THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

Coram: [Tumwesigye;Arach-Amoko;Mwangusya; Opio-Aweri;Mwondha; JJ.S.C]

MISC. APPLICATION NO.28 OF 2015.
(Arising out of Supreme Court Civil Appeal No. 8 of 2014)
BETWEEN

1. ISAYA KALYA----------
2. GEOFREY KATOORO---------- **APPLICANTS**
3. RABWONI JOHNSON----------

AND

MOSES MACEKENYU IKAGOBYA----------RESPONDENT

RULING OF HON. JUSTICE OPIO-AWERI, JSC, DESSENTING

I have pursued the majority decision with which I do not agree. Below is my detailed reasons for my dissent.

INTRODUCTION.

This application is against the judgment and orders of the Supreme Court vide SCCA 8 of 2014 delivered on the 29th day of October, 2015. The application is brought under Rule 2 (2) of the Judicature (Supreme Court Rules) Directions 13-11 seeking the following orders:-

a) A declaration that the judgment and orders passed in Supreme Court vide Civil Appeal No. 08 of 2014 and delivered on the October 2015 are contrary to the law and are null and void.

b) An order setting aside the judgment and orders made in Supreme Court Civil Appeal No. 08 of 2014 above.

c) An order dismissing Civil Appeal No. 08 of 2014 and substituting the same with the judgment and orders of the Court of Appeal; in Civil Appeal No. 82 of 2012

d) The costs of this application be provided for.

The Notice of Motion was supported by an affidavit sworn by the applicant's advocate, Ongom .A. Ruth.

BACKGROUND OF THE APPLICATION

This is a dispute between very close relatives. The 1st applicant is the father of the 2nd and 3rd applicants. The 1st applicant on the other hand is the uncle of the respondent, being the brother of the father of the respondent.

The 1st applicant in 1975 acquired the disputed land from his cousin, the late Yowasi Bamuloho, who was his friend and colleague in the Kingdom of Tooro, who gave him 400 acres from his inherited 6 square miles of land.

The 1st applicant was registered on the title on 13/05/1975. The land comprised Block 16, Plots 10 and was about 189. 70 hectares. Part of the land was being occupied by some people who were later compensated.

These included the family of Everest Kizza. Part of the said land was also occupied by relatives, brothers and cousins of the 1st applicant whom he allowed to stay on the land because they had been tenants on the land. This included the father of the respondent, Sylvester Ikagobya.

Upon being appointed District Administrator, the 1st applicant appointed the respondent and two others to care take the disputed land. The 1st applicant later divided the land into plots No.14, 15 and 16. Plots 14 and 15 were transferred and registered into the names of 2nd and 3rd applicants.

The 1st applicant on 10/04/2009 bequeathed to his brothers and nephews the land they had inherited from their parents in order for them to change as owners with titles. The 1st applicant did that in writing as freehold owner and head of clan and family.

In that way the 1st applicant gave the respondent the portion he had inherited from his father so that he could acquire his freehold title. It was at this point that the respondent started claiming that even the land the 1st applicant had given to him to caretaker belonged to him. At that point the applicants filed a suit in the High Court against the respondent for orders that the respondent be declared a trespasser on the suit land, the respondent gives vacant possession of the suit lands, a permanent injunction restraining the defendant and any one acting under him from further trespass on to the suit land and for award of general damages and costs of the suit.

The respondent denied the allegations and instead filed a counter-claim that the suit land belonged to him as he inherited part of it and bought the other part from Bibanja holders with the knowledge of the 1st applicant.

The respondent averred in the counterclaim that the land comprised in block 16 plots 14 and 15 which the 1st applicant purported to transfer to the 2nd and 3rd applicants was lawfully held and occupied by him and pleaded to court to make a declaration to that effect and also to order the 1st applicant to sign transfer forms for him in respect of the said land.

The issues agreed upon at the trial by the parties were:-

1) Whether Selvester Ikagobya (the defendant's father) owned any land, and if so, whether the defendant acquired any land from him.

2) Whether the defendant bought land from persons mentioned under paragraph 4 (viii) of the written statement of defence.

3) Whether the defendant is a trespasser on the land comprised in block 16 plots 14 and 15 and part of plot 10.

4) Whether the plaintiffs are entitled to the remedies prayed for.

5) Whether the defendant is entitled to remedies sought in the counterclaim.

The Trial Judge held that the respondent was a lawful and or bonafide occupant of the suit land and therefore not a trespasser, that the defendant was entitled to have his interest in the suit land registered in accordance with the law.

Dissatisfied with the decision of the High Court, the Applicants appealed to the Court of Appeal which reversed the decision of the High Court in favor of the applicants. The respondent was aggrieved by the Court of Appeal decision and appealed to this Court. This Court allowed the appeal, set aside the Court of Appeal judgment and reinstated the findings and orders of the High Court with costs in this court and those below. Hence this application.

