayed that:-

1. The Appeal is allowed.
2. The ruling and order of the Hon. Lady Justice Eva. K Luswata in HCMA No. 333 of 2015 be set aside.
3. The judgment of the Hon. Lady Justice Monica K. Mugenyi dated 7th December, 2012 and all orders made and delivered in HCCS No. 241 of 2006 be reinstated as a valid binding decision of the Court.
4. Costs of this Appeal and the Court below be awarded to the Appellants.

In reply learned counsel Dr. James Akampumuza who appeared jointly with learned Counsel Mr. Fox Odoi relied on their written submissions;

Submissions of the Respondent's Counsel in reply

The respondent's counsel submitted that the respondent filed High Court MA No. 333 of2015 under Articles 28 (1), 40, 44 (c), 26 of the Constitution of the Republic of Uganda, Section 33 of the Judicature Act, Sections 82 and 98 of the Civil Procedure Act and Order 9 rule 12 and Order 46 rule 1, 2 & 8 of the Civil Procedure Rules for orders that the judgment and decree in **Civil Suit No. 241 of 2006; Aketa Farmers & Millers Ltd and Mohammed Noordin vs. Turyamureeba M. Milton and Kanubhai G. Patel** be reviewed and set aside; execution of decrees and orders be stayed/set aside and for injunction in respect of the Respondent's land comprised in **FRV 1360 Folio 8 plot 19 Mackenzie Vale-Kampala Kyadondo** issued under Instrument No. 48026 measuring approximately 0.117 hectares and later, rectified to a new title measuring approximately O. 161 hectares and costs.

The appellants deliberately kept the respondent out of the main suit and withheld material facts from the court and in addition, made many misrepresentations and falsehoods that they presented as fraud. The Appellants misled court to issue orders to cancel a non-existent leasehold land title which affected the respondent's freehold title thereby prejudicially depriving the appellant of his property. Moreover, this was in a decree of a suit where he was not a party.

The Respondent's application was founded upon discovery of new and important matters of evidence. This was that he is the registered proprietor of the suit land having acquired it in 2009 for a consideration first as Leasehold from its original registered owners Arthur Busingye and Kwame Ruyondo who were in possession. Secondly, the Controlling Authority in 2012 converted Respondent's interest to Freehold. The Respondent from 2009 mortgaged the Leasehold Title to Banks. He also paid rates and other outgoings in his own names. Lady Justice Mugenyi had based her judgment on the limited pleadings Appellants filed, alleging that the 2nd Appellant and his brother purchased the suit property from one Roshan Aman in 1972. Before the transfer could be registered, the 2nd Appellant was affected by the expulsion of Asians in 1972 and the suit property was taken over by Government and vested in the Departed Asians Property Custodian Board. That the 2nd Appellant managed to repossess the property in 1995 and at that point, acknowledged an unregistered interest of the 1st Appellant in the suit land, and the latter took over possession thereof. That in an attempt to obtain a special certificate of title in respect of the suit land, the Appellants discovered that it had at some point been registered into the names of Milton Turyamureeba which registration they deemed illegal and fraudulent, and therefore filed the main suit, which was decided in their favour.

The Respondent's counsel submitted that the respondent never knew or had dealings with Turyamureeba Milton and Kanubhai G. Pater and sued them alongside the Appellants. The Appellants did not dispute the Respondent's ownership or challenge Arthur Busingye and Kwame Ruyondo's prior dealings in the land. Strangely, the Appellant stated that in December 2012, judgment was delivered in their favour which was binding on the Respondent (who they opted not to sue) as well. They argue that the sale of the suit property by Milton Turyamureeba to Arthur Busingye and Kwame Ruyondo and who sold to the respondent, was illegal.

That since Milton Turyamureeba had preferred an appeal against judgment, the application was premature. The application proceeded ex parte against 3rd and 4th respondents for failure to respond to or attend court to oppose

the motion. Justice Eva Luswata Kawuma heard the application for review and based on the sound reasons in her ruling granted the respondents application. The appellants appealed against that ruling setting aside the original judgment of Justice Mugenyi.

The respondent's counsel contended that the Appellants' appeal is incompetent because it was brought when the appellants had not purged themselves of contempt of court. The Appellant's contempt of Court arose when on the 11th of June, 2015 and 14th July 2015, the High Court in MA. No: 379 of 2015 granted an order in favour of the respondent maintaining the status quo. Secondly, on 20th August 2015, the respondents, their agents and/or anyone acting on their behalf were refrained from dealing in wasting, transferring, damaging and/or in anyway dealing with the suit property comprised in Freehold Register Vol. 1360 Folio 8 plot 19 Mackenzie Vale-Kampala Kyadondo issued under Instrument No: 480626 measuring approximately 0.117 Hectares pending determination of Miscellaneous Application No. 333 of 2015 or until further orders of the Court of Appeal. While the above orders were in place, the 1st Appellant lodged a caveat on the above title the subject of the restraint order on 24th August 2015 registered as Instrument No. KCCA 00021141 on 16th September 2015. On 21st February 2018, Lady Justice Eva Luswata granted an injunction prohibiting the Appellants from ever dealing in, wasting, alienating, transferring, damaging and/or trespassing on the Applicant's land comprised in Freehold Register Volume 1360 Folio 8 Plot 19 Mackenzie Vale - Kampala Kyadondo issued under Instrument No. 480626 measuring approximately 0.117 hectares and later rectified to a new title measuring approximately 0.161 hectares.

The respondents counsel contend that the appellants are in this court with unclean hands having committed contempt of court by disobeying the court order since June 2015 (**See Housing Finance Bank Ltd & Another vs Edward Musisi; Miscellaneous Application No. 158 of 2010 page 13 lines 298-305**). The Appellants proceeded to disobediently lodge a caveat on the title despite the court orders that they were aware of. The caveat was lodged on 24th August 2015 when the order was in existence. The Appellants

disobeyed the interim orders of the High Court Registrar since June 2015 when they had not appealed against the orders.

In the premises, the respondents counsel urged court to dismiss the appellant's appeal on the ground of unpurged contempt of court stated above.

Reply of the respondent to grounds of appeal.

Reply to Grounds 1 and 4

The respondents counsel submitted that the gist of the appellant's appeal is that Lady Justice Mugenyi had declared that the registration of the suit land in the names of Turyamureeba Milton was null and void for fraud and directed the Registrar of Titles to cancel it and substitute therein the names of the 1st Appellant as proprietor. The trial judge who reviewed the judgment correctly found, that no mention was made in the main suit of the fact that Milton Turyamureeba had at a certain point ceased to own the registered interest in the suit land and it was incumbent upon the Appellants as claimants, to have placed the correct facts before the court to guide Justice Monica Mugenyi appropriately.

Registered proprietorship to the property could have been ascertained by a search at the land registry. The respondent's counsel submitted that the first appellant sometime in 2008 sought to amend the plaint to add a 2nd Defendant for the reason that he had procured registration of the suit land fraudulently and then transferred it into the names of Milton Turyamureeba. The amendment was allowed and filed on 14th July 2009 more than one year after Busingye and Ruyondo were registered on the title. This registration was made on 11th June, 2018. The 1st Appellant did not investigate the title or would have included these two proprietors or the Respondent who became their successor in title as parties to the main suit.

The learned judge had noted that the appellants got a restraint order by way of a temporary injunction since 30th November 2006 that specifically restrained Turyamureeba Milton from dealing in the suit property but did not

necessarily restrain other parties. Moreover, the appellant has never been registered as proprietor and negligently left the land exposed to the transfers that affected third parties who are bona fide purchasers for value without notice.

The respondent's counsel submitted that the respondent's interest in the land changed from leasehold to freehold and the size of the acreage covered also changed. This added to his protection as a bona fide purchaser for value without notice of any defect in title. The remedy for the Appellants lay in suing Kanubhai G. Patel, Turyamureeba M. Milton and the Government of Uganda for damages for fraud under section 178 of the RTA.

The respondents counsel submitted that Arthur Busingye, Kwame Ruyondo and later the Respondent were not affected because they were never privy to the earlier dealings. In the premises, the trial judge never imposed facts to the case. The facts she established were facts that existed at trial but were concealed by the appellants from court. It follows that there was discovery of new and important matter of evidence not in the Courts knowledge after the exercise of due diligence and secondly, there was a mistake or error apparent on the face of the record which formed the basis for setting aside the Judgment.

As the trial Judge found, the Respondent was never party to the intended appeal by Turyamureeba and therefore could not present his case to the Court of Appeal. His application for review clearly fell under the exemption provided for under Order 46 rule 2 of the CPR. There was no common ground for appeal between the Respondent and Turyamureeba whom he included as the 3rd Respondent to his application for review. Several grounds were raised in the application for review. The Respondent succeeded because he showed that he had a new and important matter of evidence not reasonably within his knowledge after the decree was passed, or that the decree was passed on account of some mistake or error apparent on the face of the record or for some other sufficient reason.

The respondent proved that he was never given a hearing, and was purposefully kept out of the proceedings in the main suit when he had a good defence to the appellant's claims. The Appellants not only kept the respondent out of the proceedings but also omitted to inform the court that Turyamureeba Milton had long ceased to be the registered owner of the lease interest, the subject of the main suit when his names were cancelled and replaced by those of Arthur Busingye and Kwame Ruyondo and later into the Respondent's names. The appellants concealed the fact that the suit land had subsequently been sold to the respondent by Arthur Busingye and Kwame Ruyondo, who had then been registered as proprietors of the Leasehold since 2008.

These were never sued by the Appellants even when they amended their Plaint to include the then 2nd Defendant in 2009. Yet, the title had long changed hands to the Respondent who was in possession. Owing to this concealing and misrepresentations made by the Appellants, a Judgment was entered against Turyamureeba Milton with an order for his eviction. The Respondent came to know about the main suit for the first time when he was served with judgment and decree concerning the leasehold title. The judgment and decree were at variance and had the effect of cancellation of title and eviction without a hearing.

The respondent's counsel submitted that the trial Judge made a water tight decision for which she cannot be faulted. This is because there is the unimpeached evidence of Yafeesi Mwijusya, the Constitution, statutory provisions and binding Supreme Court decisions on review, which the Appellants never challenged nor distinguished. The facts reviewed disclosed error apparent on the face of the record.

Counsel further submitted that the appellants did not sue the Controlling Authority, the Commissioner Land Registration who issued title and the third parties from whom the respondent purchased his leasehold title. He contended that the facts disclosed a breach of the respondent's constitutional and right to a fair hearing from which no derogation is allowed.

