

5 THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: MWONDHA, TUHAISE, CHIBITA, MUSOKE & MADRAMA, JJSC)

CIVIL APPLICATION NO 14 OF 2019

1. HILDA WILSON NAMUSOKE}

10 2. VINCENT KIWANUKA}

3. KENNETH LUBEGA}

As Administrators of the Estate of the late

Nambi Magdalene Scott}APPLICANTS

VERSUS

15 1. OWALLA'S HOME INVESTMENT TRUST (E.A) LTD}

2. COMMISSIONER FOR LAND REGISTRATION}RESPONDENTS

(An Application for Review of the Judgment and Orders of the Supreme Court of Uganda at Kampala before Honourable Justices: Mwondha; Tibatemwa – Ekirikubinza; Mugamba; Nshimye, Tumwesigye, JJ S.C. dated
20 *25th April 2019 in Civil Appeal No. 15 of 2017)*

RULING OF COURT

The applicants lodged this application and averred that it is enabled by the provisions of sections 80 (2), 82 (b) and 98 of the Civil Procedure Act; section 7 of the Judicature Act and Rules 2 (2), 35, 42 and 43 of the
25 Judicature (Supreme Court Rules) Directions for orders that:

1. The holding that "Nevertheless, having come to the conclusion that the Commissioner rightly cancelled the Appellants' special certificate of title for having been issued in error and not on the basis of fraud, it follows that the first respondent's certificate of title remains valid"
30 either be expunged from the judgment of the court, or declared as obiter dictum.

- 5 2. The holding that the "the Commissioner rightly cancelled the appellants' special certificate of title" be expunged from the judgment of the court.
3. The holding that "... The appellants' cannot turn around and complain that they were not given an opportunity to be heard" be expunged from the Judgment of the Court.
- 10 4. The holding that and that "However the appellants chose to file a suit in the High Court on 10th March 2009" be expunged from the judgment of the court.
5. The finding that "it is clear that the reason for the cancellation of the appellants' special certificate of title was that it was issued in error" be expunged from the judgment of the court.
- 15 6. The court interprets what amounts to "error" within the meaning of S.91 of the Land Act.
7. The background fact at pages 2 lines 12 – 13 of the Lead Judgment stating that "Magdalene Scott Nambi was registered as proprietor of the suit property on 7th March 1997" be corrected to 12th February 2002 consistent with the title on record.
- 20 8. The court exercises its inherent powers to review its Judgment as above to achieve the ends of justice, correct manifest errors and contradictions apparent on its face, slips and omissions.
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In support of the application, the applicants set out 8 grounds and give the supporting facts in the affidavit of Mr. James Katono, an advocate practicing with Nambale, Nerima and Co Advocates, the firm which represents the applicants. The grounds in the Notice of Motion are that:

- 30 1. The issues in litigation were statutory jurisdiction of the Commissioner for Land Registration to cancel certificates of title. Validity of the 1st respondent's title was never an issue, ground of appeal/cross appeal, or notice of affirmation of decision.

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2. The conclusion in the Judgment that "the first respondent's certificate of title remains valid..." is without foundation, and unjustly prejudices the applicant's statutory right to challenge the Commissioner's decision on the merits, or to impeach the 1st respondent's title.

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3. The holding that "the appellant cannot turn around and complain that they were not given an opportunity to be heard because they were invited to a hearing and opted to file a suit" and "the Commissioner rightly cancelled the appellants special certificate of title" overlooked and are inconsistent with the courts finding in the judgment reproduced below:

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a) That the Commissioner's claim that she had not received a response to her earlier notice sent on 6th January 2006 was not correct since the appellants had responded.

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b) That indeed the appellant's response is on record marked annexure "B".

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c) That subsequently, both parties were invited for a hearing but the record does not indicate what transpired on the date the subsequent hearing was scheduled.

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d) The court framed issue number IV as follows: Did the Commissioner follow the proper procedure in cancelling the certificate of title?" Having outlined the proper procedure, the court omitted to resolve the issue in some aspects, and contradicted its findings in a), b) and c) above.

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4. The holding that "However the appellants chose to file a suit in the High Court on 10th March 2009" is inconsistent with the record which indicates that the application for injunctive relief was filed by the

5 appellants in the High Court on 29th December 2009 after the
cancellation decision had already been taken but not implemented by
the Commissioner.

10 5. The finding that "it is clear that the reason for the cancellation of the
appellant special certificate of title was that it was issued in error" is
inconsistent with the following findings of the court:

a) That all the grounds of appeal rotate around the allegations of
fraud.

15 b) That one of the four central issues framed by the court was "does
the Commission have authority to deal with the certificate of title
when an allegation is made that the title was obtained through fraud?"

c) That the Commissioner does not have power to cancel a certificate
premised on fraud.

20 6. The dismissal of ground 5 of the appeal "The learned Justices of
Appeal erred in law and fact when they held that the appointment of
an attorney for the first respondent was fraudulent" coupled with the
finding that the special certificate was procured using the fraudulent
power of attorney, and holding that the Commissioner does not have
power to cancel a certificate premised on fraud, is inconsistent with
the court finding that the title was cancelled for error.

25 7. The decision has given the second respondent dangerous latitude to
arbitrarily cancel titles for fraud, but under the guise, veneer or
pretext of error. It is necessary that the court judicially interpret what
amounts to "error".

30 8. The interest of justice demand that the Court reviews its Judgment
and orders consistent with logic, avert illegalities, remove errors
apparent on the face of the record, and to give effect to its true
intention.

5 The facts in support of the application are contained in the affidavit of James Katono an Advocate of the Courts of Judicature practicing with Nambale, Nerima & Co. Advocates.

The facts disclosed in the said affidavit are that on the 22nd of February 1985, the 1st Respondent (Owalla's Home Investment Trust Ltd.) became the registered proprietor of registered land comprised in Kyadondo Block 261 Plot 173, situated at Lukuli, Makindye). On 7th March 1997, Magdalene Scott Nambi was registered as a proprietor of the same property under a special certificate of title. Following the death of Scott Nambi, the applicants became administrators of her estate, which included the special certificate of title to the property.

On 11th of October, 2005, 1st Respondent lodged a caveat on the special certificate of title and filed a suit in the High Court vide HCCS No. 7 of 2003, seeking to cancel the Applicants' title. However, on the 16th of January 2008, the suit was dismissed with costs for want of prosecution.

Prior to dismissal of the suit, the 1st Respondent lodged a complaint with the Commissioner of Land Registration (hereinafter also referred to as the "Commissioner"). On the 6th of January 2006, the Commissioner issued a notice to the Applicants communicating her intention to cancel their special certificate of title on the ground that it was issued in error and to submit objections as to why the certificate should not be cancelled. The Commissioner notified the Applicants that the 1st Respondent was in possession of the original duplicate certificate of title.

On the 7th of October, 2008, the Commissioner issued a notice of cancellation of the Applicants' certificate of title. In response, Applicants filed an application in the High Court vide HCCA No. 81 of 2008 against the Commissioner to restrain him from cancelling the title and seeking an order to have the caveat lodged by the 1st Respondent vacated. The Applicants contended that the cancellation was premised on fraud. However, this Court noted that there was a sworn declaration of Mr. Robert Opio (Senior

5 Registrar of Titles) declaring that the cancellation of the certificate was on the ground that it was issued in error.

On the 26th of May, 2009, the High Court dismissed the Applicants' application, holding *inter alia* that; where cancellation of title is based on fraud, the Applicants must first apply to the High Court under **Section 177 of the Registration of Titles Act** which provides that:

10 "Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order."

The High Court held that a Commissioner has the power to cancel title on the ground of fraud under **Section 91 (2) of the Act** which provides that the Commissioner has power cancel title where a certificate of title or instrument is; (1) issued in error, (2) contains a wrong description of land or boundaries, (3) contains an entry or endorsement made in error, (4) contains an illegal endorsement, (5) is illegally or wrongfully obtained, or (6) is illegally or wrongfully retained).

25 The Applicants lodged an appeal in the Court of Appeal against the decision on the following grounds:

1. The learned trial Judge erred in law when he held that the Registrar of Titles (CLR) had powers under the Land Act to cancel Appellants' certificate of title for fraud.

30 2. The learned trial Judge erred in law when he held that the only procedure for vacating a caveat is by applying to the Registrar for removal under Section 140 of the Registration of Titles Act.

On ground 1, the Court of Appeal held that a broad reading of **Section 91 (2) (e-f) of the Land Act** encompassed fraud, empowering the Commissioner to

5 cancel the Appellants' certificate of title. The Court further held that such an
exercise of power did not run contrary to the provisions of the **Registration**
of Titles Act (RTA). On ground 2, the Court of Appeal held that the learned
trial judge did not err in refusing to hear Appellants' argument for vacating
the caveat because the application was irregularly lodged. The Court of
10 Appeal dismissed the appeal with costs to the 1st Respondent.

The Appellants further appealed the decision to the Supreme Court, on the
following grounds:

- 15 1. The learned Justices of Appeal erred in law when they held that
Section 91 (e) and (f) of the Land Act includes fraud as a ground for
cancellation of title by the 2nd Respondent.
- 20 2. The learned Justices of Appeal erred in law when they held that
Sections 59, 77, 176, and 177 of the RTA do not bar the Commissioner
Land Registration when he/she is exercising powers under **Section**
91 of the Land Act.
- 25 3. The learned Justices of Appeal erred in law and fact when they upheld
the cancellation of title decision in the absence of fraud by the
registered proprietor.
- 30 4. The learned Justices of Appeal erred in law when they failed to
properly re- evaluate the evidence on record.
5. The learned Justices of Appeal erred in law and fact when they held
that the appointment of an attorney for the 1st Respondent was
fraudulent.
- 35 6. The learned Justices of Appeal erred in law and fact when they held
that the Applicant's "special certificate of title" was issued in error.