Grounds of the application

The applicants were aggrieved by the decision of this court and filed an application for review of the judgment. The Application was premised on the following grounds:-

1. That the applicants were respondents in Supreme Court Civil Appeal No. 08 of 2014 wherein a judgment was delivered on the 29th October 2015 against them.

2. That the decree of the court in Supreme Court Civil Appeal No. 08 of 2014 is unenforceable in law to the effect that the land decreed to the respondent as per his counter claim is not defined, described, known by size and boundary.

3. That the decree in relation to the land pleaded in *paragraph* 4(i), (Vi), (Vii) and 5 of the defence and counterclaim is not defined, described, known by size and boundary.

4. That the judgment and orders in Supreme Court Civil Appeal No. 08 of 2014 in particular the findings and holdings of the court on Grounds 2, 3 and 4 of the memorandum of Appeal contravened Sections 1(h), 3(i)(a) - (h) of the Land Act cap 6 in as so far as;

I. The incidents and facts of customary tenure were not proved contrary to sections 1(h), 3(i)(a)-(h) of the Land Act Cap 227.

II. The option and consent to purchase were not proved contrary to Sections 34 and 35(1) and (2) of the Land Act Cap 227.

III. The finding of the court on (i) and (ii) above is contrary to sections 101,102,103,104,106 and 110 of the evidence Act Cap 6.

5. That the judgment and orders in Supreme Court Civil Appeal No. 08 of 2014 in particular the findings and holdings of the court on Ground 5 of the Memorandum of Appeal and the orders restoring the decision and orders of the High Court contravened Sections 28 and 29 of the Land Act Cap 227 in so far as;

I. The respondent cannot be both lawful and bonafide occupant on the suit land contrary to sections 28 and 29 of the land Act Cap 227 and the respondent's pleadings in the High Court.

II. The finding of the Court contravened Sections 101,103,103,104,106 and 110 of the Evidence Act Cap 6.

III. The holding of the case is in conflict with the previous decisions of this court namely; **Kampala District Land Board & Anor Vs National Housing and Construction Corporation SCCA 2/2004 and Kampala District Land Board and George Mitala Vs Venansio BabweYaka & 3 Ors SCCA 2/2007** among others.

6. That the judgment and orders in **Supreme Court Civil appeal No. 08 of 2014** in particular the findings and holdings of the

court on Ground 1 of the memorandum of Appeal contravened Sections 101,102,103,104,106 and 110 of the Evidence Act Cap 6 and there was no live legal dispute over the land previously owned by Mukirane and later occupied by the respondent's father.

7. That the judgment and orders did not meet the ends of justice of the dispute in particular Ground 6 contravened Section 59 of the Registration of Tittles Act Cap 230 and the principles of fairness and justice in so far as the failure to produce Joshua Kafumu and Yowana Kairu had no bearing on the applicant's case since the applicant was the registered proprietor.

8. That the judgment and orders of Court in **SCCA No. 8 of 2014** under Ground 7 shifting and casting the burden of proof on the applicants to a cross-action of the respondent is contrary to Sections 101,102,103,104,106 and 110 of the Evidence Act Cap 6.

9. That the application is intended to prevent abuse of the process of Court in so far as the respondent obtained judgment on allegations not proved in evidence and law beyond what he is entitled to.

10. That the decisions of and orders made do not meet the ends of justice of the case in so far as non-locus visit was not an issue raised in the original court, in the **Court of Appeal Civil Appeal 82 of 2012** and could not be a Ground of Appeal in Supreme Court Civil Appeal 8 of 2014 the legality of the non-locus visit.(SIC)

11. That the ends of justice demand that a party should obtain judgment and orders in line with the pleadings, facts , evidence and the law applicable in the circumstances.

12. That the justice of the case demand that locus visit be done so that the definition, description, boundary and size of the Land be established.

13. That the application is not intended to circumvent the finality of the judgment of this court nor is it intended to make the court sit in its own Appeal but rather to have substantive justice administered and a judgment of the Court contrary to law set aside.

14. That it is very fair, just, equitable, prudent in the circumstances and safe in the circumstances to grant the orders herein sought.

REPRESENTATION

At the hearing, the Applicants were represented by Mr. Muhumuza Kahwa and Mr. Ambrose Tebyasa while the respondent was represented by Mr. Andrew Kahuma holding brief for Mr. Johnson Musana. Both counsel filed written submissions.

SUBMISSIONS

APPLICANTS

Counsel for the applicants submitted that their point of claim was that the judgment, decision and orders in the main Appeal were contrary to law and were null and void abnitio, occasioned a miscarriage of justice, were not in the interest of justice, and were unenforceable in law. The judgment, decision and orders did not meet the end of justice of the case, abused the process of the court, and inhibited and impeded the course of justice.