Counsel further submitted that fraud must be directly attributable to the transferee in title (See **Kampala Bottlers vs Damanico (U) Ltd; Supreme Court Civil Appeal No 22 of 1992**). There was no fraud on the part of the respondent either directly or by necessary implication. Indeed, the learned Judge considered section 82 of the CPA and Order 46 rule 1 of the CPR and the trial judge correctly found that though the respondent was not a party to the main suit, he was a party aggrieved by the decree reviewed because that decision affected his registered ownership and possession since 2009 and the freehold title which was to be cancelled and he was never afforded any hearing.

There can be no derogation from the right to a fair hearing under Articles 28(1) and 44 (c) of the Constitution (**See AG & ULC vs James Mark Kamoga & Anor; Civil Appeal No. 08 of 2004** pages 14-16 par. 6 & **Mohan Musisi Kiwanuka vs Asha Chand Civil Appeal No. 14 of 2004** at pages 14-15).

Furthermore, the Appellant's erroneously argue that an aggrieved party is only one who suffers a legal grievance and the Respondent is not one on account of the fact that the freehold title on which he relies, was issued to him long after judgment was pronounced in the main suit and his registration was made in error. The respondents counsel contends that this argument is misleading as held by the learned judge in the review ruling. The respondent proved by affidavit that he was at the time of the original judgment in the main suit, in possession of the suit land as registered proprietor who had purchased it bona fide without notice of any fraud.

The respondent's counsel submitted that in the decree in the main suit, there is no mention of the respondent's freehold interest and the interest was not affected since the respondent was not given a hearing. As the learned trial judge noted that the decision of Mugenyi J was delivered on 7th November 2012 and a decree extracted on 19th February 2013 after the respondent had procured registration of his freehold interest on 25th January, 2013. The registration under a new freehold tenure came after Respondent acquired possession of the suit land and initially got registered as a leaseholder in 2009. The ownership started in 2009 and not 2012 and the Respondent was

entitled to convert the leasehold tenure to freehold tenure under Article 237 of the Constitution.

The respondent's counsel submitted that contrary to Appellant's submission, there is nothing like perpetual illegality in Uganda's land law which recognizes bona fide purchasers for value without notice. Yet, the Appellants admitted that they attempted to execute against the respondent a decree when he was not a party thereto. The learned trial judge correctly advised herself on the sale agreement and the temporary injunction when she found that although it is a judgment in rem, the decree in the main suit could not affect the freehold interest which it did not address.

The learned trial judge who reviewed the decree held that the respondents' ownership and possession of the suit land was not in issue in the main suit, and it was erroneous to say that conversion of the lease to a freehold was wrong or fraudulent, especially when the respondent was not accorded a hearing (See Articles 28 (1) and 44 (c) of the Constitution and sections 181, 178 and 59 of the Registration of Titles Act (RTA). Under S.181 of the RTA, the Respondent as a bona fide purchaser is not affected by any previous fraudulent dealings and fraud.

Counsel reiterated submissions that the appellants had not sued the respondent and his predecessors in title to conceal from court the actual ownership and registration on the certificate of title at the material time. Further, that under section 59 of the RTA, a certificate of title is conclusive evidence of title. Instead, the appellants wrongly sought to evict the Respondent from his land. The cited provisions of the RTA show that no action whatsoever lay against the Respondent who since 12th August 2009 before, the conversion of tenure, was the registered proprietor of the leasehold, as a bona fide purchaser for value. Counsel submitted that the appellants' remedy under section **178 of the RTA** was to sue **Kanubhai G. Patel, Turyamureeba Milton** and the **Government** for recovery of damages for the alleged fraud.

As to submissions of the appellants counsel relating to whether the learned trial judge wrongly invoked the review jurisdiction the appellants apart from merely alleging it adduced no evidence that the orders made by the learned Judge as regards the review application were not noted in the court register.

In any case such a failure would be a procedural irregularity that is incapable of vitiating the review proceedings (see Article 126 (2) (e) of the Constitution). The learned Judge did not order a rehearing of the case and just issued final orders arising from the review. In the premises, there was no order in relation to the hearing that had to be noted in the register and the court ought to dismiss the ground of appeal.

The respondents counsel submitted that trial judge was criticized for holding that registered ownership of the suit property could have been ascertained through a routine search at the land registry. However, the appellants never sued the Commissioner Land Registration for whatever they alleged against the office which liability could not be borne by the respondent.

The respondent's counsel submitted that the finding of fraud by Justice Monica Mugenyi was against the Defendants and not the Respondent nor his immediate predecessors in title. The 1st Appellant had been in occupation from 1998 to 2006 until when the 1st Defendant took possession of the suit property. The suit never covered what transpired between 2006 and when Arthur Busingye and Kwame Ruyondo purchased the suit Land. As the new evidence emerged, it was clear that the appellants' had misled Court that the title remained indefinitely inaccessible. Yet, the Respondent adduced new and important evidence that showed that they conducted all the usual necessary searches and did due diligence which disclosed that the land was available, the sellers were the registered proprietors and were in occupation hence available for purchase. The statement of search from the land registry Annexure D dated 20th July 2009 addressed to Arthur Busingye and Kwame Ruyondo had disclosed the same.

This fact was concealed from court by the Appellants who were not diligent enough to register the temporary injunction on the title. The respondent's

counsel submitted that the doctrine of Judgment in rem being invoked by the Appellants is inapplicable given the supremacy of the Constitution. It followed that the decision in **Mansukhal Ramji Karia & Anor v AG & 2 Others Civil Appeal No. 20 of 2002** is distinguishable and did not overrule existing Supreme Court decisions. Counsel further submitted that it could not supersede statutory provisions on the subject of review, the constitutional right to a fair hearing/trial, the protection of bona fide purchasers among others.

The respondent's counsel submitted that Judgment concerned the leasehold title that the Respondent had purchased as early as 2009 but later ceased to exist after the tenure was converted to freehold. The judge erroneously entered judgment without taking into account the evidence of the respondent's registered interest, ownership and possession. The appellants had no cause of action against the respondent. The respondent was an aggrieved party, as the registered owner in lawful occupation, who was deprived of land he acquired as leasehold interest from third parties three years prior to the Judgment which interest in land was later converted to freehold.

The respondent's claim was neither frivolous nor vexatious because he was an aggrieved party wrongfully deprived of registered interest and ownership of land through the prejudicial conduct of the appellants. The impugned judgment purported to determine the interest in the suit property between the appellants, Milton Turyamureeba & Patel Kanubhai who were neither in occupation nor registered proprietors of the suit property.

Reply to grounds 2, 3 and 5

The respondent's counsel submitted that the above submissions resolves grounds 2, 3, and 4 of the appeal and invited the court to find that the trial judge correctly found that the suit property belonged to the respondent. The trial judge neither sat on appeal nor re-evaluated the evidence on record in the process of review but relied on the new and important information that

was brought to court inter partes. The judge was not *functus officio* and the rule was inapplicable.

The submission that judgment in HCCS No. 241 of 2006 settled the question of ownership of the suit property is faulty as there was a different registered proprietor who was also in occupation thereof. The fact that Turyamureeba Milton, the Defendant in HCCS No. 241 of 2006 was fraudulent when he transferred the suit property in his names had nothing to do with the respondent who was the registered proprietor in possession and was never sued. Indeed, Judge Mugenyi ordered for cancellation of the title which was in his names and registration of the 2nd Appellant as the new owner thereof. Unknown to the Judge, there were no names of Turyamureeba. It rendered the order incapable of execution. Turyamureeba ceased to be the registered proprietor in 2008 and other third parties got registered. Thereafter the respondent got registered. The respondents remedy as a person who was not a party was to apply for review.

Submissions of Appellant's counsel in reply to preliminary objection of respondent

The appellant's counsel in reply to the preliminary objection of respondent submitted on the alleged unpurged contempt of court as follows. That the appellants are alleged to have committed contempt of Court by disobeying a court order issued on 11th June 2015 and 14th July 2015 through the action of lodging a caveat on the respondent's freehold certificate of title described as FRV Folio 8 Plot 19.

The appellant's counsel submitted that the appeal is lawfully filed in this court and the appellants committed no contempt of court as alleged by the respondent. The court order issued by the High Court in MA No.379 of 2015 was intended to maintain the status quo and did not expressly bar the appellants in any way from lodging a caveat to protect their interest in the suit property. The essence of the caveat was to preserve the suit property. The respondent had also filed *HCMA No 538 of 2018* in the High Court of Uganda at Kampala where the respondent seeks to have the appellants declared to be

in contempt of court but the application has not been heard yet. The respondent cannot, therefore, argue that the appellants are in unpurged contempt when no orders have been made by the court to that effect.

Further, the appellant's counsel submitted that the preliminary objection is premature because a similar matter of alleged contempt of court against the appellants has been raised by the respondent in *HCMA No. 539 of 2018* which has not been heard and disposed of by the High Court, the issue of alleged contempt of court cannot be entertained by this court. A decision from the High Court in the said application can be appealed by any aggrieved party. In the premises, it is premature for the respondent to raise the matter in this Court. In any case, the caveat lodged by the appellants was intended to preserve the suit property by maintaining the status quo which fulfils the same purpose of the interim order of injunction.

The appellant's counsel submitted that the circumstances under which the respondent purported to acquire the suit property clearly show that the respondent's predecessors in title acquired an invalid certificate of title and there was no valid title that could be acquired and passed to the respondent. The predecessors in title of the respondent obtained the title in violation of court orders. Further, it was prudent for the appellants to lodge a caveat forbidding further transactions on the suit title for preservation of the suit property till conclusion of the dispute in court. He prayed that the preliminary objection is overruled.

Rejoinder to grounds 1 and 4

The appellant's counsel submitted that the appellants did not keep the respondent out of Court. Mr. Turyamureeba was the one claiming ownership of the suit property at the time of proceedings in the suit. This is evidenced by the fact that he threatened to evict the appellants from the suit property prompting the appellants to file a suit against him and another. The appellants further obtained a temporary injunction to restrain the defendant from interfering with their quiet enjoyment of the suit property. In his written

statement of defence Mr. Turyamureeba claimed ownership of the suit property and tendered a certificate of title as proprietor of the suit property.

The appellants counsel further submitted that it is not true that the appellants misled court into cancelling a non-existent certificate of title. The fact is that there was a certificate of title for the suit property which the court held to have been fraudulently transferred into the names of Turyamureeba. The court also directed the Registrar of Titles to cancel the names of Turyamureeba and instead register the 2nd appellant as proprietor.

Counsel further submitted that there was a certificate of title in existence which had been fraudulently registered in the names of Turyamureeba and subsequently in violation of the court orders registered in the names of third parties at different stages. He contended that a fraudulently acquired certificate of title cannot confer valid ownership of property to a third party. A title acquired in violation of a court order similarly cannot confer ownership to a third party such as the respondent. The status of the suit property was preserved by the injunctive order of the Court in HCMA No. 296 of 2006.