5 7. The learned Justices of Appeal erred in law when they declined to consider arguments from both parties relating to the requirements for a hearing of affected parties before cancellation of title.

On ground 1, this Court found that the Court of Appeal erred in law when they based their reasoning and decision on the case of **Edward Rurangaranga vs Mbarara Municipal Council SCCA No. 10 of 1996**, an authority which expounded on a statutory provision (**Section 69 RTA**) that was no longer law at the time the issue was decided. This Court further held that because the **Land Amendment Act** specifically dropped fraud from the list of grounds on which the Commissioner could base cancellation of title, it shows the intention of Legislature to have fraud strictly proven before a court of law.

Concluding that Appellants succeeded on ground 1 because the Commissioner does not have the power to cancel a certificate of title premised on fraud, this Court asked: "*what was the basis of cancellation of the special certificate of title by the Commissioner in the matter before us?*" Considering the Statutory Declaration of Mr. Robert Opio, which said "the special certificate of title ... [was] issued in error," this Court concluded that the cancellation of the Appellant's certificate was "*issued in error and not on the basis of allegations of fraud.*" (emphasis added). Accordingly, this Court held that grounds 3, 4, 5 and 6 automatically failed because **Section 91 (2) (e) (i) of the Land Act** empowers the Commissioner to cancel certificates of title issued in error.

On ground 7, this Court invoked its inherent powers to address the issue of whether both parties had the opportunity to be heard because, although it was not raised as a ground in the Memorandum of Appeal, it was an issue that "touches upon the cornerstones of natural justice." **Section 91 (8) and (9) of the Land Act** sets out the procedure and process of cancellation of a certificate of title issued in error, requiring that the registrar must:

- 5 (a) give not less than twenty-one days' notice in the prescribed form to any party likely to be affected by any decision made under this Section.
- (b) Provide an opportunity to be heard to any such party to whom a notice under paragraph (a) has been given;
- 10 (c) Conduct any such hearing in accordance with the rules of natural justice but subject to that duty, shall not be bound to comply with the rules of evidence applicable in a Court of law;
- (d) Give reasons for any decision that he or she may make.
- 15 (e) The registrar shall communicate his or her decision in writing to the parties and the committee.

The record indicates that on 6th January 2006, the Commissioner issued a notice of intention to cancel the Applicant's special certificate of title and called upon them to submit any objections to the cancellation application with which Applicants complied. On 7th October 2008, the Commissioner

20 informed the Applicants that their special certificate of title had been cancelled because she had not received a response on the earlier notice. This Court noted that this was incorrect because the Applicants had responded to the Commissioner's notice of intention to cancel.

On 15th December 2008, the Commissioner had by correspondence invited

25 both parties for a hearing to take place on 6th January 2009 at 8:15 a.m. This Court noted that there was no record of what transpired on the date the hearing was scheduled. Finally, this Court concluded that ground 7 failed because "the appellants instead chose to file a suit in the High Court," yet they "turned around and complained that both parties were not given (an)

30 opportunity to be heard."

In dismissing the appeal, this Court said, "having come to the conclusion that the Commissioner *rightly cancelled* the appellants' special certificate of title for having been issued in error and not on the basis of fraud, it follows that the 1st respondent's certificate of title *remains valid*." (emphasis added).

5 Applicants filed this Notice of Motion to this Court (Civil Application No. 14 of 2019) under Sections 80(2), 82(b) and 98 of the Civil Procedure Act; Section 7 of the Judicature Act; and Rules 2(2), 35, 42, and 43 of the Judicature (Supreme Court Rules) Directions S. I 13-11, requesting this Court to invoke its inherent jurisdiction to review its Judgment.

10 At the hearing of the application learned counsel Mr. Nelson Nerima appeared for the applicant. The respondent and counsel were absent. The applicant's counsel relied on his written submissions filed on court record on the 11th of May 2021. We note that the 1st respondent is represented by Landwell Advocates who had filed written submissions in reply in July 2020

15 which we have taken into account.

Submissions of Counsel

Counsel for the Applicants, relied on the affidavit of James Katono outlining the grounds of the application. The facts are that the application before the High Court from which this appeal arose namely High Court Miscellaneous

20 Application No. 81 of 2008 was for injunctive relief to restrain the 2nd Respondent from cancelling the Applicants' title on grounds that he had no jurisdiction to do so, and that this is a pure point of law. The applicant's counsel submitted that the parties never litigated nor did the pleading ever allude to the issue of the validity of 1st Respondent's title. However, this

25 Court concluded that because the Commissioner had no such power to cancel a certificate of title based on fraud, "it follows that the 1st Respondent's certificate of title remains valid." Counsel cites **National Social Security Fund vs. Alcon International Ltd** with approval in **Elizabeth Nalumansi Wamala vs. Jolly Kasande and Ors** where this Court said, "a court

30 decision or relief on un-pleaded matters or on issue not properly pleaded before it for determination is an error of law." Applicants' counsel submitted that justice demands that this Court invokes its inherent power to expunge the declaratory orders for matters not pleaded in order to protect Applicants' right to challenge the validity of 1st Respondents' title in the High

35 Court.

5 Secondly, Counsel urges this Court to extend its inquiry from the pleaded
issue (whether or not both parties had the opportunity to be heard) into the
larger question of whether the Commissioner followed proper procedure
for cancellation. This Court concluded that the Applicants' title "was
rightfully cancelled," yet it omitted to consider whether certain steps of
10 procedure were complied with. The procedures not complied with include
those outlined in **Section 91 (8) and (9) of the Land Act**: (1) to give not less
than 21 days' notice in the prescribed form, (2) to give reasons for any
decision that he or she may make and (3) to communicate his or her
decision in writing to the parties and the committee. The Applicants
15 submitted that the Court's declaratory judgment violates their fundamental
right to a hearing in challenging the procedure for cancellation of title in the
High Court.

In addition to challenging the procedure for cancellation of title, Counsel
submitted that this Court's statement that the title was "rightly cancelled"
20 prevents the Applicants from challenging the merits of the cancellation.
Further, that **Section 91 of the Land Act** provides that any party aggrieved
by action of the registrar may appeal to the district land tribunal and where
an appeal is lodged against the cancellation of title, the title shall not be
transferred until the determination of the appeal. The Applicants' counsel
25 argued that without that statement being expunged from the judgment, they
have been deprived of the right to appeal to the district land board or to file
an ordinary suit.

Counsel further submitted that this Court, having acknowledged that the
right to be heard "touches upon the cornerstones of natural justice," having
30 established that the Commissioner was incorrect in stating that she did not
receive a response from the Applicants, and having noted that there is no
record of any hearing on the scheduled date, must expunge the statements
that title was "rightly" cancelled and "the Appellant cannot turn around and
complain that they were not given an opportunity to be heard because they
35 were invited to a hearing and opted to file a suit."

5 Counsel challenged the basis of cancellation of title framed by this Court. The Court's Judgment states, "in determining the appeal, I will deal with [all grounds] together since they rotate around allegations of fraud [and] the power of the commissioner to cancel certificates of title...." Further, this Court accepted the testimony saying the Commissioner was made to believe
10 that the duplicate certificate of title was missing, when it was not. Therefore, Counsel submitted that this Court overlooked its own findings that the complaint from the 1st Respondent to the Commissioner upon which he cancelled was of fraud. Yet, this Court concluded that title was cancelled for having been issued in error.

15 Lastly, Counsel submitted that review of the Judgment serves the public interest because without expunging the record, it may allow the Commissioner to cancel certificates of title for allegations of "fraud," under the guise of dealing with an "error", an issue that can only be determined by a court of law.

20 In reply the 1st respondent's counsel submitted that on the 25th of April 2019, the Supreme Court dismissed Civil Appeal No 15 of 2017 because the second respondent was mandated under the Land Act to cancel the applicant certificate of title because it was issued in error. That the court allowed ground 1 of the appeal to wit that "The learned Justices of the Court of
25 Appeal erred in holding that the Commissioner has powers to cancel a certificate of title on the basis of fraud". Further that the applicants have now filed an application for review of the Judgment but the 1st Respondent was served late. When the application came for hearing they were unable to file a response in time. On that basis, they submitted on matters of law
30 only.

The first respondent's counsel submitted that the application purports to be one brought under rule 35 of the Rules of this Court. That rule 35 only applies to correction of errors. The first respondents counsel submitted that errors envisaged under rule 35 include clerical and arithmetical mistakes
35 in the judgment arising from a slip in the Judgment. The rule is commonly referred to as the "slip rule" and can form the basis for review of a

5 judgment. The first respondent's counsel relied on **Uganda Development Bank Vs Oil Seeds (U) Ltd; Miscellaneous Application No 15 of 1997** where the Supreme Court held that the slip order will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when the judgment was given or in the case of a matter which was
10 overlooked, where it is satisfied beyond reasonable doubt as to the order which it would have made, had the matter been brought to its attention.

With reference to the grounds for reviewing a Supreme Court decision or order, the first respondent's counsel relied on **Vallabhadas Karsanada Raniga Vs Mansukhal Jivraj and Other [1965] EA 700** for the holding that
15 there are two circumstances under which the slip rule may be applied namely:

(1) where the court is satisfied, that it is giving effect to the intention of the court at the time when the Judgment (ruling) was given.

(2) in case of a matter which was overlooked where it was satisfied beyond
20 reasonable doubt as to the order which would have been made had the matter been brought to its attention.