Counsel contended that the injustices were embedded in the findings, holdings and conclusions arrived at by the trial Court vide **HCT-O1-CV-LD-CS-14 of 2009** and the **Supreme Court Vide SCCA NO.8 of 2014.**

Counsel argued that a miscarriage of justice occurred when the courts adjudicated *upon a* matter that was not in dispute. That the pleadings, evidence and submissions in both courts revealed that the land formerly occupied by Mukirane which was later settled in

and taken over by the respondent's father Sylvester Ikagobya was not in dispute. Counsel submitted that it was immaterial whether the respondent was never explained by the applicant since the respondent was never dispossessed of the same by any of the applicants. That the boundaries of the land were not challenged by either party and that the 1st applicant was willing to transfer the kibanja interest to the respondent as shown in Exhibit P2.

Counsel argued that the 1st applicant discharged his burden when he provided the boundaries of the said land as a registered proprietor of the land. That upon counter-claiming by the respondent, the burden shifted to the respondent to prove the alleged purchase and the boundaries of the land under section 101 and 102 of the Evidence Act. Counsel further submitted that the respondent could have moved court to visit the Locus in Quo which he did not do and the resultant failure by the court to visit the locus in quo could not be blamed on the Applicants. That it was incumbent upon the respondent to show how much his father and himself had bought in terms of size and location beyond what was formerly occupied by Mukirane.

Counsel contended that the court order directing the applicants to transfer the land to the respondent was an injustice in that the applicants would transfer more land than what the respondent claimed. That it was further an injustice for the applicants to transfer 50 acres of land when the respondent had not proved that truly his late father bought the same beyond what Mukirane owned and occupied as shown in Exhibit PE2.

Counsel submitted that the judgment and orders of the said courts propagated and perpetuated an injustice in finding and holding that the respondent had bought more land from bibanja holders mentioned and pleaded in his defence and counter-claim. That the respondent admitted to have brought such lands in a period of ten years backwards therefore such transactions took place in a period after 2000. Counsel argued that the judgment was null and void since none of the bibanja holders neither testified in court nor were any sale agreements exhibited in evidence.

That despite the submission by the 1st applicant that even if such purchases occurred, they would be illegal and contrary to section 35 of the Land Act Cap 227 since there was no formal consent of the 1st applicant as the registered proprietor of the land, the courts in question ignored this point.

Counsel further contended that it was erroneous for the said courts to grant an interest to the respondent as a lawful and bonafide occupant which interest he did not claim to be. That the decision contravened sections 29(1) and (2) of the Land Act where the said forms of occupancy have peculiar antecedents and incidences in law. That the respondent could not be both a lawful and bonafide occupant on the same piece of land at the same time.

Counsel argued that it was an injustice when the courts agreed with the submissions of the respondent that the said Bibanja holders were holding interests of customary holders despite the absence of any evidence to prove customary acquisition on land previously registered. That the decision contravenes the decision in **Kampala District Land Board & Anor V Babweyaka & Ors SCCA of 2007 and George Tuhirwe V Caroline Rumuhanda SCCA 15 of 2007.**

Counsel further submitted that the order that the respondent was entitled to have his interest in the suit registered in accordance with the law embedded a miscarriage of justice because it had an implication that the applicants would lose their proprietorship and execute transfers in favor of the respondent thereby losing their title to the land when no fraud, mistake or un-description of boundary, which would be the only known legal circumstances to cause such loss had not been proved or alleged against the applicants. Counsel concluded that the order contravenes section 59, 77 and 159 of the RTA.

Counsel further submitted that it was an injustice for the courts to order the 1st applicant to transfer his freehold interest in the land to the respondent who had not proved to have acquired such registered interest from him and who had not demonstrated that his

father or other person from whom he claims title had paid the 1st applicant or any of the other applicants for the value of this land. That in effect, the orders transformed the interest that the respondent had in the land (bonafide or lawful occupant) into a registered interest thereby contravening Article 26 of the Constitution.

Counsel submitted that a miscarriage of justice occasioned when the courts held that the failure to call Joshua Kafumu and Yohana Kaheru whom the 1st applicant had appointed as caretakers together with the respondent in 1987 as being fatal to the 1st applicant case when he was already the proprietor to the land with a certificate of title yet court accepted the submissions of the respondent who never adduced evidence concerning customary acquisition from the alleged customary holders as well as evidence of lawful and bonafide occupancy and no witnesses were brought to support the allegation.

Counsel further stated the Supreme Court acted contrary to the law when it reversed the order of High Court on costs when there had been no cross appeal by the respondent to the Court of Appeal and the Trial Judge had not been faulted or found to have un-judicially exercised his discretion in ordering each party to bear their costs. That the reasons advanced by the trial judge for not awarding costs were never faulted or found to be wanting and the interference in his discretion lacked basis. He relied his argument on the holdings in the case of **Paul Mwiru V Nathan Igeme Nabeeta & 2 Ors E.P.C.A No. 6/2011.**

Counsel concluded his submissions by praying court for a declaration; that the judgment and orders passed in Supreme Court vide **Civil Appeal No. 08 of 2014** and delivered on the 29th October 2015 were contrary to the law and are null and void abnitio;

An order setting aside the orders made in the Supreme Court Civil Appeal No. 08 of 2014;

An order dismissing **Civil Appeal No. 08 of 2014** and substituting the same with the judgment and orders of the Court of Appeal in **Civil Appeal No. 82 of 2012;**

The costs of the application he provided for. Alternatively, the court makes orders that locus in quo be visited to address the matter herein complained in the interest of justice.