Counsel further submitted that there were no valid dealings in the suit property inclusive of transfers of title, mortgaging of the suit property by the respondent; the payment of rates for the suit property by the respondent, and the conversion of tenure of the suit property from leasehold to freehold by the respondent.

Further, the appellants counsel submitted that analysis of the so called new and important evidence was non-existent at the time of trial of the suit. For instance, the purported conversion of the suit property to freehold tenure by the respondent took place on 25th January, 2013 whereas judgment in the main suit had been delivered on 7th December, 2012. Such evidence should not be relied on to set aside a judgment on review.

With regard to the sale agreement between the respondent and Kwame Ruyondo and Arthur Busingye, the appellant's counsel submitted that the use of the sale agreement in respect thereof when there was a prior existing court order, for the purpose of setting aside the judgment, was erroneous as the

order was binding on Arthur Busingye and Kwame Ruyondo. In the same category falls the evidence of mortgaging the suit property and payment of rates to Kampala Capital City Authority (KCCA).

Counsel further contended that the alleged facts, even if they were true, took place when there was an existing court order, made in rem that was binding on third parties inclusive of the respondent. The alleged mortgaging of the suit property to a financial institution on the strength of an invalid title is legally untenable from the start because there was effectively no title to transact upon.

In reply to the submission that the judgment of court was based on limited pleadings, the appellant's counsel submitted that the appellants' pleadings disclosed a cause of action against the defendants and the suit succeeded. It was unnecessary for the appellant to sue either the controlling authority or the Attorney General to succeed against the offenders the court found culpable. In any case, the court directed the Registrar of Titles to cancel the names of Turyamureeba from the certificate of title for the suit property on ground of fraud and to register the 2nd appellant as the registered proprietor for the suit property. The said Turyamureeba proved his registered proprietorship at the time of the trial. He even lodged an appeal in this Court vide Civil Appeal No. 157 of 2015 but later withdrew it.

On whether the registration as proprietors on the certificate of title for Kwame Ruyondo and Arthur Busingye, the third parties respectively from whom the respondent allegedly purchased the property, is unimpeachable, the appellant's counsel submitted that this is not true. It is curious for the respondent to make efforts to protect the registration of Kwame Ruyondo and Arthur Busingye when he ought ordinarily to sue them for purporting to sell to him suit property whose title was acquired in violation of a court order.

The respondent also asserted that there was no fraud on his part yet no one had attributed fraud to him. The appellant's counsel submitted that the position of the appellants is that the certificate of title that the respondent

purports to hold could not have been validly acquired by him because the respondent's predecessors in title acquired the said title in violation of court order. The remedy for the respondent was and is to sue the parties from whom he purportedly acquired the property for a refund of his money since there was a judgment that settled the issue of ownership of the property.

On the issue of whether, the respondent was in possession of the suit property, Mr. Omunyokol submitted that the 1st appellant was the one in possession of the suit property at the time of the trial of the suit and this fact is confirmed by the trial Judge in her judgment. He submitted that to suggest otherwise amounts to re- evaluating the evidence on record and the findings of the trial court which should not be done in reviews but only on appeals.

The appellant's counsel submitted that it was inconceivable that two warring parties were fiercely battling for ownership and possession of a prime property in Kololo, Kampala to the extent of court issuing an injunctive order, pending disposal of the main suit, without a third party claiming ownership and possession of the suit property getting to know about the case the battle in court. He submitted that this demonstrated that the respondent was not the owner in possession and did not have any legal interest in the suit property, at the time of proceedings in the main suit and its determination. Further, there were attempts to evict the appellants from the property and they obtained an injunction to restrain the defendant from doing this.

On whether the appellants could have conducted a routine search at the land register to determine the status of the file, the appellant contends that this was erroneous as it amounts to re-evaluating the evidence on record and arriving at different conclusions. Counsel contended that this is not the role of a Judge in an application for review. Moreover the trial judge had found that the file in respect of the suit property was conveniently misplaced at the land registry and only one Turyamureeba had access to it.

On whether the respondent was a bona fide purchaser for value without notice of defect in title and whether the remedy for the appellants lay in suing Kanubhai G. Patel, Turyamureeba M, Milton and Government for damages for

fraud under Section 178 of the RTA, the appellants counsel submitted that for one to enjoy the protection of law to a bona fide purchaser of land, the purchaser must hold a valid certificate of title. Where the certificate of title is invalid, there is no title to pass.

The appellants counsel reiterated submissions that the material transactions affecting the suit property were unlawful because there were orders of court barring any interference with the property. There were, the injunctive order restraining Turyamureeba, the defendant in HCCS No. 241 of 2006 from interfering with the 1st appellant's quiet enjoyment of the suit property. Secondly, there is the judgment in the main suit which declared Turyamureeba as a fraudster and the 2nd appellant as the owner of the suit property. All subsequent dealings on the suit property by Arthur Busingye, Ruyondo and the respondent are as a result invalid.

The appellant's counsel further submitted that the argument that the respondent was not given a hearing and had been kept out of the proceedings in the main suit when he had a good defence to the appellant's claims was inapplicable. The appellants were unaware of the subsequent transactions in the suit property and proceeded from the premises that the suit was fraudulently registered in the names of one Turyamureeba. Not being given a hearing is not a ground for review.

Further, counsel contended that having a defence is also not a ground for reviewing a court judgment. The facts are that Turyamureeba had threatened to evict the appellants from the suit property and the 1st appellant kept him from doing so through a court order issued in HCMA No. 296 of 2006. The 1st appellant was in possession of .the suit property but the file in the land registry was missing and the appellants had no access to it. It was not therefore, possible for the appellants to know that the registered proprietorship of the property had changed hands several times.

The appellants counsel prayed that grounds 1 and 4 of the appeal are allowed.

Rejoinder to reply on grounds 2, 3 and 5

On whether the suit property belongs to the respondent, the appellants counsel submitted that it was not permissible for the Court in an application for review to re-evaluate the evidence on record and reach to a contrary finding that the suit property belonged to the respondent. The Court had no power to confer rights of ownership of the suit property to the respondent. Moreover, the respondent's purported freehold title was founded on an invalid title.

Counsel prayed for the judgment in the main suit to be reinstated to allow the Registrar of Titles to cancel all the names in the certificate of title of the suit property and register the same in the names of the 2nd appellant.

On whether the judgment was incapable of execution on the ground that Turyamureeba had ceased to be the registered proprietor and other third parties got registered, the appellants counsel submitted that the judgment was in respect of the suit property and is capable of being executed. He further contended that the argument that the same of the suit property in 2008 and later in 2009 was lawful was a flawed one. This is because the purported agreement of sale of the suit property in 2008 was between Turyamureeba Milton and Arthur Busingye and Kwame Ruyondo and was made in violation of court orders.

Further still, the respondent was not a party to the said purported sale and cannot authoritatively testify about it. On whether the doctrine of judgment in rem invoked by the appellants is inapplicable given the supremacy of the constitution, the appellants counsel submitted that it was applicable in the circumstances. The respondent is free to sue Kwame Ruyondo and Arthur Busingye and he will no doubt get a fair hearing once he takes the case to court. In the premises counsel prayed that grounds 2, 3 and 5 of the appeal are allowed.

In conclusion the appellants counsel submitted that it is clear that the Judge who conducted the review played the role of an appellate court by re-evaluating and reviewing the evidence on record and coming to a different conclusion. That she erroneously conferred ownership of the suit property to

the respondent when the court was *functus officio*. Further in re- evaluating the evidence on record, the trial Judge relied on some material evidence which did not even exist at the time of the trial, while the other evidence she relied on was questionable, for instance, that the alleged sale of the suit property to third parties took place contrary to and in violation of an existing court order made in rem, and, which was, therefore, binding to the whole world, including the respondent, and which also preserved the status quo of the suit property. He reiterated prayers that the appeal be allowed in terms proposed in the Memorandum of Appeal with costs of this appeal and the court below.

Rejoinder to the preliminary point of law by the respondent's counsel

In rejoinder the respondents counsel reiterated the earlier submissions in reply. In rejoinder to the reply on preliminary points, the respondents counsel reiterated earlier submission, and added that the appellants' appeal is incompetent because of the appellants had not purged their contempt of court.

I have read the submissions and will further make reference to the submissions in rejoinder in the judgment. The respondent's counsel prayed that the preliminary point of law is sustained and the appeal dismissed with costs.

Consideration of appeal

I have carefully considered the appeal, the submissions of counsel and the law. This is an appeal from a decision of the High Court Luswata J in an application for review of the main judgment. The main judgment was delivered in High Court Civil Suit No. 241 of 2006; **Aketa Farmers and Millers Ltd vs Turyamureeba M. Milton and Kanubhai G Patel**. The review application is **Miscellaneous Application No. 333 of 2015** filed by a third party Mr. Vyas Chintan *inter alia* against Messrs Aketa Farmers and Millers Ltd and Mohamood Noordin Thobani (The appellants in this appeal).

The general duty of this court as a first appellate court includes subjecting the evidence on record to fresh scrutiny and coming up with conclusions on all issues of fact and law with the necessary caution that we, the first appellate court justices, did not hear or see the witnesses testify unlike the trial court which heard and saw the witnesses and assessed *inter alia;* their demeanour. The general duty to reappraise evidence is set out under Rule 30 (1) (a) of the Rules of this court which states that:

> 30. Power to reappraise evidence and to take additional evidence
>
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and

In **Peters v Sunday Post Limited [1958] 1 EA 424** and at page 429, the East African Court of Appeal applied the equivalent rule on the duty of a first appellate court and held that:

> An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

In this case the appeal arises from a ruling on review where affidavit evidence was used and judgment in the main suit set aside. Where an appeal arises from the decision of the trial court pursuant to proceedings in review of a judgment the principles to be followed are set out by the East African Court of Appeal in **Mbogo and another v Shah [1968] 1 EA 93**. The facts are that the respondent was knocked down and injured by a vehicle which was owned by the first appellant and driven at the time by the second appellant. The respondent notified the insurance company, the insurers of the vehicle that he intended to hold them liable to compensate him. He therefore served the company with a notice under the Insurance (Motor Vehicles Third Party Risks) Act, s. 10 (2) (a) of Kenya and the insurance company denied liability. Further, the insurance company's advocate, refused to accept service of process filed by the respondent against the appellants and service was effected by advertisement. The company neither entered appearance nor filed a written

statement of defence whereupon the plaintiff duly obtained judgment ex parte against the appellants. The appellants applied to set aside the judgment and the application was refused by the High Court. The appellant filed an appeal against that refusal. Sir Clement De Lestang V-P on the principles to be applied in an appeal from a review decision said:

> I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view, it has failed to do.