The respondent's counsel also referred to **Re-Nakivubo Chemists (U) Ltd [1979] HCB 12** for the proposition that there is another ground namely "some mistake apparent on the face of the record". He contended that the instant
25 application is brought under the aspect of "error apparent on the face of the record". With regard to *error apparent on the face of the record*, counsel relied on **Batuk K. Vyas Vs Surat Municipality AIR; Supreme Court Civil Appeal No 29 of 2017** where the Supreme Court of India stated that "no error can be said to be apparent on the face of the record if it is not manifestly
30 self-evident and requires an examination of documents to establish it".

The 1st respondent's counsel with reference to the affidavit in support of the application of Mr James Katono, pointed out that the applicants did not point to or identify a single error or mistake that requires review as defined in rule 35 of the Judicature (Supreme Court Rules) Directions. Secondly that
35 according to the applicants' submissions, there are new questions which

5 require further examination; such as Judgment on matters not pleaded; the
procedure for cancellation of the applicant's title; merits of cancellation; a
right to a fair hearing; basis for cancellation etc. That all those questions
were extensively handled and considered by the Supreme Court in re-
evaluating the evidence on record and are res judicata. Counsel relied on
10 **British American Tobacco Uganda Ltd vs Mwijabuki & 4 Others; Supreme
Court Civil Application No 7 of 2013.**

He submitted that the decision of the Supreme Court is very clear that the
second respondent using a special power under section 91, (2) (a), 8 and 9
of the Land Act can cancel a certificate of title issued in error and that the
15 second respondent cannot cancel a certificate of title on the ground of fraud
under the Registration of Titles Act. That the reliance of the applicants on
the decision of this court in **Elizabeth Nalumansi Wamala Vs Jolly Kasande
& others; Supreme Court Civil Appeal No 29 of 2017** was erroneous as the
decision is highly distinguishable because it related to mistake of law. The
20 court resolved that a legally married wife has no interest in the estate of
the deceased person contrary to the law while the judgment of this court in
the matter is founded under section 91 of the Land Act.

Further in the circumstances of this case, the court made a finding that the
second respondent was mandated to cancel the applicant's certificate of
25 title issued under the Land Act because it was issued in error. Indeed, the
evidence on record indicated that the impugned certificate of title was
issued in error and that is why grounds 2, 3, 4, 6 & 7 of the appeal failed and
the court held that the respondent's certificate of title is valid.

Further the court stated that the second respondent has no mandate to
30 cancel a certificate of title because of fraud. He emphasised that the
evidence on record indicated that the applicant's title was cancelled on the
ground of error and not fraud.

Finally, the first respondent's counsel concluded that the applicants have
not cited a single mistake or error on the face of the record to warrant a
35 review of the decision of this court. The applicants are merely dissatisfied

5 with the decision and interpretation of the court. That because this is the final appellate court, that decision cannot be reversed. He prayed that the application be dismissed with costs.

Consideration of the application.

10 We have carefully considered the applicants' application which primarily cites rule 35 (1) of the Rules of this Court. The application also relies on section 80 (2), 82 (b) and 98 of the Civil Procedure Act.

Rule 35 (1) of the Judicature (Supreme Court Rules) Directions provides that:

35. Correction of errors.

15 (1) A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.

20 This rule was applied strictly in **Lakhamshi Brothers Ltd V R Raja & Sons [1966] 1 EA 313** where the East African Court of Appeal sitting at Nairobi in the lead judgment of Sir Charles Newbold P considered whether the final court of appeal had jurisdiction to review of its own judgment:

25 Indeed, there has been a multitude of decisions by this court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court
30 when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted.

It was held that the decision of the court as the final appellate court ends the controversy between the parties on the relevant issues and there is no jurisdiction to review the judgment.

5 In **Somani's v Shirinkhanu (No 2) [1971] 1 EA 79**, the East African Court of Appeal sitting at Mombasa per Law Ag V-P noted that where a party had been denied a right to present his or her arguments, there would have been a breach of a fundamental principle rendering the proceedings a nullity and the court can review a judgment issued in breach of a right of hearing of a party to the appeal.

The power of review sought by the applicants is not exercised under rule 35 (1) of the Rules of this Court but under rule 2 (2). The nature of the inherent powers of the Supreme Court was alluded to by this court in **Orient Bank Ltd and Fredrick Zaabwe and Mars Trading Company Ltd; Civil Appeal No. 17 of 2007** where the Court held that the nature of the Court's inherent powers under rule 2 (2) of the Rules of this Court is wide.

In **Elizabeth Nalumansi Wamala Vs Jolly Kasande, Nabukkera Esther and Ronnie M. Lutaaya; Supreme Court Civil Application No.29 of 2017 arising from Civil Appeal No. 10 of 2013**, the Supreme Court considered an application for review and held *inter alia* that:

Notwithstanding our above holding, that we may not intervene under the 'slip rule', this court, may nevertheless under its unlimited inherent powers review its final order in order to achieve the ends of justice and logic. We should however, caution that this court being the final court in the country, where the rule of finality should strictly be observed, exercise of our inherent powers should be invoked in the rarest of the rare circumstances.

The question is whether the slip rule is applicable and where not, whether there are exceptional circumstances for the court to invoke its residual jurisdiction to recall and review its final judgment.

30 In **Musiara Ltd v Ntimama [2005] 1 EA 317**, the Court of Appeal of Kenya recognised different scenarios where the inherent powers under rule 2 (2) of the Rules of this Court (which are in *pari materia*) can be invoked to review a judgment. The Court can invoke its residual jurisdiction to reopen an appeal which has already been determined to avoid real injustice in exceptional

5 circumstances and correct "wrong decisions" which set precedence. This ensures public confidence in the judicial by remedying wrong decisions and setting precedents in areas of law for the guidance of the courts below and the public. They stated that:

10 It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations.

The reasoning in **Musiara Ltd v Ntimama** (supra) is persuasive and I need to consider whether the applicants suffered any real injustice or prejudice
15 in pursuing other avenues in any appellate tribunals or courts they are entitled to access for redress under the law. Under article 44 (c) no person or authority may derogate from the right to a fair hearing of any body as guaranteed by article 28 of the Constitution.

The crux of the submissions of the first respondent's counsel is that the
20 decision of the court revolved on one point of law which is that under section 91 of the Land Act, the Commissioner for land registration can cancel a certificate of title issued in error but has no jurisdiction to cancel a certificate of title on the ground of fraud. In other words, the point of law is not subject to review as it is an interpretation of the law and the case
25 revolved on that point of law. Secondly, what the court determined was whether the Commissioner for land registration had jurisdiction to act as he did.

The facts of this application relate to the appeal whose genesis was grounded in the fact that there was a special certificate of title that was
30 issued and it discloses registered proprietorship or title to the estate of the deceased whose estate is now administered by the applicants who were registered on the title in their character as administrators by virtue of grant of letters of administration by a court of law. Prior to that, the first respondent was registered on the suit title on 22nd February 1985. On 7th
35 March 1997, the deceased one Magdalene Scott Nambi was registered as

5 the proprietor of the suit property. However, the document in which she is also indicated as the registered proprietor, which document was in the possession of the applicants was a special certificate of title issued by the Commissioner for land registration on the 17th of March 1997.

10 On 11th October 2005, the first respondent lodged a caveat on the suit title with the Commissioner for Land registration. The 1st Respondent had filed High Court Civil Suit No 7 of 2003 (about two years earlier). The judgment of the Court of Appeal shows that the Respondent's suit against the Applicants as Administrators of the Estate of Magdalene Scott Nambi was for cancellation of title on the ground of fraud. The suit was dismissed and
15 the contents of the plaint are not available to reach a conclusion as to whether the issue had become res judicata or whether there were remedies available to the Respondent in the suit or by way of appeal. The dismissal was on 16th January 2008, reportedly for want of prosecution. However, this issue become ground 1 of the appeal where it was averred that the trial
20 judge erred in law when he held that the dismissal of HCCS No. 7 of 2003 was not a final disposal of the suit. In the notice of motion by the applicants in the High Court in Land Miscellaneous Cause No. 81 of 2008, the applicants averred in ground (a) thereof that:

25 "The respondents filed HCCS No. 07 of 2003 seeking to recover suit land from the applicants."

Further ground 1 of the Appeal in the Court of Appeal was that:

The learned trial judge erred in law and fact when he held that the first Respondent's H.C.C.S. No. 7 of 2003 was not a final disposal of the matter.

30 The Court of Appeal held that ground 1 was abandoned and it is not necessary to consider it. The Court of Appeal however interpreted section 91 of the Land Act on the issue of whether the Commissioner for Land Registration could cancel a certificate of title for fraud and the Court held that *the Registrar has powers to cancel a certificate of title for a host of reasons including fraud under section 91 of the Land Act*. The Supreme
35 Court overturned this holding and held that the Registrar cannot cancel title

5 on account of fraud thereby dealing with a point of law that disposes of the issue of any cancelation on the ground of fraud.

To be noted is the fact that before the dismissal of HCCS No. 07 of 2003, the respondent had also lodged a complaint with the Commissioner for Land Registration who in turn issued notice to the applicants on 6th January 2006
10 and the ground was that the first respondent had a duplicate certificate of title and therefore the special certificate of title had been issued erroneously. The applicants filed HCCA No 81 of 2008 in the High Court against the Commissioner to restrain him or her from cancelling the applicant's registration. Secondly to have the caveat of the first respondent
15 vacated. The application to cancel was based on alleged fraud. On 26th of May 2009, the High Court dismissed the applicant's application and held that the cancellation can be based on a suit for impeachment of title and orders issued under section 177 of the Registration of Titles Act. That the Commissioner has power to cancel on the basis of fraud under section 91
20 (2) of the Land Act. The applicants appealed to the Court of Appeal and their appeal was dismissed and the Court of Appeal affirmed the decision of the High Court. Upon further appeal to this court their appeal succeeded on one ground that the Court of Appeal erred to hold that the Commissioner has power to cancel a certificate of title on the ground of being procured through
25 fraud and the court reached the conclusion that the certificate was not cancelled for fraud but on the ground that it was issued in error and dismissed the appeal with costs to the first respondent.

