

**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

**(CORAM: MWANGUSYA; MWONDHA; BUTEERA; JJ.S.C NSHIMYE;  
TUMWESIGYE; AG, JJ.S.C)**

**CIVIL APPEAL NO.10 OF 2018**

**BETWEEN**

<b>1. MOLLY TURINAWA</b>	}	
<b>2. FIONA TURINAWA</b>	}	
<b>3. BERNES ANKUNDA</b>	}	.....APPELLANTS
<b>4. ROBIN TURINAWA</b>	}	
<b>5. DAVIS TURINAWA</b>	}	

**A N D**

<b>1. ENGINEER EPHRAIM TURINAWA</b>	}	
<b>2. DEWAK LIMITED</b>	}	.....RESPONDENTS

*[Appeal from the Judgment and Decree of the Court of Appeal (Mukasa-Kikonyogo, DCJ, Twinomujuni and Kitumba J.A delivered at Kampala on the 20<sup>th</sup> day of November 2009 in C.A.C.A. No.18 of 2009]*

**JUDGMENT OF BUTEERA, JSC**

**Brief Facts:**

The 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent were husband and wife and during their marriage they produced children who are the 2<sup>nd</sup> to 5<sup>th</sup> appellants. In 1989 the 1<sup>st</sup> respondent was employed by Kampala City Council (K.C.C.) as an Assistant

City Engineer and a Surveyor. By virtue of his employment he was allocated a residential house at Plot 27 Nyonyi Gardens, Kololo. He stayed in this house with the whole of his family and paid rent to KCC his employer and owner of the house.

5

On 11/08/1999 Kampala City Council gave the 1<sup>st</sup> respondent an offer to purchase the said property at Ugshs.65,000,000/- (Sixty five million only) payable in installments namely 15% in the sum of Ugshs.9,750,000/= within 90 days of receiving the offer and the balance of Ugshs.55,250,000/= was payable  
10 in 33 equal monthly payments.

The 1<sup>st</sup> appellant did not have the money to pay for the house. He assigned the offer to purchase the house to one Elizabeth Kabutiti for a consideration of Ugshs.70,000,000 (Seventy million only). The agreement for sale of the offer  
15 to purchase the suit property was drawn on 26/11/1999. The payments in the purchase of the property were made by two Bank drafts from a Barclays Bank account of Elizabeth Kabutiti through her sister/agent Joyce Lynn Kabutiti. The 1<sup>st</sup> appellant was paid 70,000,000 as consideration.

20 Kampala City Council executed an agreement of sale of the said property, dated 10<sup>th</sup> November 1999 between itself and Ephraim Turinawe to whom the offer had been given. The Certificate of Title for the said property was given with transfer forms drawn in favour of Ephraim Turinawe who later transferred the Title to M/s Dewark Ltd a family investment company belonging to Elizabeth  
25 Kabutiti, her son and husband. By this time Elizabeth Kabutiti had died and her sister had obtained Letters of Administration of her estate.

The appellants filed HCCS No.881 of 2004 in the High Court against both appellants. Their case was that when the suit property in which they were

residing was offered to the first appellant for purchase and as he was head of the family it became their family property and residence. They maintained that the first appellant's sale of the suit property to Elizabeth Kabutiti and subsequent transfer to second appellant without the consent of the respondents was null and  
5 void.

The learned trial judge decided in favour of the plaintiffs who were also awarded costs.

10 The respondents being dissatisfied with the High Court judgment and orders appealed to the Court of Appeal. The Court of Appeal reversed the High Court decision and decided in favour of the appellants (now respondents).

The appellants being dissatisfied with part of the decision of the Court of  
15 Appeal have now appealed to this Court on the following grounds:-

**1. The learned Justices of Appeal misdirected themselves as to the law relating to family property and registration of titles and, thereby erred when they held that:**

- 20
- (a) The registration of the suit property into the 1<sup>st</sup> respondent's name did not constitute the suit property into family property,**
  - (b) Section 59 of the Registration of Titles Act, Cap 230 Laws of  
25 Uganda was not applicable to the dispute before Court.**
  - (c) The consent of the appellants was not necessary for the conveyance of the suit property to Elizabeth Kabutiti and Dewark Ltd.**



2. The learned Justices of Appeal misdirected themselves as to the law relating to family property and, thereby, erred when they held that appellants were strangers to the transaction of conveyance of the suit property from KCC to the 1<sup>st</sup> respondent.