Further Sir Charles Newbold P stated that:

> We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of the discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.

These principles were echoed in **Mbogoh v Muthoni and another [2006] 1 EA 174** by Court of Appeal of Kenya at Nairobi in an appeal from a ruling make on review of the judgment when it court held that:

> In deciding the application for review, the learned Judge of the superior court was exercising judicial discretion. As such, this Court on appeal may only interfere with such exercise of discretion on well settled principles; that is to say, if the appellant satisfies the court that the decision is clearly wrong due to misdirection or because the court acted on matters on which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. See Mbogo v Shah [1968] EA 93.

This appeal challenges the finding of the trial judge on review in which the original judgment in High Court Civil Appeal No. 241 of 2006 was set aside and substituted with the judgment on review on the issue of ownership of Freehold Register Volume 1360 Folio 8 Plot 19 Mackenzie Vale Kampala measuring approximately 0.117 hectares and later rectified to measure approximately 0.161 hectares. The title was originally described as leasehold title known as LRV 446 Folio 22 Plot 19 Mackenzie Vale Kampala. High Court Civil Suit No. 241 of 2006 dealt with LRV 446 Folio 22 Plot 19 Mackenzie Vale Kampala while the review application was brought by the registered proprietor of Freehold Register Volume 1360 Folio 8 Plot 19 Mackenzie Vale Kampala. The question to be determined is whether the decision is clearly wrong due to misdirection or because the court acted on matters on which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

The material facts from the record that can be established are that the original property the subject matter of Civil Suit No 241 of 2006 is described as LRV 446 Folio 22 Plot 19 Mackenzie Vale Kampala registered in the names of Roshan Aman on 24th April 2001 under instrument No 315851 according to annexure I to the affidavit in support of Miscellaneous Application No 333 of 2015 deposed to by Vyas Chintan. This property was taken over by the Government of Uganda and managed by the Departed Asian Property Custodian Board and subsequently repossessed and certificate of repossession issued to the second appellant and his deceased brother who in turn conveyed without registration, the property to the first appellant.

The affidavit of Vyas Chintan and the certificate of title described as LRV 446 Folio 22 Plot 19 Mackenzie Vale Kampala also disclosed that one Kanubhai G. Patel had been registered on the title deed on 30th March 2006 under instrument No. 364922 as proprietor. Thereafter the same title shows that the property was registered in the names of one Turyamureeba M. Milton on 5th May 2007 under instrument No. 366059. The same title reveals that the property again changed hands on 11th June 2008 when it was registered in

the names of Arthur Busingye and Kwame Ruyondo as tenants in common under instrument No 397544.

The property was subsequently registered in the names of the respondent Mr. Vyas Chintan for the first time as a freehold title described as Freehold Register Volume 1360 Folio 8 measuring 0.161 hectares for the property also described *inter alia* as Plot 19 Mackenzie Vale Kampala.

On the other hand the facts of the appellant in the main suit only show that the last registered owner of the suit property was one Turyamureeba M. Milton who was sued in the main suit as the first defendant.

The judgment in the main suit in High Court No 241 of 2006; Aketa Farmers and Millers Ltd and Mohamood Noordin Thobani as plaintiffs against Turyamureeba M. Milton and Kanubhai G Patel as Defendants was delivered on the 7th December, 2012 by Justice Monica K. Mugenyi. The learned trial judge entered judgment for the plaintiff and issued the following orders and declarations.

A declaration that the registration of the land comprised in LRV 446 Folio 22 situated at plot 19 McKenzie Vale, Kololo at Kampala in the names of the second defendant and the subsequent transfer thereof into the names of the first defendant was procured by fraud and is therefore null and void.

Secondly, that the Registrar of Titles cancels the names of the first defendant from the certificate of title in respect of the land comprised in LRV 446 Folio 22 situated at plot 19 McKenzie Vale, Kololo – Kampala and substitute it with the registration of the second plaintiff as the registered proprietor thereof.

Thirdly, a permanent injunction was issued restraining the defendants by themselves or any of them, their servants or agents or any person acting under their authority from occupying or interfering with the plaintiff's quiet enjoyment of the suit premises.

Fourthly, general damages in the sum of Uganda shillings 75,000,000/= only payable with interest at 8% per annum was awarded from the date of judgment until payment in full.

Lastly, the court awarded the costs of the suit. It is clear from the pleadings and the judgment that the respondent was not a party to High Court Civil Suit No 241 of 2006. It is also clear that the registration of the respondent is of the freehold interest in the property and not leasehold interest. I will further make comments about the different definitions of leasehold interest and freehold interest under the Land Act Cap 227. For the moment it suffices to state that the basis of the respondent's application for review of the judgment in High Court Civil Suit No 241 of 2006 is his assertions clearly averred in his application for review in Miscellaneous Application No 333 of 2015 arising from HCCS No 241 of 2006. In that application Mr Vyas Chintan cited all the parties to the main suit us respondents and asserted *inter alia* that High Court Civil Suit No 241 of 2006 was an illegality and a nullity in law and violated the applicant's fundamental and economic rights to own property and to be heard. Secondly, that there were new and important matters of evidence that were not available to the court at the time of the judgment which the applicant could not produce at the time the judgment was issued. The new or important matter of evidence was his registration as the registered proprietor of freehold land as has been described above. Secondly, he contended that there was an illegality apparent on the face of the record. Particularly in paragraphs 9 and 10 of the grounds in the notice of motion he states as follows:

> 9. No other person has ever been registered on Applicant's Freehold Title which was granted to the applicant within the legal mandate of the statutory owner, the Kampala District Land Board.
>
> 10. Prior to that, applicant had purchased the land comprised in Leasehold Registration Volume 446 Folio 22 Plot 19 McKenzie Vale, Kololo, Kampala from its registered owners at a consideration, was given vacant possession and were duly registered on the Land Title and acquired secured loan facilities by mortgaging it.

In the affidavit in support of the application, the respondent further asserted that he had purchased the property as the leasehold described above and duly got registered.

The review application was heard by Justice Eva K. Luswata and her ruling was delivered on 1 February, 2018. The issues framed in the ruling are:

1. Whether the applicant not being a party to the main suit is entitled to the grant of the remedy of review.
2. Whether the applicant is entitled to the remedy of an order to set aside the judgment and decree of the High Court in the main suit and the threatened execution thereof?
3. What remedies are available to the parties?

The first issue of whether the applicant not being a party to the main suit is entitled to the grant of the remedy of review, the learned review judge held that the applicant was an aggrieved party and entitled to apply for review of the judgment which affected his interests. She found that the applicant was affected by the terms of the decree in the judgment delivered on 7th December 2012. This is what the learned trial judge held:

> Judge Mugenyi's judgment was delivered on 7/12/2012 and decree extracted on 19/2/2013, the latter coming after the applicant procured registration of his freehold interest on the 25/1/2013. Although it is a judgment in rem, the same argument raised by the respondent's counsel would hold that the decree in the main suit could not affect the freehold interest which it did not address. Since the applicant's ownership and possession of the suit land was not in issue in the main suit, it would be wrong to say that the conversion of the lease to a freehold was wrong or fraudulent, especially when he was not accorded a hearing.
>
> I would accordingly find that although not a party to the main suit, the applicant would be deemed affected by its import. The applicant therefore succeeds in the first issue.

The learned trial judge who presided in the review application further considered issues two and three together. She first addressed the issue of whether the judgment sought to be reviewed was the subject of an appeal. The learned judge however found that an appeal had not been instituted since there was only a notice of appeal. Secondly, because the applicant was not a party to the intended appeal, he could not present his case to the Court of Appeal. After making reference to the history of acquisition of the suit

property by the appellants appeal, the learned trial judge went ahead to hold as follows:

> I would agree with the applicant's counsel that no mention was made in the main suit of the fact that the third respondent Turyamureeba at a certain point ceased to own a registered interest in the suit land. It was incumbent upon the first and second respondents as claimants, to have placed in the correct facts before the court to guide her appropriately. The true ownership of the suit land could have been ascertained by a routine search at the land registry.

In conclusion the learned trial judge found that the first respondent took no trouble to investigate the title which would have given him facts to include those two registered proprietors who became the successor in title of Turyamureeba. Though there was a temporary injunction in place since 30th of November 2006, which specifically restrained Turyamureeba from dealing in the suit property and not necessarily other parties. She ruled that the first respondent should have taken the extra step to have the order registered with the registrar of titles. In any case the learned trial judge further ruled that the applicant during the pendency of the suit acquired legal interest in the property that ought to have been investigated by the court to establish whether there was a bona fide purchaser for value. The learned trial judge ruled *inter alia* that keeping the applicant out of the proceedings of the main suit of which he had no knowledge denied him the right to be heard with regard to these interests in the suit property. She held that the remedy of review was open to the applicants and allowed the second and third issues whereupon she issued the following orders:

1. The judgment and decree entered by the High Court in Civil Suit No 241 of 2006 Aketa Farmers & Millers Ltd and Mohamood Noordin Thobani vs Turyamureeba M. Milton and Kanubhai G Patel be reviewed and set aside.
2. Execution of decrees and orders arising from the above Civil Suit No 241 of 2006 be stayed/set aside.
3. An injunction to issue against the respondents prohibiting them from ever dealing in, wasting, alienating, transferring, damaging, and/or trespassing on the applicants land comprised in Freehold register

volume 1360 folio 8 plot 19 McKenzie Vale Kampala, Kyadondo issued under instrument No 480626 measuring approximately 0.117 ha and later rectified to a new title measuring approximately 0.161 ha.

4. The respondents meet the costs of the application.

The appellants were aggrieved by the ruling and appealed to this court on the grounds stipulated in the memorandum of appeal.

The respondents counsel raised a preliminary objection to the effect that the appellants were in contempt of court and had not purged that contempt and therefore the appellants appeal is incompetent. In support of the argument, the respondents counsel relied on the decision of the High Court dated 14th of July 2015 in Miscellaneous Application No 379 of 2015 in which an order was issued in favour of the respondent maintaining the status quo. The Order is maintaining the status quo is dated 11th June, 2015 in Miscellaneous Application No 379 of 2015 where an interim order was issued which provided as follows:

1. The current status quo be maintained pending the hearing of the application for interim orders inter partes on the 14/7/2015.
2. The status quo to be maintained as by the pleadings.
3. Costs stay in the cause.

Another interim order was issued on 14th July, 2015 extending the interim order issued to last until 20 August 2015 with costs in the cause.