Clearly, the grievance of the applicants arose as a consequence of the cancellation of the special certificate of title. It is also apparent that the
30 cancellation was conceived by the applicants as an act, that not only cancelled the certificate, but also cancelled their proprietorship as registered in the certificate of title.

On a matter of law, the question of cancellation of a certificate of title issued in error, is not related to any fraud of any of the parties but relates to the
35 error of the Commissioner for land registration who issues such certificate of title in the names of entitled proprietors. However, in the circumstances,

5 where a special certificate of title is issued on the application of the
applicants or their predecessor in title, the apparent error of the
Commissioner could be based on the issue of whether the duplicate
certificate of title of the owner was missing or not. Where a special
10 certificate of title is issued, it is supposed to contain all the particulars on
the original certificate of title which is kept with the registry of titles at the
office of the Commissioner for land registration and the issuance of the
special certificate is not supposed to change the registered ownership of
the property. It is therefore clear that the issue of whether to cancel a
15 special certificate of title does not have to involve any question of who the
registered proprietor is and only concerns the issue of loss of the duplicate
certificate. Analysis of section 91 of the Land Act is therefore necessary for
conceptualising the meaning of an "error" under section 91 (2) (a) of the Land
Act in the circumstances of this application. Section 91 (2) (a) of the Land
Act, cap 227 provides that:

20 91. Special powers of registrar.

(1) Subject to the Registration of Titles Act, the registrar shall, without referring a
matter to a court or a district land tribunal, have power to take such steps as are
necessary to give effect to this Act, whether by endorsement or alteration or
25 cancellation of certificates of title, the issue of fresh certificates of title or
otherwise.

(2) The registrar shall, where a certificate of title or instrument—

(a) is issued in error;

(b) contains a misdescription of land or boundaries;

(c) contains an entry or endorsement made in error;

30 (d) contains an illegal endorsement

(e) is illegally or wrongfully obtained; or

(f) is illegally or wrongfully retained,

call for the duplicate certificate of title or instrument for cancellation, or
correction or delivery to the proper party.

5 Our understanding of section 91 (2) (a) of the Land Act is that it deals with
a situation where a certificate of title or instrument is issued in error. The
crucial issue for interpretation of the section is; who issues the special
certificate of title? The answer is that it is the Commissioner for Land
10 is whether he issued it in error and this is a question of fact. Such an error
cannot be based on a transfer procured fraudulently by the action of the
transferee in title. In fact, the Supreme Court determined that the
Commissioner for Land Registration has no jurisdiction to cancel a
certificate of title on the ground of fraud. The error envisaged under section
15 91 (2) (a) of the Land Act is necessarily the error of the Registrar and not of
a transferee in title unless the name of the transferee was entered in error
and not on the basis of an instrument of transfer properly registered as
such. Clearly this delimits the powers of the Commissioner to a power to
cancel a certificate issued in error. In the circumstances, the certificate that
20 was dealt with was a special certificate of title. A special certificate of title
is a replacement title where the owners copy is lost or cannot be found.
Section 70 of the Registration of Titles Act cap 230 under which a special
certificate of title is issued deals with replacement of a lost duplicate
certificate of title. It provides that:

25 70. Lost grant.

If the duplicate certificate of title is lost or destroyed or becomes so obliterated
as to be useless, the persons having knowledge of the circumstances may make
a statutory declaration stating the facts and the particulars of all incumbrances
affecting the land or the title to the land to the best of the deponents' knowledge,
30 information and belief; and the registrar if satisfied as to the truth of the statutory
declaration and the bona fides of the transaction may issue to the proprietor a
special certificate of title to the land, which special certificate shall contain an
exact copy of the certificate of title in the Register Book and of every
memorandum and endorsement on it, and shall state why the special certificate
35 is issued; and the registrar shall at the same time enter in the Register Book
notice of the issuing of the special certificate and the date of its issuance and why
it was issued; and the special certificate shall be available for all purposes and
uses for which the duplicate certificate of title so lost or destroyed or obliterated

5 would have been available, and shall be equally valid with the duplicate certificate of title to all intents; but the registrar before issuing a special certificate always shall give at the applicant's expense at least one month's notice in the Gazette of his or her intention to do so.

10 As stated above, a special certificate of title is issued to replace a certificate of title which is lost or destroyed or becomes so obliterated as to be useless. Secondly section 70 of the Registration of Titles Act provides that a special certificate which is issued to replace the lost, destroyed or obliterated certificate of title shall contain an exact copy of the certificate of title in the register book and of every memorandum and endorsement on
15 it and shall state why the certificate of title is issued and the registrar shall give notice of the issuance in the Gazette before issuing the special certificate of title. In other words, the public or any member of the public who has an interest that is capable of legal protection is entitled to object to the issuance of a special certificate of title by the Registrar and due
20 process will be used to determine any controversy arising. The special certificate of title was issued on the basis of information given by persons having knowledge of the circumstances of the loss or destruction or the obliteration of the certificate to the extent of becoming useless.

In other words, a special certificate of title is issued to replace the duplicate
25 certificate of title and it shall contain all the entries made in the original certificate of title at the registry. It does not change proprietorship. The instrument number of issuance is not evidence of a transaction relating to the entry of any interest on the title and therefore the issuance of a special certificate of title presumably does not in any way prejudice the registered
30 proprietor of the suit property. It follows that a special certificate of title is issued on the premises that the original certificate of title is lost. The special certificate of title replaces the original duplicate certificate of title and all the entries in the register book shall be entered on the special certificate of title so that it acts as a replacement of the duplicate certificate of title, also
35 known as the owners' copy.

5 It is therefore confusing to have an ambivalent understanding of what is
meant by the holding that the certificate of title was issued in error. Such a
finding is not to the prejudice of anybody and the issuance of the special
certificate cannot in law include cancellation of an endorsement which is
10 over or in addition to the endorsement on the original certificate of title
which ought to be based on a registrable instrument that had been lodged
and lawfully registered by the Commissioner Land Registration. Such
endorsements or memorials reflecting transactions or interest must be
backed by registrable instruments registered and kept with the Registry of
land Titles. Where it includes all the lawful endorsements, even if it is
15 cancelled and the duplicate certificate of title restored, the endorsements
on the original certificate of title in the Registry will remain the same and
ought to be reflected and include all lawful transactions and registered
interests affecting the suit property which were lawfully registered. Where
this is a transfer to the predecessor in title of the applicant (the deceased),
20 It should be backed by a transfer instrument and the payment of taxes,
valuation etc. In theory, the cancellation of a special certificate of title would
not prejudice the transfer of the property to the applicant's predecessor in
title Ms Magdalene Scott Nambi (the deceased) if it is also registered in the
registry copy of the certificate of title.

25 Further the Supreme Court having found that the registrar had no powers
to cancel any title on the basis of a finding of fraud, it follows that unless
the name of the Magdalene Scott Nambi was entered in error, such a name
cannot be cancelled because that deals with the registered proprietorship
whose grounds for impeachment of title ought to be for fraud as stipulated
30 by section 176 of the RTA. An error connotes a mistake and not an action
based on an instrument lodged by a party which the Registrar believed to
be genuine as the basis for entering a transfer of title or proprietorship. The
cancellation of the special certificate of title does not change what is
reflected in the original title kept by the Registrar in terms of section 70 of
35 the RTA. It therefore cannot be a route to flout section 177 of the RTA which
envisages a suit in a competent court resulting in an order of impeachment
of title as held by the Supreme Court. Cancellation pursuant to an order of

5 Court is enforced by the Commissioner cancelling registration of title of a proprietor.

10 In the premises, we agree with the first respondent's counsel that there is no error apparent on the face of the record and there is no contradiction between the finding that the certificate of title (the special certificate of title) was cancelled because it was issued in error and the finding that the Commissioner for land registration has no jurisdiction to cancel the title of a proprietor for fraud. The cancellation of the special certificate of title proceeded from information that the duplicate certificate of title was lost whereas not and cancellation of the special certificate does not amount to
15 the cancellation of the proprietorship or registered ownership which ought to be reflected both in the original certificate kept by the registrar in the land registry or in the special certificate of title when availed to the Registrar. Where the duplicate certificate of title which was claimed as lost is found and restored as the valid certificate, any subsequent transactions
20 which are reflected on the mother title kept by the Registrar are supposed to be endorsed on as well with the entries in the registry copy of the certificate of title. That is what section 70 of the RTA commands. The Supreme Court overruled any holding of law of the lower courts that the Registrar of Titles has any jurisdiction to cancel registered proprietorship
25 on the basis of it having been procured through fraud.

The finding that the duplicate certificate of title which remained with the first respondent is valid is a consequential and inevitable finding which deals with which owners' copy also known as the duplicate certificate remains. The cancellation does not affect the title of the lawfully registered
30 proprietor or any entries made in the registry copy of the title affecting the interest in the suit property. It deals with the question of which of the two certificates is the valid certificate. This follows the finding that the special certificate of title only contains what is endorsed in the registry copy which is supposed to reflect all transactions up to the time or any other
35 transactions affecting interest in the land. Registration of interest is based on separate instruments which could have become the subject matter of a

5 suit i.e. a transfer instrument, caveat or any other registrable instrument
such as letters of administration. It follows that the cancellation of a special
certificate of title does not necessarily deal with registered proprietorship
or registration of any other instruments and interests reflected in the
instruments. It is evidence of all memorials entered and affecting interest
10 in registered land. The applicants are not prejudiced in filing any action or
continuing a pending civil proceeding.