Respondent's submission.

Counsel for the respondent contended that the application was disguised to appeal against the judgment of this court in **Civil Appeal No. 08/2014**. He argued that all stands as set out were grounds of appeal against what the applicants would have set out if any further Appeals were allowed thereby being an abuse of court process and ought to be dismissed summarily.

Counsel contended that it was true that Rule 2(2) of the Judicature Supreme Court Rules conveys inherent powers upon this court to make necessary orders for achieving the ends of justice. However, it could only be applied where the court is satisfied that it is giving effect to the intention of the court at the time the judgment was given or in case of a matter which was over-looked where it is satisfied as to the order made, had the matter been brought to its attention.

Counsel stated that there was nothing in the application to show that the judgment could not be put into effect since the acreage of the land was well established. That the Court ordered that the land be registered in the names of the respondent leaving the only question at hand as that of surveying and getting title to the land.

Counsel contended that the issue of locus in quo was an issue that would have been raised at the High Court hearing not being a new matter envisaged under R.2(2) of the Supreme Court Rules. Learned Counsel further argued that the issue of extent of the land never arose since all the parties recognized that the land in issue was that land occupied by the then defendant. That the question of whether there was a sale of land between the respondent's father and the

Late Bamuloho was encompassed in the judgments of the three courts, submissions and evidence on record and ought not to have been raised again.

Counsel relied on the authorities of **Orient Bank limited Vs Fredrick Zaabwe & mars trading limited Supreme Court Civil Application No. 17/2007** which set out the scope of R.2(2) of the Supreme Court Rules. He argued that an application under this rule must seek to perfect the Judgment of court and not to review or reverse its decision on grounds that the findings were erroneous. He contended that this application was not tenable in court since it did not highlight that the judgment contained any slip or error. In furtherance of his argument, counsel observed that the principle was that litigation must come to an end Counsel referred to **Orient Bank V Fredrick Zaabwe 7 Anor SCCA 17/2007, URA Vs Shell (U) ltd SCCA ppcn 17/2014, and British American Tobacco Uganda Limited vs Sedrach Mwijbuki & $ ors, Misc App 07/20 13** where similar applications were dismissed on the above principle.

Consideration by Court.

Legally, a decision of this Court on any issue of law or fact is final. Ideally, a losing party cannot seek for its reversal. There are however circumstances under which this court may be asked to re-visit its decision. These are set out in rule 2(2) and 35(1) of the judicature (Supreme Court Rules (Direction SI 13-11), under which this application was made. The rule preserves the inherent power of this court to make necessary orders for the ends of justice, including orders for inter alia- ***"setting aside judgments which have been proved null and void after they have been passed."***

It is well known that no party is entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. For purposes of emphasis the principle is that a judgment pronounced by this Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. For instance,

1) If clearly a wrong has been done and it is necessary to pass an order to do full and effective justice

2) If the decision embedded in the judgment is null and void in law. That is: it particularly violates provisions of the law.
3) If the decisions or judgment is unjust, unfair, and occasion a miscarriage of justice.

4) If and when ever circumstances transpire after the finality of the decision which renders its execution unjust, un-equitable, and unenforceable.

The above exceptional circumstances are a summary of the decisions of this court and other courts across the globe. Notably: **Northern India Caterers (India) vs Lt. Governor Of Delhi on 1980 AIR 674, 1980 SCR (2) 650, Sewanyana v Martin Aliker, Civil Appication No.4 of 1991 (SC), Orient Bank vs Fredrick Zaabwe and another Supreme Court Civil Application No 17 of 2007, Hipfoog Hing vs Heotia & co (1918) AC 888, M.S.Ahlawat vs State Of Haryana And Anr on 27 October, 1999, GirdhariLal Gupta vs D.H. Mehta AndAnr AIR**

1971 SC 2162, (1971) 3 SCC 189,

In **Orient Bank (supra)** this Court explained the scope of the power of the Court to revisit its decisions as follows:

" It is trite law that the decision of this Court on any issue of fact or law is final, so that the un-successful party cannot apply for its reversal. The only circumstances under which this Court may be asked to re-visit its decision are set out in Rule 2(2) and Rule 35(1) of the Rules of this Court. On the one hand, Rule 2 (2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders inter alia-

'....setting aside judgments which have been proved null and void after they have been passed,..."

The Indian Supreme Court is more emphatic on the scope and principles where the Supreme Court can revisit its decision. For instance in Northern India Caterers (**India Ltd VS Lt Governor of Delhi** (supra) it stated as follows:-

"The question is whether on the facts of the present case a review is justified.