A further ordered relied on by the respondent is dated 20th August, 2015 and allows Miscellaneous Application No 379 of 2015 where the following orders are issued:

a) The application is allowed.

b) The respondents, their agents and/or anyone acting on their behalf are hereby restrained from dealing in, wasting, transferring, damaging and/or in any way dealing with this suit land comprised in Freehold Register Volume 1360 Folio 8 Plot 19 McKenzie Vale – Kampala Kyadondo issued under Instrument No 480626 measuring

approximately 0.117 hectares until the determination of Miscellaneous Application No 333 of 2015 or until final orders of this honourable court.

c) Costs shall be in the cause.

Apparently a caveat was lodged by the first appellant company on FRV 1360 folio 8 plot 19 McKenzie Vale – Kampala 16th September, 2015. The encumbrance page of the title deed only shows a mortgage of bank of Baroda registered on 19th November, 2014. This information appears in the respondent's supplementary record of appeal. The complaint of the respondent is that the caveat was registered when there was an order maintaining the status quo.

As a matter of fact the three interim orders maintaining the status quo were issued within the period between 11th June, 2015 and 20th August, 2015. By the time of the caveat on 16th of September 2015, the interim order of 20th August, 2015 was in force. The question which can be considered from facts on the face of the record is whether the interim order of 20th August, 2015 was breached by the appellants lodging a caveat forbidding the registration of any interest in the registry of the certificate of title. The wording of the order of 20th August, 2015 restrained the appellants or their agents from dealing in, wasting, transferring, damaging or in any way dealing with the suit property. The caveat was not, in any way, dealing in, wasting of, transferring, damaging or in any way dealing with the suit property since the interest of the respondent which was restrained from being interfered with remained intact. The appellants by lodging the caveat did not in any way deal in the property. They did not waste the property. They did not transfer the property. They did not damage the property or in any way deal with the suit property. A caveat forbids entry of interest affecting land on the register and is not a transaction of dealing in registered property. Section 139 of the Registration of Titles Act Cap 230 (RTA) allows an interested person claiming any interest in land under the operation of the Act to lodge a caveat with the registrar forbidding the registration of any person as transferee or proprietor of or of any instrument affecting the estate or interest until after notice of the

intended registration or dealing is given to the caveator or unless the instrument is expressed to be subject to the claim of the caveator as required in the caveat or unless the caveator consents in writing to the registration.

The very wording of section 139 of the RTA forbids the dealing in the land the subject of the caveat. By literal interpretation of section 139 of the RTA which permits the lodging of a caveat forbidding "dealing" in the suit property. The caveat itself is not "dealing in registered property" but a statutory remedy to forbid such envisaged dealing in the suit property or registration affecting the suit property without notice to caveator. The interim order of the court was not violated by lodging a caveat when there was a pending suit by way of an application for review of the main judgment between the appellants and the respondent who is the registered proprietor of FRV folio 1360 Plot 19 Mackenzie Vale - Kololo. The caveat is a statutory remedy and may be removed upon application by the registered owner. The caveat is registered upon satisfaction of the Registrar of Titles that the intending caveator claims any estate or interest in the land. The basis of the interest of the appellants to Plot 19 Mackenzie Vale - Kololo is a decree of court in HCCS No 241 of 2006, the subject matter of the application for review in High Court Miscellaneous Application No. 333 of 2015 from which the interim or interlocutory order dated 20th August 2015 arose. The interlocutory order was issued pending determination of the application for review and therefore the rights of the parties remained indeterminate. The caveat in effect maintained the status quo by ensuring that no further interest was registered on the suit property without notice. In any case, the final ruling in the application for review was delivered in February 2018. I will further consider an issue of whether a ruling in a review application by setting aside the judgment of the court on the ground of not having heard the respondent could be a basis for a judgment against the appellants on the merits or whether having set aside the judgment, the issue of ownership of the suit land, whichever way described, should have been determined after hearing the appellants and the respondent on the merits.

In the premises, the preliminary objection of the respondent challenging the competence of the appeal on the ground of contempt of court order by the appellant has no merit and is overruled.

The appellants counsel addressed the court on grounds 1 and 4 first and then grounds 2, 3 and 5 together and I will try to follow the same format in resolving the issues.

Grounds 1 and 4 of the appeal respectively are:

Ground 1: **The learned trial judge erred in law and fact when she wrongly set aside the judgment and decree in HCCS No 241 of 2006; Aketa Farmers & Millers Ltd versus Turyamureeba M. Milton and Another.**

Ground 4: **The learned trial judge erred in law and fact when she, in deciding the application in favour of the respondent, entertained new evidence and also relied on a Freehold certificate of title for the suit property which, at the time judgment in HCCS No 41 of 2006 was delivered, did not exist and/or was not registered in the names of the respondent.**

In support of the above two grounds, Mr George Omunyokol submitted that the learned trial judge relied on and used facts and evidence that did not exist at the time of the main judgment. This included the non-existence of the Freehold certificate of title registered in the names of the respondent. He contended that this offended the provisions of section 82 of the Civil Procedure Act and Order 46 rules 1 (1) (b) of the Civil Procedure Rules which require the dispute to be based on the discovery of new and important matters of evidence which could not be discovered after the exercise of due diligence. Alternatively, the review should be based on a mistake or error apparent on the face of the record.

The appellant also relied on the factual evidence of the sale agreement between Arthur Busingye and Kwame Ruyondo as proprietors of the suit property and the respondent. He contended *inter alia* that there was an injunction which had been issued by the court on 30th November, 2006

forbidding any dealing in the suit property and the transaction in question by which the property was transferred was carried out in violation of the injunction. He submitted that the order was binding on third parties.

The appellant's counsel also criticised the learned judge for arriving at a different decision which was not supposed to be the case in an application for review. This included the finding that the ownership of the suit property could be ascertained by routine search at the land registry contrary to the finding of the trial judge in the main suit that the file in respect of the suit property at the Land Registry was missing and inaccessible to the appellants. On the other hand the review ruling did not take into account the existence of the appellant's application for a special certificate of title, Gazette notice and correspondence from the custodian board showing that the second appellant had an unregistered interest in the suit property. Furthermore, the appellants were in possession according to the findings of the trial judge in the main suit but the review ruling states the contrary. Finally, the submission of the appellants was that the court having established the ownership of this suit property it was not permissible in an application for review to make a final judgment changing the ownership to that of the respondent because the court was *functus officio*.

In reply the respondent's counsel submitted that the basis of the judgment in the main suit was the invalidity of the title of the Turyamureeba Milton which did not take into account the fact that the said Turyamureeba at a certain point in time ceased to be the registered proprietor of the suit property and the appellants had not placed the correct facts before the court. Further, that the registered proprietorship could be ascertained by a search at the land registry. He pointed out that the appellants amended the plaint to add the second defendant who had procured registration of the suit property and transferred it into the names of Milton Turyamureeba. However, the amendment was allowed on 14th July, 2009 more than a year after the registration of Businge and Ruyondo, who subsequently sold the property to the respondent. The appellants ought to have investigated the titles to include the subsequent successors in title of the suit property. Moreover, the

respondents counsel submitted that the temporary injunction order only restrained a specific person namely Milton Turyamureeba from dealing in the suit property but did not apply to other parties who subsequently got registered on the title. Last but not least the respondent's title was changed from leasehold to freehold and the appellant's remedy was in filing a suit against Kanubhai G Patel and Turyamureeba for damages.

The respondent's counsel further submitted that the respondent was not a party to the main suit and the decree against Milton Turyamureeba which cancelled his name from the certificate of title and ordered the registration of the first appellant affected his rights as a registered proprietor of Freehold for the same plot of land without being heard. He could not appeal the decision and could only apply to set aside the judgment through an application for review. Counsel asserted that this amounted to a new and important matter of evidence not reasonably within the respondent's knowledge after the decree was passed. Secondly, there was some mistake or error apparent on the face of the record. He had not been given a hearing which was a fundamental right from which there can be no derogation under article 28 and 44 (c) of the Constitution of the Republic of Uganda.

I have carefully considered grounds 1 and 4 of the appeal. Review is a procedure provided for under Order 46 Rule 1 of the Civil Procedure Rules as well as section 82 of the Civil Procedure Act.

Order 46 rule 1 of the Civil Procedure Rules provides that:

> 1. Application for review of judgment.
>
> (1) Any person considering himself or herself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient

reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

The phrase "Any person considering himself or herself aggrieved" is also repeated in section 82 of the Civil Procedure Act which provides that:

> 82. Review.
>
> Any person considering himself or herself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.

The phrase "person aggrieved" was held in **Re Nakivubo Chemists [1979] HCB** page 12 to mean a person who has been injuriously affected in his rights or has suffered a legal grievance. Further, the term "any person considering himself aggrieved" under section 82 of the Civil Procedure Act meant a person who has suffered a legal grievance. The definition of a person aggrieved can be traced to **Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465** where James L.J held that:

> the words "person aggrieved" do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title.

Was the respondent in the words of Lord Justice James (supra) a person against whom a decision has been pronounced which wrongfully deprived him of something or wrongfully affected his title to the suit property? Specifically, and because the respondent was not a party to the main suit, did the judgment wrongfully affect the freehold title of the respondent? According to Lord Denning in **Attorney General of Gambia vs. N'jie [1961] AC P 617** at page 634:

> the words "person aggrieved" are of wide import and not subject to a restrictive interpretation. They do not include of course a mere busy body who is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

From those premises, a third party can apply for review if he has a 'genuine grievance because an order has been made which prejudicially affects his interests'. In **Ladak Abdulla Muhammad Hussein vs. Griffiths Isingoma Kakiiza & 2 Others S.C.C.A. No. 8 of 1995** Odoki J.S.C. held that a person who could bring an application under Order 46 rule 1 of the Civil Procedure Rules or section 82 of the Civil Procedure Act (revised laws) is a person who has suffered a legal grievance. However, in a suitable case a third party may apply for review under the inherent powers of the Court.

Technically a third party can apply for review and his application may be considered under the inherent powers of the trial court. The inherent powers of court are spelt out in section 98 of the Civil Procedure Court as

> 98. Savings of inherent powers of court.
>
> Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

As far as third parties are concerned, a suitable person can apply under the inherent powers of the court.