On the question of prejudice or injustice to the applicants, the question of
failure to follow certain procedural steps under the Land Act by the
Commissioner for Land Registration does not prejudice the applicants
15 because there were two duplicate owners' certificates of title and only one
should be lawfully retained since two ought not to exist in the possession
of two different persons at the same time and in connection with the same
land.

However, it is discernible that the issues advanced by the applicants go
20 beyond mere cancellation of a special certificate of title but touch on the
question of whether the title of the proprietor was properly and lawfully
impeached.

That is a matter to be considered by a court exercising original jurisdiction
on the question of impeachment of title for fraud. The Judgment of this court
25 has already determined that special certificate of title was cancelled for
error and the matter is not properly before this court.

If it is the contention that the registrar cancelled proprietorship, that
cancellation was nullified by finding that the registrar had no powers to
cancel title on the ground of it having been procured through fraud. The
30 court found that the registrar cancelled a special certificate of title issued
in error and this would not affect entries made in the register of titles other
than the entry of the issuance of a special certificate of title.

With regard to any right of appeal, the finding of the court does not prejudice
the applicants in their appeal as the court is unequivocal in holding that the
35 registrar has no jurisdiction to cancel registered proprietorship on the

5 basis of fraud. Proprietorship can only be cancelled on the basis that the transferee in title is guilty of some fraud or had notice of such fraud and in that regard is not a bona fide purchaser for value without notice of any fraud.

10 In the premises, we find that the applicant's application has no merit and we would dismiss it with costs.

Dated at Kampala the 5th day of October 2023



Percy Night Tuhaise

Justice of the Supreme Court

15


Mike Chibita

Justice of the Supreme Court



Elizabeth Musoke

20

Justice of the Supreme Court



Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the Registrar

5th October 2023


Reg

Delivered on 25/04/2019

ANNEXURE 'A'

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

Civil appeal No.15 of 2017

(Coram: - Mwendha, Tibatemwa Ekirikubinza, Mugamba JJSC, Nshimye, Tumwesigye AG. JJSC)

BETWEEN

1. Hilda ^{Wilson} Namusoke
2. Vincent Kiwanuka
3. Barbra Luff
4. Kenneth Lubega

As Administrators of the Estate
of Late Nambi Magdalene Scott

.....Appellants

AND

1. Owalla's Home Investment Trust (EA) Ltd }
2. Commissioner Land Registration }

.....Respondents

(Appeal arising from the judgment and orders of the Court of Appeal at Kampala Civil Appeal No.72 of 2009 before Buteera, Egonda Ntende and Obura JJA dated 4th July 2017)

JUDGMENT OF MWONDHA JSC

I have had the benefit of reading in draft the judgment of my learned sister Tibatemwa Ekirikubinza JSC. I agree with her that ground one succeeds. I however, with respect do not agree that the rest of the 6 grounds fail.

The appellants were aggrieved by the decision of the Court of Appeal. They appealed to this Court. The memorandum of Appeal had seven grounds. In order to discuss the appeal, it is important to reproduce the grounds and the brief facts/back ground of the case.

The seven grounds of the appeal were:

1. The learned Justices of the Court of Appeal erred in law when they held that section 91(e) and (f) of the Land Act includes fraud as a ground for cancellation of title by the 2nd respondent.
2. The learned Justices of Appeal erred in law when they held that S.59, 77, 176 and 177 of the RTA do not bar the commissioner for land Registration when he or she is exercising powers under section 91 of the Land Act.

3. The Learned Justices of Appeal erred in law and fact when they upheld the cancellation decision in the absence of proof of fraud by the registered proprietor
4. The learned Justices of Appeal erred in law when they failed to properly re-evaluate the evidence on record
5. The learned Justices of the Court of Appeal erred in law and fact when they held that the appointment of an attorney for the first respondent was fraudulent.
6. The learned Justices of Appeal erred in law and fact when they held that the appellant's special certificate of title was issued in error.
7. The learned Justices of Appeal erred in law when they declined to consider arguments from both parties relating to the requirements for a hearing of affected parties before cancellation of title.

They prayed that the appeal be allowed and set aside the decisions and orders of the courts below and enter judgment in their favour.

Both counsel filed written submissions.

Brief facts/ Back ground

The 1st respondent was registered as proprietor of the suit property on 22nd February 1985 (Mailo tenure) comprised in Kyadondo Block 261 Plot 173.

Magdalene Scott Nambi was registered as proprietor of the suit property under a special certificate of title on 12th February 2002 issued on 7th March 1997.

The appellants were registered as proprietors of the suit property on 5th November 2004 as administrators of the estate of Magdalene Scott Nambi.

The 1st respondent filed HCCS No. 07 of 2003 seeking to recover the suit property from the appellants on the ground of fraud. This suit was dismissed with costs under section 17(2) of the Judicature Act on the 10th of January 2008 for want of prosecution.

Before the dismissal of the suit, the first respondent had lodged a caveat on the title on 11th October 2005 and he had pursued proceedings before the Registrar of Titles when the suit was still pending in Court. He was seeking cancellation of the appellant's special certificate of title as the 1st respondent was still in possession of the duplicate certificate of Title and that the special certificate of Title must have been issued in error and or fraudulently.

On the 6th January 2006, the 2nd respondent issued a Notice to effect changes in the Register book and invited the appellants to submit objections and to show cause why their special certificate of Title should not be cancelled on the grounds that it was obtained in error.


On 20th January 2006, according to the record, the appellants responded to the commissioner's letter objecting to the amendment of the register and the letter was annexed to the affidavit of Kenneth Lubega and marked "B".

After dismissal of the suit, the 2nd respondent on 7th October 2008 published a notice of cancellation of the appellant's special certificate of title and amendment of the register book.

The appellants filed High Court Land Division Misc Cause No.81 of 2008 to challenge the cancellation decision on the grounds that the commissioner Land registration had no jurisdiction to cancel the special certificate of title comprised in Kyadondo Block 261 Plot 173 Lukuli registered as instrument No. KLA 186579 of 07.03.97. They also sought an order to vacate the 1st respondent's caveat.

On 29th May 2009, the High Court dismissed the appellant's application with costs. The High Court stated inter alia:

It is hereby ordered as follows:-

- (1) The Registrar of titles has powers to call for and cancel any certificate of title if the certificate issued contains what is enumerated in sections 91(2)(a-f) of the Land Act*
- (2) The cancellation of a certificate of title for fraud or illegality is a preserve of the High Court under S.177 of the Registration of Titles Act*
- (3) Section 91(1) subjects the powers of the Registrar to the Registration of Titles Act which gives power to the Registrar to cancel any certificate of title due to fraud*
- (4) If the allegations are for fraud, then the first procedure is to apply to the High Court under S.177 of the Registration of Titles Act otherwise if it is for fraud embedded in S.91(2) of the Land Act then the Registrar of Titles has power to cancel the title.*
- (5) The applicant's application to remove the 1st respondent's caveat registered as instrument No KLA 28222333 of 11.10.05 is hereby dismissed. The proper application for vacating caveat under RTA should be followed.* 

The appellants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The appellants were dissatisfied with the decision hence this appeal.

I must state on the onset that all grounds revolved on error and or fraud as evidenced from the facts on record. Error and or fraud was the contentious issue in my view. However, I will discuss and resolve the grounds in the following order. Ground 1 alone, Ground 2 alone, Grounds 3, 5 & 6 together and Ground 4 & 7 separately.

GROUND 1

The learned Justice in her judgment resolved this ground in favour of the appellants and I agree with the decision. I hasten to add that it is settled that fraud is a specific illegality which has to be pleaded specifically and proved.

I therefore accept counsel for the appellant's submission that fraud is completely a different concept. In **Frederick J.K Zaabwe Vs Orient Bank Ltd Civil Appeal No.04 of 2006**, this court adopted the definition of fraud and the definition of fraudulent in Black's Law Dictionary 6th edition as:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive whether by a single act or combination or by suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth, or look or gesture.... a generic term, embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestion or suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. Bad faith and fraud are synonymous and also synonymous of dishonesty, infidelity, faithfulness, perfidy, unfairness etc...

As distinguished from negligence, it is always positive intentional (sic). It comprises all acts, omissions, and concealments involving a breach of a legal or a equitable duty and resulting in damage to another and includes anything calculated to deceive, whether by a single act or combination of circumstances whether the suppression of truth or the suggestion of what is false whether it be by direct falsehood or by innuendo, by speech, or by silence, by word of mouth or by look or gesture.....

In Farm International Ltd, Ahmed Farah Vs Mohamed Hamid Farih Civil Appeal No.16 of 1993; the Supreme Court cited the principle as follows:

No Court will allow a person to keep an advantage which he has obtained by fraud. Fraud unravels everything, the Court is careful not to find fraud unless it is distinctly pleaded and proved. But once proved, it vitiates contracts, judgments and all transactions whatsoever" Katureebe JSC (as he then was).

The Court of Appeal indeed erred in law when it held that S.91 (2) (a-f) of the Land Act includes fraud as a ground for cancellation of the certificate of title by the 2nd respondent. It is useful to state that the Commissioner for Land registration /Registrar of Titles has no concurrent powers with the High Court.

GROUND 2:

Counsel for the appellants faulted the learned Justices of the Court of Appeal that they erred in law to hold that Sections 59,77,176 and 177 of the Registration of Titles Act do not bar the Commissioner for Land Registration when he or she is exercising powers under section 91 of the Land Act.

First and foremost, the RTA which was enacted on 1st May 1924 has to be read and interpreted in conformity with the 1995 constitution by virtue of Article 274. This is the reason why the Land Act and other amendments were effected.

The RTA in the long title states, ***An Act relating to transfer of land and Registration of Titles***” while the Land Act 1998 as amended in 2004 cap22 commenced on 2nd July 1998 provides in the long title, ***“An Act to provide the tenure, ownership and management of land, to amend and consolidate the law relating to tenure, ownership and management of land, and to provide for other related or incidental matters.***

The provisions in issue in ground 2 are reproduced for ease of reference as hereunder:

S. 59 of the RTA provides:

Certificate to be conclusive evidence of title.