3. The learned Justices of Appeal misdirected themselves as to the law relating to family property and, thereby, erred when they held that Elizabeth Kabutiti acquired equitable interest in the suit property or, any interest at all.

It proposed to ask the Court for orders that:

(i) The judgment and orders of the Court of Appeal be set aside, and the suit property be declared to be family property of the appellants and the 1<sup>st</sup> respondent.

(ii) The registration of the 2<sup>nd</sup> respondent be declared a nullity and cancelled,

(iii) The suit property be registered in the name of the 1<sup>st</sup> appellant as family property.

(iv) The appellants be awarded costs of this appeal and those incurred in the courts below, and that such costs be paid by the respondents.

#### **REPRESENTATION:**

At the hearing of the appeal the appellants were represented by learned counsel, Peter Allen Musoke assisted by Mr. Mugabi Ivan Bakesiga.

The 1<sup>st</sup> respondent was represented by learned Counsel Edward Kangaho. The 2<sup>nd</sup> respondent was represented by learned Counsel, Francis Bwengye assisted by Ms. Eva Nabitaka and Mr. Andrew Ankunda Bwengye Junior.

5 Counsel for all the parties filed written submissions which they adopted and in addition made some oral highlights of their written submissions at the hearing of the appeal. I shall rely on both the written submissions and the oral highlights in resolution of the appeal.

## 10 **SUBMISSIONS OF COUNSEL FOR THE APPELLANTS**

### **Ground one.**

Counsel submitted that both the High Court and the Court of Appeal found that the 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant were married. The rest of the appellants  
15 were their children. According to counsel, the 1<sup>st</sup> respondent was given the option to buy the house in which the family resided. He made the required down payment of the initial deposit of 15% of the price of the suit property on 10<sup>th</sup> November 1999. Counsel contended that from the time he paid the 1<sup>st</sup> deposit, 1<sup>st</sup> respondent obtained an equitable interest in the property after the  
20 10<sup>th</sup> November 1999.

Counsel submitted that the family resided in the house and therefore the house became a family property and the 1<sup>st</sup> respondent acted illegally when he attempted to sell the suit property to the 2<sup>nd</sup> respondent contrary to provisions  
25 of Section 39(1) and (9) of the Land Act then in force. (It is now Section 40 of the Land Act.)

Counsel submitted that the agreement of sale between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent dated 26<sup>th</sup> November 1999 was illegal and therefore a nullity.

Counsel further submitted that the position of the suit property as family property was further crystallized with the registration of the 1<sup>st</sup> respondent on the Land Title as proprietor on 3<sup>rd</sup> January 2001. The family equitable interest  
5 in the suit property was elevated to legal interest on registration.

Counsel contended further that it was a requirement of the law for the 1<sup>st</sup> respondent to seek and obtain consent from the appellants if the purported sale to Kabutiti and the transfer of the suit land to Dewark Limited were to be valid.  
10 No consent was sought and none was obtained and therefore this Court ought to declare the said transactions nullities.

#### **Ground two**

Counsel submitted that after the initial payment to KCC, the suit property  
15 continued to be the ordinary residence of the 1<sup>st</sup> respondent and 1<sup>st</sup> appellant.

According to counsel, pursuant to National Objective and Directive Principle XIX and Article 31(1) of the 1995 Constitution read together with Section 39 of the Land Act, the appellant became a silent, but congruent part of the 1<sup>st</sup>  
20 respondent's agreement with KCC and they were, therefore, not strangers to the contract between the 1<sup>st</sup> respondent and KCC as held by the Court of Appeal.

#### **Ground three**

Counsel submitted that the Justices of the Court of Appeal erred when they held  
25 that Elizabeth Kabutiti paid the purchase price of the suit land and, thereby, obtained equitable interest in the suit property.