I have carefully considered the arguments of counsel and the facts and circumstances of grounds 1 and 4 of the appeal. High Court Miscellaneous Application No 333 of 2015 was supported by affidavit evidence attaching various documents relied on by the learned judge. It is factually accurate to state that the Freehold title attached to the application was registered in the names of the respondent and was issued for the first time according to the date of registration on 25th January, 2013 at 3:11 PM under Instrument No 480626. The freehold title has not history of transactions; it has no encumbrances or past dealings. On the other hand, the judgment in High Court Civil Suit No 241 of 2006 was delivered on 7th December, 2012. As a matter of fact, the certificate of title issued on 25th January, 2013 could not

form the basis for setting aside judgment delivered on 7th December 2012 because it was not a relevant factor even with the exercise of due diligence as it could not be produced and adduced by any of the parties to the suit and was not yet in existence. It was not therefore in the words of Order 46 rule 1 (1) (b) of the Civil Procedure Rules "...for the discovery of new and important matter of evidence matter of evidence which after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made." The respondent was not a party and the rule does not apply to him. Secondly, the fact of freehold registration of Plot 19 Mackenzie Vale Kololo, Kampala was non-existent by then. For that reason the judgment could not have affected a non-existent interest. Any other equitable and unregistered interest such as a sale agreement between Arthur Busingye and Kwame Ruyondo on the one hand and the respondent were unregistered interests for which constructive notice could not be imputed on the appellants.

The facts deposed in the affidavit of the respondent in the review application included a statement that the respondent purchased the suit property from Kwame and Ruyondo. As a matter of fact the certificate of title discloses that Leasehold Register Volume 445 Folio 22 was registered in the names of one Kanubhai Patel on 30th March, 2006 under Instrument No 364922. It was further registered in the names of Turyamureeba M Milton on the 5th of May, 2006 under Instrument No 366059. Lastly, the certificate discloses that it was a registered in the names of Arthur Busingye and Kwame Ruyondo as tenants in common in equal shares on 11th of June 2008 under Instrument No 397544. As noted above, High Court Civil Suit No 241 of 2006 was only concerned with the leasehold title, whose certificate of repossession was given to the second appellant and another and could not have been about the Freehold title which interest was registered for the first time on 25th January, 2013.

Suffice it to note that the leasehold title cannot be and is not the freehold title registered in the names of the respondent. The provisions of the Land Act make this abundantly clear.

Section 1 (p) and (s) of the Land Act defines freehold land tenure and leasehold land tenure separately. Freehold tenure is:

> (p) "freehold land tenure" means the holding of registered land in perpetuity subject to statutory and common law qualifications the incidents of which are described in section 3;

On the other hand leasehold tenure is:

> (s) "leasehold land tenure" 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 and lessee, the incidents of which are described in section 3, and includes a sublease;

Section 3 of the Land Act further gives the incidents of freehold tenure as:

> (2) Freehold tenure is a form of tenure deriving its legality from the Constitution and its incidents from the written law which—
>
> (a) involves the holding of registered land in perpetuity or for a period less than perpetuity which may be fixed by a condition;
>
> (b) enables the holder to exercise, subject to the law, full powers of ownership of land, including but not necessarily limited to—
>
> (i) using and developing the land for any lawful purpose;
>
> (ii) taking and using any and all produce from the land;
>
> (iii) entering into any transaction in connection with the land, including but not limited to selling, leasing, mortgaging or pledging, subdividing creating rights and interests for other people in the land and creating trusts of the land;
>
> (iv) disposing of the land to any person by will.
>
> (3) For the avoidance of doubt, a freehold title may be created which is subject to conditions, restrictions or limitations which may be positive or negative in their application, applicable to any of the incidents of the tenure.

It is apparent that a freeholder titleholder may grant a lease out of the title to another person for a limited period of time while the holder of the Freehold has perpetual title. A leasehold title can therefore exist and derive its

existence from the freehold title. For emphasis leasehold tenure is further defined by section 3 (5) of the Land Act as:

> (5) Leasehold tenure is a form of tenure—
>
> (a) created either by contract or by operation of law;
>
> (b) the terms and conditions of which may be regulated by law to the exclusion of any contractual agreement reached between the parties;
>
> (c) under which one person, namely the landlord or lessor, grants or is deemed to have granted another person, namely the tenant or lessee, exclusive possession of land usually but not necessarily for a period defined, directly or indirectly, by reference to a specific date of commencement and a specific date of ending;
>
> (d) usually but not necessarily in return for a rent which may be for a capital sum known as a premium or for both a rent and a premium but may be in return for services or may be free of any required return;
>
> (e) under which both the landlord and the tenant may, subject to the terms and conditions of the lease and having due regard for the interests of the other party, exercise such of the powers of a freehold owner as are appropriate and possible given the specific nature of a leasehold tenure.

A leasehold title owner is entitled to exclusive possession subject to the covenants in the contract between the lessee and the lessor. I need to note that the land law has evolved since the lease was granted in 1958 for a period of 97 years and 1 month. LRV 446 folio 22 plots 19 McKenzie Vale, Kampala was issued on the 1st September, 1958. By the promulgation of the 1995 Constitution of the Republic of Uganda in October 1995, the law governing leases had evolved. Suffice it to note that the lease agreement was between the Governor of the Uganda Protectorate and Roshan Aman. By 8th October, 1995 when the Constitution of the Republic of Uganda 1995 was promulgated, article 237 thereof vested all land in the citizens and divested the government of its power of holding land save for land acquired or retained in public interest. Article 237 (5) of the Constitution of the Republic of Uganda provides that any lease which was granted to a Ugandan citizen out of public land may be converted into freehold in accordance with the law which shall be made by Parliament.

The intention of legislature is to enable leasehold owners to access perpetual proprietary title out of the former leases granted by the Uganda Land Commission or the Crown out of public land or crown land as the case may be. The question of conversion of the leasehold into freehold is crucial and hangs on the premises that the respondent lawfully acquired the leasehold title and converted it into freehold.

As far as the facts of this appeal are concerned, the only nexus between the respondent and the registered owners of the leasehold are Arthur Busingye and Kwame Ruyondo. There is an agreement dated 20th July, 2009 between Arthur Busingye and Kwame Ruyondo on the one hand as vendors and Mr Vyas Chintan, the respondent as the purchaser on the other hand. The facts are clearly summarised in the letter of the Commissioner Land Registration to the managing director of the first appellant in a letter dated 2nd February, 2015. The letter was responding to the request of the first appellant to enforce the decree in the main suit namely HCCS No 241 of 2006 affecting leasehold described as LRV 446 folio 22 plot 19 McKenzie Vale Kololo wherein the Commissioner Land Registration wrote as follows:

> By the time you presented the court orders, the leasehold title was no longer in existence having been overtaken by the conversion of leasehold to freehold. The reference in the court order to the land was LRV 446 folio 22, which was no longer in existence. However, court went ahead and cited the plot No as Plot 19 McKenzie Vale Kololo – Kampala. The conversion therefore in my view would not bar the registration of the court order. However, by the time you presented the court order, the property had changed hands as follows:
>
> 1) Transfer from Turyamureeba M. Milton to Arthur Busingye and Kwame Ruyondo of P.O. Box 7873, Kampala registered on 11/6/2008 under Instrument No. 397544.
> 2) Transfer from Arthur Busingye and Kwame Ruyondo to Vyas Chintan of P.O. Box 24498, Kampala registered on 12/8/2009 under instrument No 416712.
> 3) Vyas Chintan converted the leasehold to freehold of reference FRV 1360 folio 8 and has mortgaged his property to Bank of Baroda (Uganda) Limited.
>
> By the time of presentation of the court order, the defendant no longer had any interest in the land having transferred it. This raises problems with effecting the

court order. The current registered proprietor was not party to this suit and there was no order of court stopping any further transactions.

I note that earlier court had given interim orders, one expired on 22nd of August 2006 and another one expired on 12th September 2006. This interim order was registered on the register but it was removed upon expiry. The removal was done on 14th May, 2008 long after its expiry. You lodged a caveat on 6th September, 2006 under Instrument No. 370824 and upon notice given to you, the caveat also lapsed.

This means that at the time the transfers were done, there was no legal ban barring the registered proprietor from dealing in the land.

In the circumstances, this office is constrained in registering the court order. I advise that you refer back the matter to court for court to advice on the next course of action.

...

COMMISSIONER LAND REGISTRATION

From the documentary evidence considered in the review application, it can be discerned that one Turyamureeba M. Milton transferred the property to persons who got registered on 12th August 2009. By that time, High Court Civil Suit No 241 of 2006 was pending in court. The appellants counsel argued that there was a temporary injunction restraining the defendants particularly the first defendant Mr Turyamureeba M Milton who was the registered owner of the suit property from further dealing in the suit property. In fact in Miscellaneous Application No 968 of 2006 Mr. Turyamureeba M Milton applied to set aside the order of temporary injunction restraining him and ruling was delivered by Justice R.A, Opio – Aweri, judge of the High Court as he then was on 22nd May, 2007. In that application the appellants were the respondents and this is what the learned trial judge said:

> In the instant application the respondent is still emphatic that it is in occupation of the suit property and that the applicant is trying all means of gaining occupation of the disputed property. I may therefore add that these are no fresh circumstances to justify sufficient cause to set aside, vary or discharge the temporary injunction. Should it be said that the injunction has become unduly harsh or unnecessary or unworkable? The answer is not. It may be that the applicant is desperate but this type of action is not the answer. The answer lies in having this suit set down for

> hearing so that it is disposed of expeditiously other than relying on interdictory matters which may only result in delaying and denying justice.
>
> This application is accordingly dismissed...

Mr Turyamureeba M. Milton failed to have the temporary injunction order which restrained him, from being set aside by the court. It followed that the registration of Arthur Busingye and Kwame Ruyondo in June 2008 was made when there was an interlocutory injunction pending disposal of High Court Civil Suit No 241/2006. By the time the learned trial judge delivered judgment the defendant had been restrained by a temporary injunction from having any dealings in the suit property. By the time the suit was determined on 7th December, 2012, the learned trial judge was fully aware that the property had been registered in the names of Kanubhai P Patel before it was transferred to Mr Turyamureeba M Milton, the first defendant. The learned trial judge considered the evidence that showed that the appellants in this appeal had lodged some documents in the registry which clearly indicated that they had equitable interest in the suit property. This included that the notice of June 2001 by which they sought a special certificate of title. There were also correspondences from the Departed Asian Property Custodian Board to the Chief Registrar of Titles indicating the interest of the appellants in the suit property. She found that on the higher degree of probability, Mr. Kanubhai Patel, the second defendant was a party to the fraud in the registration of his purported interest in the suit property to the exclusion of the appellant's unregistered interest and found that he was registered fraudulently as a proprietor. Secondly, Mr Turyamureeba was aware of the fraud of the second defendant and was not a bona fide purchaser for value without notice of the defect in title of the vendor or purported vendor.