No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.

S. 77 of RTA

Certificate void for fraud.

Any certificate of title, entry, removal of incumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to the fraud.

S. 176 of the RTA

176. Registered proprietor protected against ejectment except in certain cases.

No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases—

1. the case of a mortgagee as against a mortgagor in default;
2. the case of a lessor as against a lessee in default;

3. the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;
4. the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of the other land or of its boundaries as against the registered proprietor of that other land not being a transferee of the land bona fide for value;
5. the case of a registered proprietor claiming under a certificate of title prior in date of registration under this Act in any case in which two or more certificates of title may be registered under this Act in respect of the same land,

and in any case other than as aforesaid the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in that document as the grantee, owner, proprietor or lessee of the land described in it, any rule of law or equity to the contrary notwithstanding.

S.177 of RTA- Powers of High Court to direct cancellation of certificate or entry in certain cases.

Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may in any case in which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest, and to substitute such certificate of title or entry as the circumstances of the case require; and the registrar shall give effect to that order

I am of the view that S.2 of the RTA is equally important in resolution of Ground 2 and so I have to reproduce it.

S.2 of the RTA provides:-

Conflicting laws.

1. Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act.

2.

S.71 RTA Issue of special certificate

Where under any provisions of the Civil Procedure Act any court calls upon the registrar to issue a special certificate of title, the registrar shall issue the special certificate as prescribed by section 70; but the registrar before issuing the special certificate shall give notice in the Gazette of his or her intention to do so, whereupon any person who wishes to oppose the issue of the certificate may, within one month of the date of the notice, make an application to the court in that behalf.

S.91 of the Land Act provides:

(1) Subject to the Registration of Titles Act, the Registrar shall, without referring the matter to court or a District land Tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise,

(2) The Registrar shall where a certificate of title or instrument-

(a) Is issued in error

(b) Contains a misdescription of land or boundaries

(c) Contains an entry or endorsement made in error

(d) Contains an illegal endorsement

(e) Is illegally or wrongfully obtained or

(f) Is illegally or wrongfully retained,

Call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party.

It is clear that when S.91 of the Land Act is subjected to the Registration of Titles Act, it means that its application has to be consistent or in line with the provisions of the RTA particularly S.59, 77, 176 and 177 and not contrary. That, in my view does not mean or imply that the interpretation is restrictive as stated in the judgment of the Court of Appeal.

Those provisions are so clear, there is no ambiguity whatsoever in that they bar and or stop or prohibit any action on the land registered under it except in the circumstances described in section 176 of the RTA. There is no way one can close eyes and mind to the applicability of these provisions. Besides, S.2 (1) of the RTA for emphasis provides:


Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act

It is clear in my mind that stating that S.91 (2) (e & f) includes fraud is superfluous and creates an absurdity.

The learned Justices of the Court of Appeal stated:-

"We do not subscribe to that view, subject to the Registration of Titles Act, means in our view, that the provisions will be read together with RTA and cannot override the RTA. Neither can the words to give effect to this Act be read too restrictively as to imply that the Registrar's powers are limited to certificates of title issued under the Land Act. Giving effect to the Land Act is a very wide power given the span of the Act and the fact that it is actually implementing the new constitutional regime for land ownership, management, administration and adjudication in relation to land in Uganda. The RTA deals with the law in relation to inter alia the office of Titles and management of the register.

The RTA, Chapter 230 in the long title as reproduced above lays the parameters. It states; **"An Act relating to transfer of land and registration of titles"**. It is a specific law relating to transfer of land and registration of titles. It was misdirection on the part of the Court of Appeal therefore to state as above quoted that giving effect is a wide power given to the span of the Act. My view is that giving effect is a process, and the special powers of the Registrar are only given in S.91 (2) of the Land Act and they are limited as clearly indicated.

By the Court of Appeal misdirecting itself on S.91 (2) (e & f) of the Land Act, it brought the Act in cosmetic contravention of section 2 of the RTA above quoted. In addition, the two paragraphs of the Court of Appeal Judgment quoted contradict each other. The first part shows that the Land Act cannot override the RTA but at the same time, the Court interprets the Land Act as having wide powers, which in effect, means it overrides the RTA and or have the same effect which is not the case. The RTA obviously prevails. 

This brings me to the issue as to whether the RTA and the Land Act complement each other because land Registration aids and ensures the effective management and control of land, the very essence of enactment of the Land Act as stated in the learned Justices' judgment. My view is that the two can only complement each other in a way consistent to their perimeters provided by the law, as opposed to taking over the powers and or jurisdiction of the other. The long titles of the RTA and the Land Act as already reproduced in this judgment speak for themselves.

The word complementary according to the Oxford English Dictionary 9th Edition means an adjective, combining in such a way as to enhance or emphasize the qualities of each other or another. E.g. they have different but complementary skills. Synonyms-harmonising, harmonious, supportive, interdependent, supportive, interrelated. My view is that, as far as powers of the Registrar/commissioner for Land Registration are concerned, there is no room for complement. Either they have it under S.91 of the Land Act or they do not have them as it was the case in this appeal. Saying so would be an understatement.

The learned Justices of Appeal therefore erred in holding that Sections 59, 77, 176 and 177 of the RTA do not bar the Commissioner for land registration when he or she is exercising powers under section 91(2) of the Land Act. This ground would also succeed.

GROUND 3, 5 & 6

In Ground three, the appellants' complaint was that the learned Justices of the Court of Appeal erred in law and fact when they upheld the cancellation decision in the absence of fraud by the proprietor.

In Ground five, the complaint was that the learned Justices of Court of Appeal erred in law and fact when they held that the appointment of an Attorney for the 1st respondent was fraudulent.

In Ground six, the learned Justices of the Court of Appeal were faulted in law and fact for holding that the special certificate of title was issued in error.

The Court of Appeal stated in the facts of the case as recorded in the judgment as follows:-

Prior to the dismissal of this suit and thereafter, the 1st respondent pursued proceedings before the Registrar of Titles seeking the cancellation of the appellant's special certificate of Title as the 1st respondent was still in possession of the duplicate certificate of Title and the special certificate of title must have been issued in error and or fraudulently.

The majority judgment^{in this Court} relied on the evidence contained in the statutory declaration of a one Mr. Robert Opio Senior Registrar of titles in Kampala Mailo office between 1992 and 2004. He stated as follows:-

On the 7th March 1997, an application for a special certificate of title comprising the land known as Mailo Register Kyadondo Block 261 Plot 173 was lodged in Kampala Mailo office as instrument No. KLA 186579 of 7th March 1997 presented by M/S. Nabagesera & Co. Advocates and Agnes Nantamu (as Donees thereof) and to transfer the said land in favour of Magdalene Scott Nambi (now deceased). That subsequently, he was shown an original duplicate of the certificate of title indicating that M/S Owalla Investment Trust (EA) Ltd and notice to effect changes in the Register book dated 6th January 2006 in respect of the said land issued by Edward Karibwende, the Principal Registrar of Titles, Ministry of Lands, Housing & Urban Development. That in the said notice, it was indicated that M/S Owalla Home Investment Trust (EA) Ltd has denied having ever sold the property to Magdalene Scott Nambi now being held by the disputed registered proprietors to wit Hilda Wilson Namusoke, Vincent Kiwanuka, Barbara Luff and Kenneth Lubega who are administrators of the estate of the said deceased. That as a result, he believed that the special certificate of title issued by him on 7th March 1997 under instrument No. 186579 and the subsequent transfer under instrument No. KLA 233387 of 12th February 2002 to the said Magdalene Scott. Nambi were registered in error and ought to be reversed accordingly.

It is my view that the mere statement as per the statutory Declaration is not sufficient to conclude with precision, without evidence adduced before the High Court to facilitate sieving through, to separate error from fraudulently registering the special certificate of Title. What is contained in the declaration calls for proof to the required standard which is higher than a balance of probabilities. And it is a fact that the complaint of the 1st respondent revolved on error and or fraud. It was therefore wrong for the Registrar to single out that he issued it in error alone when the complaint given the facts before him was on error and or fraud.

The affidavit of the 2nd respondent who did the actual cancellation deponed;

That I verily believe the Registrar does not have limited powers under the RTA as alleged (even it did), the legislature has since found it necessary to enhance the Registrar's powers by the enactment of the subsequent law, the Land Act, Cap 227 clearly delineating the new special powers of the Registrar."

The 2nd respondent was in short stating that S.91 (2) of the Land Act includes fraud as a special power which is not the case.

The above, is evidence showing that the case, as the grounds are, had both error and or fraud allegations and hence the need to have actual evidence as opposed to the evidence by affidavit.

On the basis of the above alone, the appeal would succeed. The interest of Justice dictates that the case has to be heard in order to come to its logical conclusion. A dismissal for want of prosecution means that the case was not heard on its merits to facilitate deciding it conclusively.

The Registrar of Titles did not have evidence whether this was authentic or not. But even if he had, he was not seized with jurisdiction. This was an appeal arising out of an institution of the case by Notice of motion and the evidence was by affidavits of both parties.

In **Sanyu Lwanga Musoke Vs Yakobo Ntate Mayanja SCCA No.59 of 1995** which was similar to this in that it was instituted by Notice of Motion, Oder JSC had this to say; ***In the present case, the absence of pleadings, framing of issues, testimonies of witnesses who should be examined in chief and cross examined (if necessary) means that there was not sufficient material to assist the trial and this Court to consider and decide on the allegations of fraud.***

I concur with the above authority, in that there was no sufficient material to assist all courts to consider and decide on allegations of error and or fraud. It defeats logic and or reason that the appellant's interest in the land in issue can just be ignored which would imply that they were responsible for the error and or fraudulent transaction or events that led to the issue of the special certificate of title which they had no knowledge of. My view is that, the appellants cannot be party to the error and or fraudulent action since they were merely administrators

unless actual evidence is on record for fraud to be imputed on the original owner their mother. So any reasonable Court considering the law and evidence would lead to the conclusion that there was no sufficient evidence to determine whether there was an error and or fraud.