It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Sajjan Singh v. State of Rajasthan.(1) For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment. G. L. Gupta v. D. N. Mehta.(2) The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility." Chandra Kanta v. Sheikh Habib."

This Court In its Judgment, decision and orders in SCCA 8 of 2014 restored the judgment, decision and orders of the Learned Trial Judge in the High Court which were to the effect that;

i- The Defendant [Respondent] is the lawful, and or bonafide occupant of the suit land in his possession and located in Block 16 Plots 14 and 15 and part of Plot No.10 situated in Bukolekole, Omuhangara, Bunyangabu county, Kabarole District.

ii- The Defendant [Respondent] is entitled to have his interest in the suit land described above registered in accordance with the law.

iii- The head suit is hereby dismissed while the counter claim is allowed.

iv- Each party shall bear their respective costs of the head suit and of the counterclaim save that this court reversed the order on costs.

2. The complaint in the instant application is that the Judgment, decision and orders of this court above stated were contrary to the law and null and void ab initio, occasioned a miscarriage of justice, not in the interest of justice, unenforceable in law. The judgment, decision and orders did not meet the ends of justice of the case, abused the process of the court, inhibited and impeded the course of justice, inter alia. These complaints are premised under Rule 2 [2] of the Judicature (supreme court Rules (Direction SI 13 -11). which empowers this court to investigate, hear and determine the complaints of this nature, with wide powers to set aside the offending orders earlier issued by this court.

3.The gist and thrust of the applicant's complaint was laid out in the Notice of Motion, specifically in Paragraphs 2-14 thereof and expounded upon in the affidavit in support and in rejoinder responding to the reply.

4. This application is brought in the interest of justice to avert and cure several miscarriages of justice occasioned by the

Judgment, decision and orders perpetuated and propagated by **SCCA No. 8 of 2014** which restored the judgment, decision and orders of **HCT – 01 – CV – LD – CS – 14 of 2009.**

5. I have perused the judgments and proceedings in the High Court, Court of Appeal and the Supreme Court. I respectfully agree with the applicants that there are numerous injustices embedded in the findings, holding and conclusions arrived at by this Court in Civil Appeal No. 8 of 2017. These injustices are embedded in the findings, holding and conclusions arrived at by this Court. It is therefore not true as decided by the majority decision that there were no injustices occasioned by the court.

A miscarriage of justice occurred when this court and the High Court went ahead to determine and adjudicate upon a matter that was not in dispute. The pleadings, evidence and submissions in both courts reveal that the land formerly occupied by Mukirane which was later settled in and taken over by the respondent's father Selevester Ikagobya was not in dispute **[See page 119, 120,121 of this record]** paragraph **3[a] 4[c], [e], [f], [h] and 8 [a]** of the plaint. It was immaterial whether the respondent's father had bought it or occupied it since the respondent was never dispossessed of that land by the applicants. The location of this land and the boundaries thereof were formally shown by **PW1** the 1st applicant in **PE2 [page 227 of this record]**. The respondent did not challenge these boundaries and the same were never put in dispute. The interest held was a Kibanja interest on registered land which the 1st applicant was ready and willing to transfer to the respondent as shown in **PE2.**

It was an injustice, unfair and erroneous for the said courts to condemn and blame the applicants for not establishing the size of this Kibanja yet the 1st applicant had established and provided the boundaries in **PE.2** hence discharging the burden as a registered proprietor. It was the respondent who was claiming by way of counterclaim that his father had bought more land than that of Mukirane. This placed the burden of proof on the respondent to

prove the alleged purchase under Ss 101and 102 of the Evidence Act and was thus required to show the boundaries and size of the alleged kibanja over and above that of Mukirane.

The respondent could do this by moving Court to visit the locus in quo which he did not do and any resultant failure by court to visit the locus when it was not required or shown to have been required could not justly have been shifted on the applicants who had not brought any boundaries in issue. In any case by 1964 the respondent must have been very young.

From the above facts, the injustice disclosed and meted is that the 1st applicant is being asked to prove what he had not alleged. At all times the applicants' land was registered land **[page 120 and 130 of the record]** Para 4[a] of the plaint] from Nicodemus Kakurorora who passed it on to Yowasi Bamuroho in 1963 and then to the 1st applicant in 1975 as **Plot 10 which is 189.70 hectares equivalent to 468.70 acres, plot 14 is 3.037 hectares equivalent to 7.504 acres, plot 15 is 8.445 hectares equivalent to 20.867 acres [pages 222, 223, 233 and 237-238 of this record].** Thus it was incumbent upon the respondent to show how much his father and himself had bought in terms of size and location beyond what was formerly occupied by Mukirane.

The respondent alleged that his total land was around 60 acres i.e the one bought by his father from Yowasi Bamuloho inclusive that of Mukirane which approximated to be 50 acres **[see pages142, 171 and 173 paragraph 4(a) and 4[vii] of the Defence and Counterclaim]** and the one he allegedly bought approximated to be 10 acres from Bibanja holders [see page 173 of Dw1 evidence]. The respondent did not locate the plot in which the 10 acres lie yet the judgment awards land situate in plot 14 and 15 in addition to part of plot 10 which total to 77.371 acres which adds the respondent more 17.371 acres that the respondent never claimed.