The judgment clearly demonstrates that the court was only aware of the registration of Mr Turyamureeba as the last registered proprietor of the suit property. In the application for review, the question was whether material facts were concealed from the court such as the subsequent transfer by Mr Turyamureeba to Arthur Busingye and Kwame Ruyondo who were subsequently registered on the leasehold certificate of title. Suffice it to note

that the appellants had obtained a temporary injunction order albeit which had not been registered maintaining the status quo. As observed by the learned judge in the review application, the temporary injunction was binding on Mr. Turyamureeba. However, it is an accepted fact that the appellants were in fact in possession of the suit property before they lost possession. Clear evidence includes exhibit P14 which is a notice to vacate dated 9th May, 2006 for the occupants of LRV 446 folio 22 McKenzie Vale Kololo to vacate the suit premises. The notice was issued on behalf of Turyamureeba M. Milton. The pleadings further confirmed the state of affairs. In paragraph 14 of the amended written statement of defence, the appellants averred that the plaintiffs were shocked to receive a letter dated 9th May, 2006 from the first defendant's lawyers alleging that the first defendant was the registered proprietor of the suit property and demanding *inter alia* that the first plaintiff as the occupant thereof vacates the suit property within three weeks. In a reply the amended written statement of defence of Turyamureeba Milton avers in paragraph 5 thereof as follows:

> In the alternative and without prejudice to the foregoing and in further reply to paragraphs 5, 6, 7, 8, 9, 10 and 11 of the plaint, the first defendant shall aver that even if the first plaintiff was in possession of the suit property as claimed (which is however denied), the possession was unauthorised, illegal and irregular and the same per se could not pass over registrable interest in the property to it.

Further he goes on to aver in paragraph 10 that the occupants of the house voluntarily vacated it on receipt of the notice. Finally, I note that the learned judge who reviewed the judgment pursuant to Miscellaneous Application No 333 of 2015 held that the plaintiffs ought to have conducted a search at the Land registry to ascertain the prevailing registered proprietorship of the title to the suit property. Had they done so, they would have discovered that the property had further been registered in the names of other persons. I do not agree. The order restraining the first defendant was sufficient to prevent any further dealings in the suit property by the first defendant. For the same reason, the appellants could not be faulted for not being aware or for not bringing the other registered proprietors into the main suit. They filed a suit against the last registered proprietor and his predecessor in title and obtained

a temporary injunction to restrain the last registered proprietor from dealing in the suit property. The transfer of the property in the circumstances was in defiance of the court order. There are also other certificates of title to the suit property issued by the Land registry. There is a special certificate of title which demonstrates that the property has been registered in the names of the Departed Asian Property Custodian Board by virtue of section 13 of Decree No 27 of 1973. On 25th August 1977 it was registered in the names of Nasur Fadhimula under instrument No. 200396. Thereafter it was registered in the names of Roshan Aman by virtue of certificate of repossession No. 327 dated 10th April 2001 instrument No. 315851. A duplicate certificate of title was subsequently issued on 11th September 1998 in accordance with section 70 of the Registration of Titles Act the first certificate originally issued being lost. Subsequently, Kanubhai G. Patel and successors were registered. Of these the last registered owners are Arthur Busingye and Kwame Ruyondo. I further note that the sale agreement between Arthur Busingye and Kwame Ruyondo and the respondent is dated 20th July 2009. On the same day there is a statement of search as on 20th July 2009 showing that the property is registered in the names of Arthur Busingye and Kwame Ruyondo who had been registered on 11th June 2008 under instrument 397544 and nil encumbrances. The search letter is addressed to Arthur Busingye and Kwame Ruyondo and signed on behalf of the Commissioner Land registration. The letter of the Commissioner Land Registration addressed to the first Appellant dated 2nd February 2015 indicates that Vyas Chintan was registered as proprietor on 12th August 2009. The certificate of title reflecting this alleged transaction is not on record. The affidavit of Vyas Chintan in support of HCMA No. 333 of 2015 in paragraph 5 thereof refers to the sale agreement but does not refer to a transfer made from the names of Arthur Busingye and Kwame Ruyondo to Vyas Chintan. Instead the affidavit states that the respondent was issued a freehold title and the leasehold title had ceased to exist. The record before the court does not have a leasehold certificate of title registered in the names of Vyas Chintan.

What is material is that the subsequent dealings gave rise to a new cause of action which was not and could not have been the subject matter of Civil Suit

No 241 of 2006. The transactions, which were the subject matter of the suit were the transfers of the property stated to be made fraudulently to Kanubhai Patel and then to Turyamureeba Milton. There was no right of hearing on the basis of the registration of the freehold interest of the respondent which interest arose or is deemed to have accrued upon registration after the judgment. In relation to the sale agreement between the respondent and Arthur Busingye and Kwame Ruyondo it could not have been discovered by the appellants because the facts proved in the appellant's suit was that the file was missing from the registry and therefore they could not even get a special certificate of title. The evidence of the application for a special certificate of title and the Gazette notices were adduced in evidence. The learned trial judge believed the testimony of PW1 and PW2 that the registry file was missing and this is what they were informed about. In any case upon the registration of Turyamureeba, they discovered that he had derived title from one Kanubhai Patel and accordingly amended the plaint to include him.

The cancellation of the leasehold interest and the registration on the same piece of land as freehold interest could not have been part of the suit. They were new causes of action if any and in the least ought to be tried afresh. I therefore agree with the appellant's counsel that the evidence of registration on 25th January, 2013 of the freehold title on the same piece of land could not have been discovered before delivery of the judgment because it was not in existence. I also agree that the sale agreements subsequent to the registration of Turyamureeba who had been restrained from court order from dealing in the suit property could not have been discovered because there was no basis for the appellants to believe that further transactions had taken place on the register so that the respondent was finally registered on the leasehold title. The respondent did not for his own reasons seek to prove his stated registration on the leasehold title (if at all it happened) through production of a certificate of title to that effect. What's on record is only a freehold title. A leasehold title can exist side-by-side with a freehold title because the freehold owner can grant a lease of property to a leasehold owner for a limited period of time. The conversion of the leasehold is a misnomer because there is no evidence that the transition was made from leasehold registered in the names

of the respondent. The evidence shows a fresh grant of freehold. From the evidence on record, the interest of the respondent to the same piece of land remained unregistered interest until the issuance of the freehold certificate of title after judgment had been delivered. It follows that the respondent could not have been heard on the basis of an unknown, unproved and unregistered interest and the appellants could not be faulted for not being aware of the unregistered interest evidenced by a sale agreement. In any case, the cause of action of the appellants related to leasehold interest and the transactions therein that were registered on the certificate of title. None of the parties applied to join Arthur Busingye and Kwame Ruyondo in the application for review. Contrary to the submissions of the respondent's counsel, it was incumbent upon the respondent to join the persons from whom he claims to derive title. It is however clear from his own application that he asserted freehold title which was registered for the first time on 25th January, 2013 after judgment was delivered in the main suit. The judgment concerned the leasehold title and not the freehold title. The question of conversion of the leasehold title to freehold title through registration happened after the suit had been decided. This can be clearly seen by the grounds in the notice of motion in the application for review of the judgment in the main suit which include *inter alia* the following grounds:

1. The court was misled by the respondents to issue orders to cancel a non-existent leasehold land title affecting the applicant's freehold and when applicant did bona fide acquire the suit land honestly without notice of any defects in title and therefore is aggrieved by the resultant imminent danger of dispossessing him of his land.
2. High Court Civil Suit No 241 of 2006 was an illegality and a nullity in law and violated applicants fundamental and economical right to own property and to be heard as it was made without according him any fair hearing.
3. There are new and important matters of evidence that were not available to court at the time of judgment which, applicant could not produce at the time when the decree was passed as he was not aware that litigation was ongoing against his land.
4. The applicant being the registered proprietor of freehold land comprised in freehold register volume 1360 folio 8 plot 19 McKenzie Vale Kampala Kyadondo 0.117 hectares issued under instrument No 480626 measuring approximately

> 0.161 hectares which he acquired from the controlling statutory authority for a consideration is aggrieved by the decree and judgment was effected is to dispossess him of his land and cancel his title....

The appellants could not be aware that the leasehold title the subject of the suit was no more in terms of its registration. Secondly, the new important matter of evidence did not exist at the time of the cause of action of the appellants. Thirdly, any grounds of the respondent asserted a freehold registration derived from the controlling statutory authority for consideration and not even the sale agreement between him and Arthur Businge and Kwame Ruyondo. Freehold title as far as the registration is concerned is deemed to have commenced on 25th January, 2013 way after judgment had been delivered. A right of hearing could not have been derived from any proprietary interest in the freehold title. Lastly the sale agreement gave rise to an equitable interest which was undisclosed with no evidence of transfer of the lease in the names of the respondent. The learned High Court judge on review agreed that the main judgment was in rem and affected the suit property (the leasehold title). That holding meant that the learned review judge agreed that the leasehold interest was affected by the judgment. According to the **Oxford Dictionary of law** 5th Edition, judgment by a court means:

> A decision made by a court in .respect of the matter before it.
>
> Judgments may be interim (interlocutory), deciding a particular Issue prior to the trial of the case; or final, finally disposing of the case. They may be in *personam,* imposing a personal liability on a party (e.g. to pay damages); or in rem, determining some issue of right, status, or property binding people generally.

The learned judge in review agreed that the judgment on the lease title was in rem and this is what she stated:

> Although the judgment is in rem, the same argument raised by the respondent's counsel would hold that the decree in the main suit could not affect the freehold interest which it did not address. Since the respondent's ownership and possession of the suit property was not in issue in the main suit, it would be wrong to say that the conversion of the leasehold to freehold was wrong or fraudulent, especially when he was not accorded a hearing.

It followed that the leasehold titles were bound by the decree and the respondent's case was hinged only on the freehold title. I will address the issue further in grounds 2, 3 and 5 of the appeal. In the premises, grounds 1 and 4 of the appeal are answered in the affirmative.

The appellants counsel argued grounds 2, 3 and 5 of the appeal together. Grounds 2, 3 and 5 of the appeal are as follows:

> Ground 2. **The learned trial judge erred in law and fact when she wrongly awarded the respondent the reliefs is sought in HCMA No 333 of 2015; Vyas Chintan v Aketa Farmers and Millers and Others.**
> Ground 3. **The learned trial judge erred in law and fact when she conferred ownership of the suit property to the respondent.**
> Ground 5: **The learned trial judge erred in law and fact when she failed to hold that the temporary injunction order in HCMA No 296 of 2006 arising from HCCS No 241 of 2006 and the judgment in HCCS No 241 of 2006 Aketa Farmers and Millers Ltd v Turyamureeba M. Milton and Another one order and judgment in rem respectively which were both binding upon third parties including the respondent.**

On the above grounds learned counsel for the appellant submitted that judgment in High Court civil suit No 241 of 2006 settled the question of ownership of the suit property because the trial judge found that the transfer of the suit property to the first defendant was fraudulent. Secondly, there was an order for cancellation of title and registration of the second appellant. Thirdly it was a judgment in *rem* and not in *personam* and binds the property. Fourthly, there was a temporary injunction restraining the first defendant. Fifthly, the change of tenure of the suit property from leasehold freehold was a nullity for being in contravention of the temporary injunction order. In the premises, the title of the respondent was null and void ab initio.