It is noteworthy that in HCCS No. 07 of 2003, in their defence against fraud against the 1st respondent's allegations, the appellants pleaded that they were bonafide purchasers for value without notice. Their being bonafide has to be proved as it was not considered at all.

It is apparent that the Court of Appeal failed to properly discharge its duty as a first appellate Court.

The conclusion that the Commissioner for land Registration cancelled the special certificate of title not on the basis of fraud but on the grounds of error cannot stand in the absence of actual evidence. Sections 77 and 177 of the RTA are instructive.

The specific cases in which the High Court has powers to direct cancellation of certificate or entry are laid down in section 176 reproduced above already in this judgment.

The High Court exercises these powers after conducting a proceeding, as clearly provided in section 177. It is after these proceedings that the High Court exercises its power. Obviously, there is no mention of Commissioner for Land registration or Registrar in those provisions of the RTA.

Section 59 lays the foundation for this hence the need to fully and carefully inquire into the allegations of fraud. It goes without saying as stated earlier in this Judgment that in the facts of this case, it was error and or fraud which were the issues. 22

The Court of Appeal in the judgment stated that the Registrar /Commissioner for land Registration had the duty to keep the integrity of the register, but the integrity of the register cannot be kept by entering instruments which have been obtained or entered without jurisdiction like the commissioner did in this case, otherwise it becomes an illegality and null & void for want of jurisdiction. The special certificate of title was cancelled on grounds of error and or fraud according to the evidence on record.

The three grounds would succeed.

GROUND 4

This ground faulted the learned Justices of the Court of Appeal for erring in law as they failed to properly re-evaluate the evidence on record.

Rule 30 of the Judicature (Court of Appeal) Rules provides as follows:

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

(b)....

(2)...

(3)...

(4)...

As a first appellate court, the learned Justices of the Court of Appeal had a duty to review the evidence of the case and to reconsider the materials before the trial Judge and subject it to fresh scrutiny. The appellate court then ought to have made up its mind not disregarding the judgment appealed from but carefully weighing and considering it. (**Kifamunte Henry Vs Uganda (1997) EA72.**)

It is not in dispute that the 1st respondent filed HCCS No. 07 of 2003 against the appellants for cancellation of the title on the ground of fraud. The appellants pleaded the defence of bonafide purchaser for value without notice (Affidavit of Kenneth Lubega at page 56 of the record of Appeal)

Counsel for the appellants submitted that the allegations made against the appellant amounted to serious imputations of fraud. It is clear according to Lubega Kenneth's affidavit in paragraph (4) that the 1st respondent moved the Commissioner for land registration to cancel the applicant's title when the case alleging fraud was still in Court. This by all standards shows bad faith on the 1st respondent's part. g

The applicants responded to the notice and informed the Commissioner that he had no jurisdiction to cancel the title and the matter was before Court (paragraph 5). The letter was annexed and marked B). It is dated 20th January 2006 and this was before the expiration of the 21 days the Commissioner had stated that he had to get the response within 21 days. The letter strongly objected to the proposed action of cancellation of the certificate of title by the Commissioner. It was received the same day. The letter stated inter- alia that:

(a) The appellants were bonafide purchasers for value without notice of the alleged error and will be greatly prejudiced by his action if not stopped

(b) Whether or not the people who have reported to you are the real owners or whether or not the persons who sold to our clients had no authority to do so, and whether or not any errors were made are matters of fact which need to be verified by the Court of Law. The former registered proprietor appreciates this point and indeed filed High Court civil suit No.7 of 2003 against our clients which suit is ongoing has not yet been heard and determined.

Counsel for the appellants by the letter dated 21st October 2008 to the Commissioner for land registration wrote inter alia "our attention has been drawn

to your notice of cancellation of our client's certificate of title advertised in today's New vision newspaper (I observed that the notice of cancellation was given only 2 months after the dismissal of civil suit No.7/2003). Upon receipt of the notice of intention to cancel our client's title we made a response to your office on 20th January 2006. A copy is attached. The matter was the subject of HCCS No. 07 of 2008 filed by Owalla's Home Investment Trust against our clients, who pleaded the defence of bonafide purchase for value without notice. The plaintiff's directors failed to appear in the Court to testify. Two witnesses were called but they failed to prove fraud against our clients. The suit was dismissed with costs on 16th January 2008; we accordingly applied for removal of the caveat lodged by the plaintiff (copy attached)

Lex Uganda Advocates who moved your office to effect cancellation were instructed after dismissal of the case and filed a notice of change of advocates on 1st September 2008 (See copy attached) With due respect, it was highly unprofessional for them to proceed the way they did when aware that their clients' claim had been dismissed and was res judicata. We are contemplating appropriate professional disciplinary proceedings against them.

In the premises, we seek that the cancellation be reversed. Owalla's Home Investment Trust may appeal against the Court decision. The 1st respondent in reply to Lubega Kenneth affidavit deposed by John Bosco Gakibayo a director of the 1st respondent company.

Mr. John Bosco Gakibayo deposed an affidavit in Misc. Application No.81 of 2008 on behalf of the 1st respondent and averred as follows:

In paragraph 5 of the affidavit, he stated "that while it is true that the first respondent was a party to civil suit No. 17 of 2003, the same was never heard and determined on its merits. A copy of the proceedings and the order is attached and marked A & B respectively (emphasis is mine)

In Paragraph 6, he stated that I have been advised by my counsel that there is nothing to prevent the Registrar from exercising his or her rights vested in her by the law to correct the Register of titles at any time whether at the instance of a complaint or on her own motion.

That I have perused the statutory declaration sworn by the Registrar who handled the original transaction Mr. Robert Opio on 20th August 2008 in regard to the same matter to the effect inter alia that; (a) that he is the one who issued a special certificate of title now under investigation by the Commissioner/

that he issued it in error since the original duplicate title was in existence.

that the power of Attorney presented by M/s Nabagesera & Co. Advocates and Nantamu Agnes were not issued by the registered proprietor. A copy of the statutory declaration is attached and marked "C"

that I am aware a notice of cancellation of the instrument of the instrument No. KLA 186579 of 7th March 1997 was communicated to the applicants and the public on 21/10/2008

That I believe that the remedy being sought has been overtaken by events

That the commissioner was correct to cancel and amend the Register because she had been satisfied on evidence available that it had been entered in error.

that a one John Muwonge who is said to have granted powers to sell to Nabagesera & Co. Advocates and one Agnes Nantamu has never in fact been a director of the company at any one time or at all (copies of the memorandum and Articles of Association of the company and annual returns for the period between 1995-1997 are attached and marked respectively D1, D2, D3 and D4)

On careful analysis of the record of proceedings of HCCS No. 07 of 2003, I noted that:

- (i) Much as the suit in which Owalla's Home Investment Trust (EA) Ltd was the plaintiff and the appellants were defendants, was instituted in 2003, the first hearing started on 12th September 2006, three years from the time of institution. There is no evidence or indication on record as to why there was such inordinate delay to fix the hearing. I would safely conclude that the delay was intended to buy time for ulterior motives by the 1st respondent.
- (ii) The court in the presence of both counsel for the plaintiff, according to the proceedings made a hearing schedule in which it was to be completed between 9, 16 and 24th of January 2008. This was made on 30/08/2007 and it was by consent of both counsel. The record however shows that the Court sat on 08/01/2008, both counsel were present. JB
- (iii) One witness testified PW1 Gakibayo. The testimony appears not to have been completed. Mr. Musisi, Counsel for the plaintiff told Court; *"I need time to speak to my witness about the correctness of this evidence."* Counsel Nerima for the defendants/ appellants said No objection.
- (iv) The case was adjourned to 16/01/08, however the Court resumed on 11/01/08. Counsel Musisi addressed Court and said *"we received a notice of change of advocates; Mr. Nuwamanya is the new counsel for the plaintiff. I seek to vacate. Court granted the request.*
- (v) Counsel Nuwamanya addressed court and said; *"I got into physical contact with one of the directors only yesterday. I have to be fully conversant with claim. I seek an adjournment in that behalf".* Counsel Nerima said *"Plaintiff appears not serious. Case was filed 5 years ago. Along the way, the defendant died. The administrators are anxious to resolve the matter. Even when hearing started recently, plaintiff was unprepared. The plaintiff has had enough time.*

The Court said; I agree with defence counsel. Perusal of the whole file attracts the application of section 17(2) of the Judicature Act. I hereby dismiss the suit with costs to the defendants. Signed on 16/07/08.

A decree to that effect was extracted.

S.17 (2) of the Judicature Act provides:

With regard to its own procedures and those of the magistrates courts, the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.

There was no reason whatsoever for the plaintiff not to apply for reinstatement of the suit since it was a dismissal for want of prosecution so the matter was not res judicata as it had not been determined on merit. The evidence had not been exhausted and the defendants had not given their defence evidence. Instead, before the dismissal, he complained to the Commissioner for Land registration. The fact that the plaintiff (1st respondent) complained to the Commissioner when the suit had not taken off and not determined speaks for tonnes. It was the 1st respondent who had fraudulent intentions in my view. He took his time to fix the case to be heard, even when it commenced, it was at the instance of the 1st respondent that adjournment was made. This was in January 2008. As if that was not enough, when the 1st respondent changed advocates in 2008 still, its advocate continued to seek for further adjournment. Five years had lapsed since the filing of the HCCS in which they were alleging fraud against the defendants. As I said earlier, there was no evidence on record as to why it took all this time to be fixed. Even when the hearing started, adjournments were sought by the 1st respondent's counsel. His conduct squarely falls within the meaning of fraud as defined in the Frederick Zaabwe case (supra) and in the Black's Law Dictionary.