According to counsel, the evidence on record was that the purchase price was cleared by the 1<sup>st</sup> respondent and how the money was raised by him was



irrelevant. Counsel contended that Elizabeth Kabutiti was a stranger to the contract between KCC and the 1<sup>st</sup> respondent.

5 He submitted that the agreement between the 1<sup>st</sup> respondent and Elizabeth Kabutiti as well as the supposed transfer to Dwark Ltd were illegal contracts and could therefore not secure any rights that could be enforced by a Court of Law.

10 Counsel contended that the agreement between the 1<sup>st</sup> respondent and Elizabeth Kabutiti of 26<sup>th</sup> November 1999 was geared towards defeating public policy that was embodied in the agreement between KCC and the 1<sup>st</sup> respondent of 10<sup>th</sup> November 1999 and for that reason was void and could not pass any interest. He sought to rely on the case of **NSSF vs. Alcon International and Another Civil Appeal No.15 of 2009** in support of his submission.

15

#### **SUBMISSIONS BY COUNSEL FOR THE FIRST RESPONDENT.**

Counsel submitted that the 1<sup>st</sup> respondent was an employee and a tenant of KCC in the house where he and his family resided and he paid rent to KCC.

20

He was given an offer to purchase the house but he had no money.

25 He searched for a buyer and got Elizabeth Kabutiti who paid the purchase price for the KCC offer. That Elizabeth Kabutiti was the actual buyer of the property. That the suit property did not become family property, simply because it was registered in the names of the 1<sup>st</sup> respondent.

Counsel contended that the transfer of the suit property into the names of the 1<sup>st</sup> respondent was a continuation of the execution process of the agreement

between Elizabeth Kabutiti and the 1<sup>st</sup> respondent which the appellants were aware of.

According to counsel, the suit property was not covered by Section 39 of the  
5 Land Act and Regulation 64 of the Land Regulations as it never became family  
property of the 1<sup>st</sup> respondent's family.

According to counsel, Section 59 of the RTA was also not applicable because  
the transfer into the name of the 1<sup>st</sup> respondent was a conditional transfer in  
10 continuation of execution of the agreement between Elizabeth Kabutiti and the  
1<sup>st</sup> respondent which the appellants were aware of.

### **Ground two**

Counsel submitted that the Justices of the Court of Appeal were right when they  
15 held that the appellants were not party and were not privy to the contract  
between KCC and the 1<sup>st</sup> respondent.

The appellants could therefore, not complain of breach of a contract to which  
they were not party. If at all there was a breach of Clause 13 of the contract  
20 between KCC and the 1<sup>st</sup> respondent, it would be KCC and not the appellants to  
complain as they were not the parties to the agreement.

### **Ground three**

Counsel submitted that the appellants' right in the suit property was a personal  
25 right and not a property right. They had a right as persons in the 1<sup>st</sup>  
respondent's home to occupy the suit property but were not staying there  
because the family owned the suit property. He submitted that the Court of  
Appeal Justices were right when they found that the 1<sup>st</sup> appellant was not a co-



owner of the suit property since she had no credible evidence of contributing to the purchase of the same.

5 Counsel submitted that the whole appeal lacked merit and ought to be dismissed with costs to the 1<sup>st</sup> respondent.

## **SUBMISSIONS OF COUNSEL FOR THE 2<sup>ND</sup> RESPONDENT**

### **Ground one**

10 Counsel submitted that the crux of this ground of appeal was whether the registration of the 1<sup>st</sup> respondent on the Certificate of Title for the suit property automatically made the suit property a family property.

15 According to counsel, for Section 39 of the 1998 Land Act to come into play, the property in question must first be a family property.

Counsel submitted that the appellant's claim to the suit property as family property was based on purchase of the property and yet neither the appellants nor the 1<sup>st</sup> respondent ever paid any money for purchase of the suit property.

20 According to counsel, the 1<sup>st</sup> respondent testified that he did not pay any money at all for the suit property. He explained that he sold the offer to purchase made to him by KCC to the late Elizabeth Kabutiti who paid all the money for the suit property. The 1<sup>st</sup> respondent also confirmed executing an agreement to that  
25 effect.