In reply to grounds 2, 3 and 5 of the appeal the respondents counsel submitted that the respondent had been deprived of his property rights and right to hearing from which right there can be no derogation. He reiterated

earlier submissions on grounds 1 and 4 of the appeal. Further, that the judge was not *functus officio*. Further, that the submission that judgment in HCCS No 241 of 2006 settled the question of ownership of the suit property is faulty because there was a different registered proprietor who was also in occupation of the property. The learned trial judge ordered the names of Turyamureeba Milton to be cancelled from the register of title when he was no longer the registered owner of the suit property since 2008 and other third parties had been registered thereon. He contended that the remedy of the respondent who was not a party to the main suit was to apply for review of the judgment.

I have carefully considered the submissions of counsel and in my view the issue is whether the learned trial judge in conducting the application for review misdirected herself on some material matters and took into account factors which she ought not to have taken into account in such an application. The other question is whether because of the misdirection, there was a failure of justice.

The first area of misdirection is procedural. Order 46 rule 6 of the Civil Procedure Rules provides that:

> When an application for review is granted, a note of the application shall be made in the register, and the court may at once rehear the case or make such order in regard to the hearing as it thinks fit.

In this appeal it was very clear that proceedings took place in the High Court on the basis of existing facts. One of the parties namely Mr Turyamureeba M. Milton had been restrained by injunction from further dealing in the suit property but went ahead and transferred the property to other parties who subsequently (and from the evidence) executed a sale agreement with the respondent. The respondent was subsequently registered on the title deed and the title deed admitted in evidence in the review application is a freehold title issued on 25th January, 2013. The judgment in civil suit No 241 of 2006 was due for execution when the new state of affairs was established and communicated to the first appellant. They indicated that the respondent on the freehold title on the same plot of land. This new state of affairs had

nothing to do with the original cause of action of the appellants in HCCS No 241 of 2006. The correct procedure upon establishing another interest which was in conflict with a valid decision of the High Court could have been, even if the judgment in the main suit is set aside, to hear the parties and establish and determine who should be in occupation of the suit property. The danger with that procedure would be injustice being caused to innocent parties litigating in court on the basis of existing facts on the register at the time an injunction maintaining the status quo is issued. The proceedings in the court would have been in vain because the subsequent acts were not part of the dispute. It is a mockery of justice after the appellants proceeded since 2006 when there was an existing state of affairs and having won or having succeeded in the suit, to have no remedy because one of the parties to the suit in defiance of court orders further transferred the property to other parties presumably taking it out of the reach of the court in HCCS No 241 of 2006.

Mr Turyamureeba M Milton, the first defendant having lost in the suit purported to file a notice of appeal to the Court of Appeal. This notice of appeal is clearly mentioned by the learned trial judge in the application for review at page 10 of her ruling when she noted that notice of appeal was filed on 11th December, 2012. The lawyers wrote a letter on 12th December, 2012 requesting for certified copies of the proceedings and judgment. She goes on to hold that:

> I am persuaded by the argument that once an appeal has been preferred against the judgment of the court, it is not open for the same court to again review that judgment. However the facts of this case are distinguishable from that principle.
>
> A notice of appeal only initiates the process of appeal in the Court of Appeal. Indeed the contents of the notice of appeal gave no indication of the proposed grounds of appeal, so as to lead to the conclusion that the intended grounds of appeal by Turyamureeba the third respondent, are common to what is raised in this application or that the appeal would address the appellants grievances raised in this application. Thus, the applicant not being a party to that intended appeal he cannot present his case to the Court of Appeal and this application would thus fail under the exemption provided under order 46 rule 2 CPR ...

It subsequently transpired that the third respondent in the application for review at the High Court who is Mr Turyamureeba withdrew the intended appeal. The appellants to this appeal were not aggrieved by the decision of the High Court and there was no need for them to challenge that decision. By the very import of the review decision, the court could not deal with the leasehold title. The review could only have proceeded to set aside the judgment on the ground that the freehold title had not been addressed in the main judgment and in any case was the subject of appeal at the time of the decision in the review application according to page 11 of the ruling thereof. The learned trial judge therefore purportedly only dealt with the freehold interest in land of the respondent and proceeded on the premises that his right of hearing had been violated. That argument cannot stand for the simple reason that the freehold title was registered after the main judgment. The argument could have held water if only there was proof that the respondent had been registered on the leasehold title. In which case, it would be open for the parties to address the merits of title in the leasehold interest of plot 19 McKenzie Vale. Even then, the issue of illegalities would arise and the review ruling shows that the leasehold title was bound by the judgment.

From the state of affairs, Mr. Turyamureeba M Milton no longer had any incentive to pursue the appeal because the High Court judgment could be perceived as frustrated by the further dealings in the suit property and he was not aggrieved by the dealings but a beneficiary thereof. Section 103 (c) of the Penal Code Act cap 120 laws of Uganda *inter alia* makes it an offence for any person to obstruct or in any way interfere with or knowingly prevent execution of any legal process, civil or criminal. The transfer of the property in violation of the court order may be taken to be an attempt to obstruct the execution of any judgment conferring title on the appellants in the main suit in light of an injunction maintaining the status quo pending determination of the suit. Secondly, section 107 (1) (i) of the Penal Code Act cap 120 also makes it an offence for any person to intentionally commit an act of disrespect to any judicial proceedings or any person before whom such proceedings is being had or taken. Dealing in the property was an act of disrespect.

The law is quite clear that anything done in contravention of an Act of Parliament is an illegality rendering the act done in breach of a statutory provision a nullity. The violation of the temporary injunction order by Mr Turyamureeba M Milton was subversion and disrespect for the process of court whose consequences can be seen from the orders stated above. Having lodged a notice of appeal against the decision of the High Court in HCCS No 241 of 2006, he withdrew the same because he was satisfied with the transfer of the property to other third parties. He was not aggrieved by the judgment of the High Court because from that perspective it had been circumvented by the further transfer of the suit property initially under his own hand. He lost the main suit yet he got the property and a purported transfer of title to third parties. Any disrespect of the court process should not be encouraged or tolerated. Any disrespect of court process through defiance should not be tolerated. The High Court does not sit in vain hearing a suit filed in 2006 and by December 2012 having binding judgment delivered.

The general proposition of law can be found in **Bostel Brothers Ltd v Hurlock [1948] 2 All ER 312** in the judgment of the Court of Appeal of the United Kingdom per Somervell LJ stated at 312 that:

> What is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action.

It could be argued that the respondent did nothing in contravention of an Act of Parliament. However, the application for review sought orders that compounded and condoned illegalities including illegal transfer of property to Arthur Busingye and Kwame Ruyondo by Turyamureeba M Milton and which frustrated a lawful judgment issued by a court of competent jurisdiction. The contract of sale where the respondent purports to derive title was made in blatant disregard of court process and even when there was a temporary injunction in force. The law does not assist a guilty party of an illegal contract. In **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** the Court of Appeal England per Kerr LJ stated that it is settled law that any contract prohibited by statute, either expressly or by implication is illegal and void.

Breach of the temporary injunction order violated provisions of the Penal Code Act. Such violations can be the subject of a prosecution in its own right. For purposes of the civil proceedings, it was absurd to proceed with the review application when there was a purported notice of appeal albeit one which had been subsequently withdrawn affecting the leasehold title. Secondly, it was absurd to condone breach of the temporary injunction order of the High Court by the transfer of the property to Arthur Busingye and Ruyondo. The problem was only compounded by the use of the freehold title which would in the end shut out the plaintiffs who are current appellants from justice. It would be irrelevant in the circumstances that the respondent would be an innocent party. The appellants were not only innocent but had judgment in their favour which judgment gives a right under article 237 (5) of the Constitution to apply for freehold title. The very argument that the appellants should seek damages can be used against the respondent. He has the right to sue the persons who sold in the property inclusive of the Government for damages. The appellants on the other hand had got their remedy against the known registered proprietor in the circumstances in which they could not access the file with the registrar of titles. They did not have to sue the Attorney General in order to get their remedy of cancellation of title.

In **Makula International v His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11** the Court of Appeal of Uganda as it then was agreed with the law that a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. The Court of Appeal cited with approval the judgment of Donaldson J in **Belvoir Finance Co. Ltd v Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** at page 908 that:

> I think illegality, once brought to the attention of court, overrides all questions of pleadings, and therefore this is, and remains a real and indeed insuperable difficulty in the way of the defendant so far as the Mercantile agency defence is concerned.

Further in **Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680**, it was held that counsel was not acting improperly to draw courts attention to an

illegality of the transaction. On the contrary it was counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract.

In the premises I would answer grounds 2, 3 and 5 of the appeal in the affirmative. In the very least, the learned trial judge ought to have ordered a hearing of the suit afresh to establish who in the circumstances should have possession of the suit property notwithstanding the presence of the freehold title and the judgment ordering the appellants to be registered on the leasehold title. There was a miscarriage of justice by merely setting aside the main judgment and leaving the respondent as the unquestioned owner of the suit property on the basis of a freehold title obtained when the matter that was pending in the High Court had been concluded. Even if the respondent is a bona fide purchaser, a matter that can be tried on its own merits, the question of whether he was protected by the provisions of the RTA could not be determined on the basis of affidavit evidence but required a full hearing. The appellants were under no obligation to sue the respondent because the already had judgment in their favour. In the premises the following orders would issue:

1. The ruling in High Court Miscellaneous Application No 333 of 2015 is hereby set aside in its entirety and the judgment of the High Court in HCCS No 241 of 2006 dated 7th December, 2012 is reinstated.
2. The root of FRV 1360 Folio 8 Plot 19 Mackenzie Vale Kampala Kyadondo is an illegality and is null and void and cannot stand at the same time as the leasehold title decreed in favour of the appellants. The Commissioner Land Registration is directed to cancel FRV 1360 Folio 8 Plot 19 Mackenzie Vale. It is the right of the appellants to convert the leasehold to freehold under article 237 (5) of the Constitution.
3. The appellants appeal succeeds with costs of the appeal in this court and in the lower court.

Dated at Kampala the 28th day of February 2020

Christopher Madrama Izama

Justice of Appeal