The injustice suffered by the applicants is that in enforcing the Court Order the applicants would be transferring more land to the respondent than what he claimed and when he had not shown

where the Bibanja holders' land allegedly bought was part of or in plot 14 and 15 and in the same breadth the 1st applicant as proprietor of plot 10 would suffer an injustice to transfer 50 acres when the respondent had not proved that truly his late father bought the same beyond what Mukirane owned and occupied as shown in **PE2.**

This mix up and contestation on size of the land allegedly bought by the deceased father of the respondent and that of Mukirane and what the respondent allegedly bought from Bibanja holders formed the basis of the respondent's counter-claim which would have been resolved by court being moved to a locus in quo visit by the respondent who was claiming to have bought pieces, parcels and portions of registered land from persons who were not registered proprietors to show court what exactly he claimed to have bought in size, location and boundary.

The failure of which and going with Judgment, decision and orders gave the respondent more than what he did not claim for, prove and constituted a poor understanding of evidence and facts. This necessitated the respondent to apply to Court to visit locus as required by the case law.

The respondent had more to benefit from locus in quo visit in light of his claims as opposed to the applicants because for the applicants, their respective lands were under registration and the location, size and boundary known. It was an injustice for the two courts to condemn the applicants on failing to establish the size of the respondent's lands in the circumstances when the respondent had a counter-claim to prove. It was therefore erroneous and superfluous in the circumstances for the two courts, to find and hold that the respondent and his deceased father owned more than what was formerly occupied by Mukirane.

The Law is that courts sit to determine and resolve live disputes. There was no live controversy on the land formerly occupied by Mukirane. A decision based on such claims cannot stand. This was held in the case of **Joseph Borowaki Versus Ag of Canada**

[1989] SCR 342 cited with approval in numerous cases in this jurisdiction e.g. **Hon. Justice R.O. Wengi Versus Ag. HCMA – 233 of 2006.** The land formerly occupied by Mukirane was not in dispute. The judgment, decision and orders based on the counterclaim become unenforceable as to the exact size, location and boundary bought by the respondent's father, the respondent himself as well as the location, size and boundary of the Bibanja holders.

The applicants in their submissions in both courts as well as pleadings [pages 120, 162, 165, and 185 para 4[e] complained that the respondent had alleged that his deceased father Selevester Ikagobya bought part of the suit land including that of Mukirane from Yowasi Bamuloho in 1964 and the full purchase price was paid but no explanation was given as to why a transfer was never executed up to the time of the demise of Yowasi Bamuloho Selevester Ikagobya who died in 1980. As stated earlier, the land occupied by the respondent's father was already earmarked and made ready for transfer to him.

The transfer from Yowasi Bamuloho to the 1st applicant was in 1975 when the respondent's father was still alive; how come no dispute or complaint arose from Selevaster Ikagobya that Isaaya Kalya, the 1st applicant was taking over his land earlier bought in 1964? That is notwithstanding the fact that the transfer of 1975 must have been preceded by a long survey exercise and boundary opening as is the custom and must have even affected Mukirane's land which the respondent's father had long occupied! [See page 162 of PW1 evidence of this record].

The Judgment, decision and orders of the said courts propagated and perpetuated an injustice in finding and holding that the respondent had bought more land from Bibanja holders [see pages 143 para 4[vii], 170 and 173 of this record] mentioned and pleaded under **Para 4[vii] of the Defence and Counterclaim**. The respondent admitted that he had bought such lands within a period of 20 years backwards at the time of testimony in **August 2010. Further and b**etter particulars of these purchases were sought and

none was availed [see pages 150-151 of this record]. None of these alleged Bibanja holders were called as a witnesses by the respondent. Instead this court blamed the applicants for not calling them to testify in court as former care takers of his land.

These were people whose interest the first applicant had already compensated and merely colluded with the respondent to make such a wild allegation. There was no way the 1st applicant would have succeeded in securing their attendance as his witnesses. In any case, no sale agreements were exhibited in evidence. A submission was made to the effect that such purchases if at all any occurred were illegal and contrary to **Section 35 of the Land Act Cap 227** without the formal consent of the 1st applicant as the registered proprietor. The Trial Court and this court ignored this point. This makes the Judgment, decision and orders of the court based on such a finding and conclusion null and void in law.