Counsel submitted that there was evidence that the money paid to KCC for the suit property was drawn on a Barclays Bank account of Joyce Kabutiti. Counsel contended that KCC accepted the Bank drafts presented by Joyce Kabutiti and

thereby ratified the 1<sup>st</sup> respondent's sale of the suit property. That KCC only issued a receipt in the name of the 1<sup>st</sup> respondent as a formality. Counsel argued that since the entire purchase price was paid by Joyce Kabutiti a resulting trust was created and the 1<sup>st</sup> respondent was holding the property in trust for the purchaser and not as family property since neither he nor the appellants paid for the property.

Counsel contended that the 1<sup>st</sup> respondent and the appellants had no equitable interest in the land, since they did not pay for the property at all. Counsel submitted that since the appellants and 1<sup>st</sup> respondent did not acquire any interest in the suit property their consent to the purchase was not necessary.

According to counsel there was no consideration paid by the 1<sup>st</sup> respondent and the appellants to KCC for the suit property. It would have been fraudulent of the appellants who did not acquire the property by way of gift, or under a will and never paid a single shilling for the property to go behind Section 59 of the Registration of Titles Act and reap off the 2<sup>nd</sup> respondent. In respect of the suit property counsel submitted that no interest existed that was capable of being protected as indefeasible.

20

### **Ground two**

Counsel submitted that the 1<sup>st</sup> respondent was a tenant of KCC. He and his family lived in the suit property as tenants which was rented premises and was never their family property to be covered by Section 39 of the Land Act.

25

The appellants were not and did not become party to the contract between KCC and the 1<sup>st</sup> respondent.

The 1<sup>st</sup> appellant claimed in the trial Court to have made a contribution of 10,000,000/= towards the purchase of the suit property but failed to adduce evidence to prove the fact that she paid the said money.

- 5 Counsel concluded that the Justices of Appeal were correct when they held that the appellants were strangers to the transaction of conveyancing from KCC to the 1<sup>st</sup> respondent.

### **Ground three**

- 10 Counsel for the 2<sup>nd</sup> respondent submitted that the Justices of Appeal were correct to have held that Elizabeth Kabutiti acquired equitable interest in the suit property when she paid the purchase price for the suit property.

- 15 Counsel contended that the agreement between the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent was not contrary to public policy as it was not harmful to the public nor was it against public good.

- 20 Counsel submitted that the Justices of the Court of Appeal properly applied the law on equity and equitable interest, and arrived at the right conclusion that the late Elizabeth Kabutiti acquired equitable interest in the suit property.

Counsel prayed court to disallow the appeal with costs for lack of merit.

### **SUBMISSIONS FOR THE APPELLANT IN REJOINER**

- 25 Counsel submitted that the transfer of the suit property by KCC to the 1<sup>st</sup> respondent was subject to the KCC Turinawe agreement of 10<sup>th</sup> November 1999 only, and it had no connection with the purported agreement between Turinawe and Kabutiti.



According to counsel, the appellants knew of the KCC Turinawe agreement and there was no evidence that they knew of the Turinawe/Kabutiti agreement until the hearing in the High Court.

5 Counsel contended that the appellants and the 1<sup>st</sup> respondent moved from being mere tenants of KCC after payment of the initial payment to having equitable rights in the suit property. Counsel contended further that the suit property became family property and was therefore subject to Section 39 of the Land Act.

10

### **CONSIDERATION BY COURT**

This is a second appeal. In the resolution of the appeal I will keep in mind the role of this Court as a second appellate court which this Court stated in **Kifamunte Henry versus Uganda Cr. Appeal No.10 of 1997** as follows:-

15

**“On second appeal, the Court of Appeal is precluded from questioning the findings of facts of the trial Court provided that there was evidence to support such findings though it may think it possible or even probable that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the findings of fact this being a question of law.”**

20

### **Grounds one, two and three**

I find that the three grounds of appeal are so intertwined that it is appropriate to  
25 handle and resolve them together. In my view, the critical issue for resolution of this appeal is whether the suit property was property on which the 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant resided and derived their sustenance and therefore whether the agreement for purchase of the suit property between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent was valid without the written consent of

the 1<sup>st</sup> appellant. Once that is resolved the whole appeal will in substance be resolved as I later will elaborate in this judgment.