Since he had filed Civil suit No. 07 of 2003, he ought to have followed it to the end if he was coming to equity with clean hands. JS

The learned Justices only mentioned the issue of the learned trial Judge making some observation about S.140 (2) of the RTA as to the vacation of the caveat. There were annexures attached, affidavits of the appellants and the respondents. Instead, they went ahead to fault the appellants for having filed an application to vacate the caveat. The Court of Appeal stated inter alia; *"It is of course clear that the action of appointing an attorney for the 1st respondent was clearly fraudulent, but this did not mean that the 1st respondent was stuck to only one course of action under S.176 of the RTA. It was open to the 1st respondent to point out to the Registrar what had happened in this particular case for the Registrar to exercise the powers he/she has under Section 91 of the Land Act to correct the errors that the Registrar of Titles had been led to commit i.e. to issue a special certificate of title while the duplicate certificate of title had never been lost"*. S. 177 of the RTA is clear. I am unable to subscribe to that view.

If the 1st respondent was honest, he ought to have prosecuted his case to a logical conclusion. In my view, the Court erred in deciding the matter in favour of the 1st respondent considering the facts of the case. This is a case which ought to have been directed to be heard denovo. So this ground would succeed.

GROUND 7

The appellants faulted the learned Justices of the Court of Appeal for declining to consider arguments from both parties relating to the requirements for hearing of affected parties before cancellation.

The majority judgment dismissed this ground by stating among others that it lacked merit since the appellants and 1st respondent were invited by the 2nd respondent on 6th January 2009 at 8:15am in the Ministry of Lands, Housing and Urban Development Board room. That it was not indicated what transpired on the date of hearing. The appellants instead decided to file Misc. Cause No.81 of 2008 on 10th March 2009.

The filing of Misc. Application No.81 of 2008 came after the commissioner for Land Registration refused to take heed the appellant's response dated 20th January 2006. She cancelled after two years of receiving the response without any reply from her.

With due respect, I disagree with the conclusion as stated above. The duty of the Court of Appeal as a first appellate court was to determine the merits of the complaint as presented in the submissions. Whether it was moot or not, was immaterial. The Constitution provides that fair hearing is a right which cannot be derogated from in any circumstance.

Article 44(c) of the Constitution provides:

44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(a).....

(b).....

(c) the right to fair hearing

It comes out clearly that the 2nd respondent denied the appellants the right to be heard as she clearly denied that there was no response to her 6th January 2006 when actually the response was there.

It is correct that Rule 102 of the Court of Appeal Rules prohibits parties from raising a new ground on appeal except with leave of Court. I hasten to add that, there are a host of cases of this Court, with decisions to the effect that if it is a point of law, the Court has to give both parties a right to be heard before a decision is made.

In **Makula International Limited Vs His Eminence Cardinal Nsubuga and Rev. Dr. Father Kyeyune Civil Appeal No.04 of 1981**, this Court had occasion to pronounce itself on the circumstances under which the appellate Court may allow a party to argue a point he did not raise in the lower Court. It stated as follows:-

In short, the test which emerges from these decisions and from the decisions quoted by counsel is that the Court of Appeal ought only to decide in favour of an appellant on a ground they put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as would have been the case if the contention had arisen at the trial, and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for an explanation had been offered them in the witness box...

It follows therefore that even under exceptional circumstances highlighted above, where a new point is allowed on appeal, parties must be given a chance to address Court on it. In **Oriental Insurance Brokers Vs Transocean SCCA No.55 of 1995**, it was held that where an issue arises while writing a judgment, it's necessary to give opportunity to parties to address Court or adduce evidence on the amended issues before judgment.

The 2nd respondent, it is clear, denied the appellants the right to be heard before eventual cancellation.

So the appellants rightly faulted the learned Justices of the Court of Appeal.

It was after cancellation of the certificate of title that she scheduled a hearing on 6th January 2009 when the title had already been cancelled hence Misc cause No.81 of 2008. (A copy of the letter was annexed and marked). From the above stated which were not disputed, it is evident that there was merit in this ground. This would lead to the conclusion that the cancellation of the special certificate of title was invalid because of the non derogable right which was violated.

This ground would succeed.

Rule 31 of the Judicature (Supreme Court) Rules provides:

On appeal the Court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the Court of Appeal with such directions as may be appropriate, or order the rehearing of the appeal before the Court of Appeal and as the justice of the case demands the Court may order a trial de novo in the Court of first instance including a constitutional matter and may make any necessary incidental or consequential orders including orders as to costs.

Since all the 7 grounds have been resolved in the affirmative, the appeal would succeed in the whole entirety.

The following orders are made:-

- (1) Appeal allowed.
- (2) Declare the cancellation of the special certificate of title invalid and the decision of the 2nd respondent to cancel the special certificate of title null and void for want of jurisdiction and denial of the right to be heard.
- (3) The appellant's registration as proprietors of Kyadondo Block 261, Plot 173 be reinstated.

(4) Costs of this Court and the Courts below to the appellants.

Before the orders of Court are pronounced, I would like to express my amazement that the Court of Appeal in the judgment criticised the appellants for using a wrong procedure to vacate the caveat and said that he ought have filed a suit, but went ahead and dismissed the appeal, without ordering the case to be heard denovo from the Court of first instance to determine the issues at stake.

Be that as it may, since the four members of the coram agreed that the appeal fails, it is dismissed with costs to the 1st respondent.

Dated at Kampala this 25th day of April 2019.


MWONDHA
JUSTICE OF THE SUPREME COURT

Delivered by the Registrar

5th October 2023.


By

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

Coram: Mwondha, Tuhaise, Chibita, Musoke & Madrama, JJ.SC

CIVIL APPLICATION NO. 14 OF 2019

- 1. HILDA WILSON NAMUSOKE**
- 2. VICENT KIWANUKA**
- 3. KENNETH LUBEGA (As Administrators
of the estate of the late Nambi Magdalene Scott)APPLICANTS**

VERSUS

- 1. OWALLA'S HOME INVESTMENT (E.A) LTD**
- 2. COMMISSIONER FOR LAND REGISTRATIONRESPONDENTS**

(An application arising from the judgment and orders of the SCCA No. 15 of 2017 at Kampala before, Mwondha, Tibatemwa-Ekirikubinza, Mugamba, Nshimye, Tumwesigye, JJ.SC dated 25th April 2019)

RULING OF MWONDHA, JSC

(Dissent)

This application was brought under sections 80(2), 82(b) and 98 of the Civil Procedure Act, section 7 of the Judicature Act and Rules 2(2), 35, 42 and 43 of the Judicature (Supreme Court Rules) Directions SI 13-11.

The grounds of the review are set out in the lead judgment. So I shall not reproduce them.

I have had the benefit of reading in draft the Ruling of the Court authored by my learned brother Christopher Madrama, JSC. I however do not agree with it. I was part of the Coram in the impugned judgment dated 25th April 2019. Apart from the first ground which I concurred with namely that “the learned Justices of the Court of Appeal erred in law when they held that s. 91(e) and (f) of the Land Act includes fraud as a ground for cancellation of title by the 2nd respondent”. I disagree with the rest of the judgment as shown in my judgment dated 25th April 2019.

My judgment was a dissenting judgment and I still strongly hold the same position. (See Annexure A for your ease of reference)

Definitely, s.91(e) and (f) does not at all give powers to the Commissioner Land Registration to cancel a certificate of title on grounds of fraud much as in the impugned

judgment cancelling the title was disguised with, the Commissioner having issued it in error whereas not.

Issuing of a special certificate of title in error does not exist in the circumstances of this case. This is so because issuing a special certificate of title is not done in a vacuum.

The word error as defined in the Black's Law Dictionary 9th Edition at page 621, means, "(1) an assertion or belief that does not conform to the objective reality; a belief that what is false is true or that what is true is false/mistake.

The word error comes from a verb err and it means to make an error; to be incorrect or mistaken for example, the court erred in the denying the motion for summary judgment.

When the lead judgment is read visa vi the instant application for review of the same as provided in the notice of motion, it becomes so clear that denying to grant the application shall compound the error already made as the decision both in law and fact do not conform to the objective reality of the law and defeats the intention of the legislature. Cancelling a certificate of title on ground of fraud is a preserve of the High Court as per se.

In my view all the grounds of the application for review would succeed.

It is apparent that the decision in the impugned judgment gave or gives the Commissioner for Land Registration (2nd respondent) power to arbitrarily cancel certificates of title for fraud under the guise, veneer or pretext of an error as argued by learned counsel for the applicants.

Accordingly, in the interest of justice and in order to uphold the rule of law, this court would review its judgment so that it makes orders consistent with the law and logic to avert the absurdity as prayed by counsel for the applicants. This shall serve to remove the errors apparent on the face of the record and give effect to the true and correct position of the law. Certainly the impugned judgment is marred with grave inconsistencies and contradictions in law and fact.

I accordingly affirm the orders I made in my dissenting judgment dated 25th April 2019 with the necessary amendment since this is an application.

- 1) The Application is allowed
- 2) Declare the cancellation of the special certificate of title invalid, null and void for want of jurisdiction and denial of the right to be heard to the applicants.
- 3) The Applicants' registration as proprietors of Kyadondo Block 261 Plot 173 be re-instated.
- 4) Costs of this court and the court's below awarded to the applicants.

Dated at Kampala thisth.....day ofOctober.....2023

.....*Mwondha*.....

Mwondha
Justice of the Supreme Court