The Judgment, decision and orders of both courts that the respondent is the lawful and or bonafide occupant of the suit land. The injustice meted against the applicants is that the courts granted to the respondent an interest in the land **[i.e lawful and or bonafide occupants]** which he had not claimed to be, both in the pleadings and evidence. Besides such a Judgment, decision and orders contravenes **Sections 29 [1] and [2]** where each of the said forms of occupancy and mode of category of acquisition has its own peculiar, distinct and separate antecedents and incidences in law. The case of **George Tuhirirwe versus Caroline Rwamuhanda SCCA 15 of 2007 reported in [2009] KALR at 139** is exhaustive on this issue. Besides, the respondent cannot be both a lawful and or bonafide occupant from the same registered proprietor at the same time and on the same piece of land. The facts, evidence and circumstances of this case do not justify such a finding and conclusion.

The respondent further pleaded that the said Bibanja holders were holding interests of customary holders, Para 3 of the counterclaim **[page 145 para 3 of this record]**. The said courts agreed with him in the absence of any evidence to prove customary acquisition on

land previously registered. No custom was pleaded and no evidence of customary acquisition was adduced as held in **Kampala District Land Board & Another versus Venansio Babweyaka & Others SCCA 2 of 2007**.

The said Judgment, decision and orders based on such findings and conclusions of lawful and or bonafide, customary interests of Bibanja holders are not only in conflict with the provisions of the Land Act above cited but also case law namely the decisions of this court in the cases of;

- ***George Tuhirirwe Versus Caroline Rumuhanda SCCA 15 of 2007.***
- ***Kampala District Land Board and George Mitola Vs Venasio Babweyaka and 3 others SCCA 2 OF 2007.***

These decided cases hold and emphasize that a party who alleges acquisition of land by custom evidence must be adduced of that particular custom by which such acquisition was acquired. That a person cannot be both a lawful and or bonafide occupant on the same piece of land at the same time from the same source and that each of the said forms of occupancy is separate and distinct.

The other injustice meted out against the applicants by the Judgment, decision and order of the said courts is embedded in the order that the respondent is entitled to have his interest in the suit land registered in accordance with the law. The implication of this is that the applicants would lose their proprietorship and execute transfers in favour of the respondent. The injustice occasioned is that the applicants' title to the land would be lost when no fraud, mistake or misdescription of boundary the only circumstances known in law to cause such loss have not been proved or alleged against the applicants. The decision is contrary to the **Section 59, 77 and 176 of The Registration of Titles Act Cap 230.** None of the above instances was ever a complaint raised by the respondent.

The injustice is further compounded by the fact that the 1st applicant at no consideration is directed to transfer his registered

freehold interest to the respondent who does not claim or prove to have acquired such a registrable interest from him and who does not demonstrate that his father or any other person from whom he claims title had paid the 1st applicant or any of the other applicants for the value of this land. The orders in essence transformed the respondent's claim of un registered interest (bonafide or lawful or customary whatever the case may be) into a registered interest. Such orders to transfer the land are inconsistent with Article 26 of the Constitution of Uganda as the applicants would under an order of court be dispossessed of their land without any due or other consideration at all.

The original purpose and object of the applicants resolve to litigation was to limit the respondent's occupation within the boundaries of the land formerly occupied by Mukirane that was owned and later occupied by the respondent's father Selevester Ikagobya whose boundaries were spelt out in PE 2. It was clear as argued above that there was no dispute over this land. This was not the suit land. The suit land related to and covered land in excess of the one of Mukirane.

The excess land in dispute would be Plot 14 and 15 and part of Plot 10 outside the boundaries shown in **PE2.** The injustice suffered by the applicants was that the court decreed more land to the respondent than what he claimed, did not ascertain, did not specify by boundary let alone move to locus to view what the respondent alleged his deceased father had bought if any, and himself. The allegations in the counterclaim were not proved in relation to such land. The respondent did not apply to trial court to visit locus, it was not his complaint in the Court of Appeal as a ground of cross-Appeal. The law precludes a party to raise a new ground of Appeal formerly not a ground in the lower court.

A miscarriage of justice occurred in the said judgment, decision and orders of the court by the holding that the failure to call Joshua Kafumu and Yohana Kaihura whom the 1st applicant had appointed as caretakers together with the respondent in 1987 as being fatal to the 1st applicant's case when he was already the proprietor to the

land with a certificate of title yet the respondent who never adduced evidence of customary acquisition from the alleged customary holders as well as evidence of lawful and or bonafide occupancy and called none of the persons mentioned in **para 4[vii]** of the defence to support this alleged claims of purchase from them but the courts judged in his favour. This was equivalent to applying double standards and were an abuse of the process of court to perversion of justice. In any case under the registration of titles Act, a certificate of title is conclusive evidence of ownership of land and the first applicant needed to call no one to prove his ownership of his land.

The court erred in law when it reversed the order of High Court on costs when there had been no cross appeal by the respondent to the Court of Appeal and the judge had not been faulted or found to have un-judicially exercised his discretion in ordering each party to bear its costs. The reasons advanced by the trial judge for not awarding costs were never faulted or found to be wanting and the interference in his discretion had no basis in law. **(See Paul Mwiru Vs Nathan Igeme Nabeeta & 2 Others E P.C A No 6/2011)**

Conclusion.