Section 39 of the 1998 Land Act imposes a restriction on the transfer of land on which a person ordinarily resides with his or her spouse and from which they derive their sustenance.

Section 39 of the Land Act 1998 provides:-

**39. Restriction of transfer of land by family members.**

**(1) No person shall-**

**(a) sell, exchange, transfer, pledge, mortgage or lease any land;**

**(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease or any land; or**

**(c) give away any land inter vivos, or enter into any other transaction in respect of land-**

**(i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse; [the underlining is mine for emphasis.]**

Both the High Court and the Court of Appeal found, and in my view correctly so, that the 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent were legally married. They were therefore spouses. The next question would be whether Plot 27 Nyonyi Gardens, Kololo on which the 1<sup>st</sup> respondent and the appellants lived as tenants of KCC was property from which they derived their sustenance and thus requiring the spousal consent of the 1<sup>st</sup> appellant at the time of the 1<sup>st</sup> respondent selling the offer to him by KCC to purchase the suit property.



Both courts found that the 1<sup>st</sup> respondent and the appellants resided on the suit property as tenants of KCC. The 1<sup>st</sup> respondent paid rent to KCC who was the owner of the property and his employer. KCC offered to the 1<sup>st</sup> respondent the option to purchase the suit property.

5

The 1<sup>st</sup> respondent did not have the money to purchase the property so he got the 2<sup>nd</sup> respondent to buy the house, pay the purchase price and pay him a difference on top. When considering the issue of sale of the suit property by the 1<sup>st</sup> respondent the Court of Appeal held as follows:-

10

**“Be that as it may, the issue before court is whether from the evidence on record, the suit property qualifies as family property/land where one ordinarily resides with his spouse and children of majority age.**

15

**The evidence on record shows that the first appellant was a tenant of KCC and paid rent. He was given the offer to buy the suit property because he was the sitting tenant. He could not pay for the property and searched around for a buyer, who would be able to pay him some difference. He found the buyer. The payment of the purchase price was paid by bank drafts from the account of Elizabeth Kabutiti. She was the actual buyer of the suit property. The suit property did not become family property, simply because it was registered in his names. I appreciate the submission by appellants’ counsel that when one Kabutiti paid the purchase price she acquired an equitable interest in the suit property. The first appellant had to transfer the property into his names before it could be transferred to the buyer. The learned trial judge’s holding that Section 59 of the Registration of Title Act that provides that a certificate of title is**

25



conclusive proof of proprietorship unless obtained by fraud is applicable to the instant appeal was, with due respect, incorrect. In my view it would be dishonest to allow the respondents and the first appellant to retain ownership of the suit property after the first appellant had already accepted and received a consideration of Ug. Shs.70,000,000/= to sell his offer, simply because the suit land was registered in his names. Section 59 of the Registration of Titles Act was not intended by legislature to cover such situation like the one in the appeal before court.”

10 I would not fault the Court of Appeal for the finding and resolution above quoted for the following reasons.

15 The first respondent and the appellants were one family that lived in the house as tenants of KCC, the employer of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent paid rent for the house which the family did not own.

The heading of Section 39 of the Land Act is:-

**“Restrictions on transfer of land by family members”**

20 What the section clearly envisages and restricts is transfers. One can only transfer what one owns or possesses. One would not transfer land or rights in land that one does not own or transfer rights over land that have not yet accrued to the transferee.

25 Section 39 (1) (c) (i) refers to land on which the person ordinarily resides with the spouse and from which they derive their sustenance. The 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant resided on this property. That is not disputed.

Did they derive their sustenance from the property?

The oxford Dictionary 8<sup>th</sup> Edition defines Sustenance as:- **“means of support, a lively maintenance of life.”**

5

The 1<sup>st</sup> respondent was paying rent for the suit property as he worked for KCC his employer. He and his family were not getting income from the house. They were not deriving their sustenance from the suit property.

10 The offer to purchase the KCC house was made to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent when the latter was still a tenant and an employee of KCC. He and his family lived in the property as tenants and it was not their property. He could not have transferred the property when he was a tenant and not the owner. At that time he did not own the house to be able to transfer title in it.

15

There was therefore, no requirement for written consent by the 1<sup>st</sup> appellant as the property was not their property from which the spouses derived their sustenance.

20 When the offer to purchase the house was made by KCC to the 1<sup>st</sup> respondent, he could not raise the money to buy the same.

At the trial the 1<sup>st</sup> appellant claimed she made a contribution of 10,000,000/= (Ten million only) towards the purchase of the house. Both the High Court and  
25 the Court of Appeal found for a fact that there was no evidence to back the said claim. The 1<sup>st</sup> respondent maintained that the money paid to KCC for the purchase of the house was from the 2<sup>nd</sup> respondent.

Counsel for the appellants submitted that the source of the money paid to KCC was irrelevant for as long as it was paid in the names of the 1<sup>st</sup> respondent to whom the offer to purchase the house had been made following an agreement of sale of the offer to purchase to him from KCC.

5

I do not accept the argument of counsel that the source of money paid to purchase the house on the facts of the instant dispute was irrelevant.

10 There was evidence that the 1<sup>st</sup> respondent had no money to purchase the suit property. The 1<sup>st</sup> respondent and Elizabeth Kabutiti reached an agreement whereby the 1<sup>st</sup> respondent sold the offer to purchase the suit property to the 2<sup>nd</sup> respondent and the money to purchase the house came from the 2<sup>nd</sup> respondent's bank account. The source of the money could not be irrelevant. The house would not have been bought from KCC by the first respondent and his family  
15 since they had no money to effect the purchase.

There was on court record an agreement of sale between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. The question then becomes who was the actual buyer and when did title to the purchased property pass to the actual buyer.

20

A number of authorities provide guidance in the resolution of this issue. In the case of **Lysaght versus Edwards [1875] 2 Ch. D. 499**, the plaintiffs in 1874 entered into a contract for the purchase of a mansion house. A deposit of the purchase price was paid but before completion of the full payment was made  
25 the seller died.



The agreement provided that on payment of the balance of the purchase money the vendor would execute a proper conveyance. The deceased had made a will and bequeathed his property to his cousin.

- 5 The issue at the trial was whether the plaintiffs who were the purchasers could take the house. The Court held:-

10 **“What is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of *Lord Hardwicke*, who speaks of the settled doctrine of the Court as to it. What is the doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, money and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.”**

15

- 20 The legal principles stated in *Lysaght v Edwards* (supra) were cited with approval by this Court in **Supreme Court Civil Appeal No.53 of 1995 Ismail Jaffer Allibhai and 2 Others versus Nandlal Harjivan Karia and Another** when the court held:-

25 **“On completion of a contract of sale of immovable property, property passes to the purchaser, and the vendor holds it as a trustee for the purchaser. The legal title, on the other hand, remains with the vendor until transfer is effected.**

**The equitable title which passes to the purchaser is considered to be superior to the vendor's legal title, which is extinguished on payment of the purchase price by the purchaser"**

5 This Court then made reference to and found guidance from the authoritative works entitled, **"The Law of Real Property, by R.E. Megarry and H.W.R. Wade,"** and quoted page 582 as follows:

**"(a) The purchaser as owner:**

10 **If the purchaser is potentially entitled to equitable remedy of specific performance, he obtains an immediate equitable interest in the property contracted to be sold: for he is or soon will be, in a position to call for it specifically. It does not matter that the date for completion, when the purchaser may pay money and**  
15 **take possession, has not yet arrived: equity looks upon that as done which ought to be done, and from the date of contract the purchaser becomes owner in the eyes of equity (he cannot, of course, become owner at law until the land is conveyed to him by deed). This equitable ownership is as has been seen, a**  
20 **proprietary interest, enforceable against third parties, though it must be registered to protect it against purchasers.**