This court is the highest court of justice in this country. Except in circumstances that are clearly spelt out in rules 2 (2) and 35(1) of the judicature (Supreme Court Rules (Direction SI 13-11), the decisions of this court are final and not reversible. This is the backbone of the idea of finality of judgement which is also premised on the notion that litigation must not last for eternity.

The instant application was brought under rule 2(2) and 35(1) of the judicature (Supreme Court Rules) seeking interalia, declaratory orders to the effect that this court's judgement in SCCA NO. 8 of 2014 occasioned miscarriage of justice to the applicant, and is null and void ab into. I have carefully examined the Notice of motion, and the affidavits both in support and in reply thereto. I have also thoroughly studied the written submissions filed on behalf of the applicants and the respondent, by their respective counsel, and I have read the judgement of this court which is the subject of this application as well as the entire records of the two courts below this court (the high court and the court of appeal).

I considered the submissions in this application and am convinced that there exists clear incidents of nebulous conclusions in the judgment of this court in SCCA no. 8 of 2014 which in my view is an affront to the ends of Justice. The Constitution of the Republic of Uganda, 1995 instructs this court to ensure that justice prevails Article 126 (1) and 126(2) (e) enjoins this court to ensure that the ends of justice are met in all cases that are placed before it. Indeed the spirit of the constitution emphasises that justice must not only be done but must be seen to be done. The above provision also echoes the principle that "Justice cannot just be seen [in laws] but must be felt in the heart of the people [values and norms] and in the soul of the country (aspirations of the people)".

This provision is the blue print in the operation of this court and indeed all courts of judicature. Applications of this nature are borne out of that spirit of the constitution, that justice must be the ultimate end in any proceedings before this court.

This application therefore offers invaluable opportunity for this court to strenuously inquire into the questions raised therein with the primary intent of unearthing all sorts of flaws or injustices caused by a decision of this court and then address them. With greatest respect the majority decision does not redress the injustice complained against by the applicants.

This Court in **SCCA No. 8 of 2014** ordered that because the first applicant failed to call certain witness to testify in his favour, then the applicant's case can not stand. This order was bizzare, the applicants are title holders for a huge chunk of land that include the portion of land which the respondent inherited from his father, who is the first applicant's brother. The respondent's occupation of that well defined piece of land is not contested by the applicants and the applicants' suit in the High court was not in respect of that land. The applicants sued the respondent when he encroached on land which is in excess of what he inherited from his father.

He filed a counterclaim in which he claimed he acquired that portion of land by purchase with the consent of the first applicant, a claim the first applicant denied. Unfortunately this court agreed with the respondent on such a claim. One would ask why the first applicant would turn around and claim a piece of land which the respondent, his brother's son whom he trusted for long and

consent. It puzzles even more in the absence of any indication that the first applicant had a grudge with the respondent whom he seemingly trusted so much.

By deciding the way this court did, it would mean the respondent's counterclaim succeeded because the applicants failed to prove otherwise. This offends the law of evidence, particularly the principle that he who alleges must prove. In our view the respondent did nothing to prove the counterclaim and it should have failed in the High court.

Form the analysis of the records, this court in the same judgment wrongly declared the respondent a lawful and bonafide occupant. The respondent cannot in the circumstances of this case qualify to be either a lawful occupant or bonafide occupant.

It follows therefore that this court's findings and or conclusion in **SCCA No. 8 of 2014** is contrary to the law. This court is not a court whose jurisdiction is restricted to merely dispute settling. This court is a law maker and its role travels beyond merely dispute setting. It must always act as a problem solver and in carrying out its functions as a law maker and a problem solver must not hide under the cloak of finality of judgement and shy away from correcting glaring mistakes in its judgements.

The Supreme Court being the highest forum and apex Court, should always be very careful about its final judgment to ensure that there is no miscarriage of justice in a particular case. In case of any wrong occasioned within human infallibility, the same should be checked and corrected. It should however be noted that review is not on any day an appeal in disguise. It should also be noted that the power of review is exercised in rarest of the rare cases where something of a patent wrong has been committed, like in the instant case. As human beings we are bound to make mistakes. Errors once identified must be corrected and not celebrated. This is the reason Rule 2 (2) of our Rules is in place.

The learned Justices of this Court spent more time criticizing the Justices of the Court of Appeal, sometimes using unjudicial tones instead of properly addressing the problem at hand knowing that this Court is not merely a Court of discipline and dispute solver but a Court of justice and more so a problem solver. For the above reasons, I do not agree with the majority decision. This application

has merit and falls within the ambit of Rule 2 (2) of the Rules of this Court and must succeed. I find that I would allow the application with the following orders:-

1. This courts' judgment in **SCCA No. 8 of 2014** be recalled.

2. The judgment and orders of the Court of Appeal be reinstated.

3. The applicants are awarded costs incurred in this application.

Dated at Kampala this.....29th.....day of.....August.....2019

HON. JUSTICE OPIO-AWERI;
JUSTICE OF THE SUPREME COURT