**(b) The vendor as trustee:**

25 **As between the parties to it, the contract creates a relationship of trustee and beneficiary: the vendor is said to be trustee for the purchaser and the purchaser to be beneficial owner. The vendor must therefore manage and preserve the property with the same care as is required of any other trustee, until it is finally handed over to purchaser. ...."**



5 The principle that property passes to the purchaser at the conclusion of a contract of sale and the vendor becomes a trustee of the purchaser is strengthened by the principle that risks also pass to the purchaser. At page 583 of Megarry and Wade, (supra) it is stated:

(c) Risk passes:

10 Since in equity the property at once belongs to the purchaser the risk also passes to him at once. Thus if a house has been sold and is, without fault of the vendor destroyed by fire before completion, the purchaser must nevertheless pay the full purchase-money and take the land as it is .....

15 The contract of sale between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent was a valid contract and the 1<sup>st</sup> respondent had the power to transfer title to the 2<sup>nd</sup> respondent which he did in implementation of the agreement he had made as correctly held by the Court of Appeal.


20 For those reasons I find that ground one and two of the appeal are without merit and I would dismiss them. Ground three of the appeal would also fail as a result since the contract between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent was a valid contract and there was no contravention of any law or public policy.

The whole appeal therefore fails and I would dismiss the same.

25 The appellants were a wife and children of the 1<sup>st</sup> respondent. In respect of these parties, I would order that each party bears its costs. The appellants shall bear the costs of the second respondent.



Dated at Kampala this 21<sup>st</sup> day of November 2018.



5 Hon. Justice Richard Buteera  
JUSTICE OF SUPREME COURT

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KOLOLO**

**Coram:** (Mwangusya, Mwondha, Buteera, JJ.S.C; Nshimye, Tumwesigye, Ag. JJSC)

**CIVIL APPEAL NO.10 OF 2018**

**BETWEEN**

1. MOLLY TURINAWE  
2. FIONA TURINAWE  
3. BERNES ANKUNDA  
4. ROBIN TURINAWE  
5. DAVIS TURINAWE

..... APPELLANT

**AND**

1. ENG EPHRAIM TURINAWE  
2. DEWAK LIMITED

..... RESPONDENT

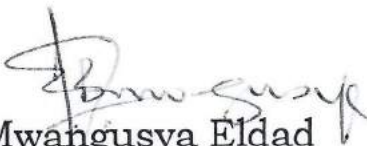
*(Appeal from the Judgment and a decree of the Court of Appeal at Kampala, Uganda Delivered by (Mukasa Kikonyogo DCJ, Twinomujuni, Kitumba, JJA) in Civil Appeal No.18 of 2009)*

**JUDGMENT OF ELDAD MWANGUSYA, JSC**

I have had the benefit of reading in draft the judgment of my brother Justice Buteera, JSC and I agree with him that the appeal has no merit and should be dismissed. I also agree with the orders proposed.

As all the other members of the Court agree, this appeal is dismissed with costs to the second respondent and as between the appellants and the first respondent each party is to meet its own costs.

Dated at Kampala this 21<sup>st</sup> day of November 2018

  
Mwangusya Eldad

**JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT KAMPALA**

**(CORAM: MWANGUSYA, MWONDHA. BUTEERA JJ.S.C. NSHIMYE,  
& TUMWESIGYE A.G. JJ.S.C)**

**CIVIL APPEAL NO. 10 OF 2018**

**BETWEEN**

**1. MOLLY TURINAWE  
2. FIONA TURINAWE  
3. BERNES ANKUNDA  
4. ROBIN TURINAWE  
5. DAVIS TURINA**

..... **APPELLANTS**

**AND**

**1. ENGINEER EPHRAIM TURINAWE  
2. DEWAK LIMITED** } ..... **RESPONDENTS**

*[Appeal from the Judgment and Decree of the Court of Appeal (Mukasa-Kikonyogo, DCJ Twinomujuni and Kitumba JA delivered at Kamapala on the 20<sup>th</sup> day of November 2009]*

**JUDGMENT OF A.S. NSHIMYE, A.G. JSC.**

I have had the benefit of reading in draft the lead judgment of my brother Hon Justice R. Buteera J.S.C. I agree with his reasoning and conclusion that the appeal lacks merit and ought to fail. I also concur with the orders he has proposed regarding costs.

However, for the sake of emphasis, I wish to state, that neither Engineer Ephraim Turinawe nor his members of family had the financial capacity to accept the offer from KCC to purchase the house they were residing in as tenants.




If they had such capacity, they would have paid for it and converted it from a rented premise to a family property.

As clearly stated in the lead judgment, the family through the 1<sup>st</sup> respondent sold the offer to purchase the house to Elizabeth Kabutiti at a consideration of shs 70,000,000. The money was paid to the 1<sup>st</sup> respondent on condition that when the suit property is conveyed to him, he would in turn then transfer it to her. Elizabeth Kabutiti paid the purchase price to KCC through the 1<sup>st</sup> respondent. She became an invisible purchaser and the 1<sup>st</sup> respondent became her trustee who was under a contractual obligation to transfer the house to the actual purchaser.

Section 39 (1) (c) (i) of the Land Act pre-supposes that, the land mentioned therein belongs to the family and the family derives sustenance from it. Sustenance connotes some benefit accruing from property. It may be, by way of rent money that would be saved because the property is theirs or rent accruing from tenants if it was to be rented out.

In this case the suit property was making the family poorer every month through payment of rent. Therefore, in my view, at no moment in time did the house become the property of the family so as to sustain them within the meaning of section 39(1) (c) (i) of the Land Act.

Dated at Kampala, this 21<sup>st</sup> day of November 2018.

  
A.S. NSHIMYE

**A.G. JUSTICE OF SUPREME COURT**

THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
(CORAM: MWANGUSYA, MWONDHA, BUTEERA JJSC, NSHIMYE, TUMWESIGYE  
AG.JJSC)  
CIVIL APPEAL NO.10 OF 2018

BETWEEN

1. Molly Turinawe  
2. Fiona Turinawe  
3. Bernes Ankunda  
4. Robin Turinawe  
5. Davis Turinawe } .....Appellants

AND

1. Engineer Ephraim Turinawe  
2. Dewak Limited } .....Respondents

(Appeal from the Judgment and Decree of the Court of Appeal delivered by Mukasa Kikonyogo DCJ, Twinomujuni, Kitumba JJA at Kampala on the 20<sup>th</sup> day of November 2009 in Civil Appeal No.18 of 2009)

**JUDGMENT OF MWONDHA JSC**

I have had the benefit of reading in draft the judgment of my brother Hon. Justice Buteera JSC. I agree that the appeal lacks merit and should be dismissed. I also agree with the orders proposed.

Dated at Kampala this.....*21<sup>st</sup>*.....day of.....*November*.....2018.

*Mwondha*  
MWONDHA  
JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT KAMPALA**

(CORAM: MWANGUSYA, MWONDHA, BUTEERA, JJ.SC;  
NSHIMYE, TUMWESIGYE, AG. JJ.SC)

CIVIL APPEAL NO: 10 OF 2018

BETWEEN

1. MOLLY TURINAWE
2. FIONA TURINAWE
3. BERNES ANKUNDA
4. ROBIN TURINAWE
5. DAVIS TURINAWE

:..... APPELLANTS

AND

1. ENG. EPHRAIM TURINAWE
2. DEWAK LIMITED

:.....RESPONDENTS

*[Appeal from the Judgment of the Court of Appeal (Mukasa-kikonyogo, DC), Twinomujuni and Kitumba, JJA) delivered at Kampala on 20<sup>th</sup> November, 2009 in Civil Appeal No. 18 of 2009]*

**JUDGMENT OF TUMWESIGYE, AG. JSC**

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Richard Buteera, JSC, and I agree with him that this appeal lacks merit and should be dismissed. I also agree with the orders he has proposed.

Dated at Kampala this 21<sup>st</sup> day of November 2018



Jotham Tumwesigye

**AG. JUSTICE OF THE SUPREME COURT**