

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

CIVIL APPEAL NO. 15 OF 2008

[Arising from HCCS No. 1296 of 2000]

5

FRANCOISE

MUKYO:.....APPELLANT

VS

10

1. REBECCA MAWANDA

2.

JOSEPH

MUTEBI:.....RESPONDENT

CORAM: HON. JUSTICE C.K. BYAMUGISHA, JA

15

HON. JUSTICE S.B.K. KAVUMA, JA

HON. JUSTICE M. S. ARACH AMOKO, JA

JUDGMENT OF THE COURT

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This is an appeal against the judgment of the High Court of Uganda at Kampala delivered by Moses Mukiibi, J, on the 19th July 2007, in HCCS No.1296 of 2000.

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The respondents brought that suit jointly and severally against Francis Mukyo, the appellant, Oguro Bernard t/a Atlas Court Bailiffs and the Registrar of Titles as first, second and third defendants, respectively. They instituted the suit in their capacity as administrators of the estate of late Benard Mawanda, seeking among others, a declaration that the

purported sale and transfer of property comprised in Kyadondo Block 245 plot 447 at Kiwuliriza (hereinafter referred to as the suit property), to the appellant by the 2nd defendant, effected by the 3rd defendant, was null and void and of no
5 consequence.

The sale arose from a previous suit (**HCCS No. 954/93: Patrick Kirunda vs Benard Mawanda**), in which an ex parte judgment was entered against late Mawanda due to non-
10 appearance and execution issued against the suit property.

The respondents' major complaint was that the attachment and subsequent transfer of the suit property to the appellant was null and void because the execution took place illegally since
15 they had no notice thereof.

The appellant and the 2nd defendant in their defence denied the claim in its entirety. The appellant pleaded that the respondents were not entitled to any notice at all, prior to
20 execution and alternatively, she contented that she was a bonafide purchaser for value without notice of the alleged illegality. The 2nd defendant averred on his part, that he executed a lawful court order in his capacity as an officer of the court. He was protected by law. Ultimately, both of them
25 prayed for dismissal of the suit with costs. The 3rd defendant did not file any defence.

At the trial, the issues agreed upon for determination by court were:

- i. Whether the plaintiffs, in their capacity as Administrators of the estate of the deceased, were entitled to Notice under O.19 rule 19 of the Civil Procedure Rules. If so, the effect of failure to give such notice.**
- ii. Whether the plaintiffs, in their capacity as beneficiaries of the estate of the late Bernard Mawanda, were entitled to Notice under O. 19 rule 19 of the Civil Procedure Rules. If so, the effect of failure to give such notice.**
- iii. Whether the 2nd defendant had an obligation to give notice under O.19 rule 19 to the plaintiffs under the warrant or in law.**
- iv. Whether there was an over attachment or undervaluation of the suit property by the 2nd defendant and if so, whether he is liable.**
- v. Whether the 2nd defendant was barred by the warrant or by the law from selling and transferring the suit property to the 1st defendant.**
- vi. Whether the alleged over attachment and/or undervaluation, if any, or a failure to follow procedural rules of court constituted fraud under S.184 of the RTA on the part of the 2nd defendant.**
- vii. Whether the 1st defendant is a bona fide purchaser for value without notice of the alleged fraud.**

- viii. **Whether the threats by the 1st defendant to evict the plaintiffs from the suit property were justified.**
- ix. **Whether the plaintiffs have suffered any damage.**
- x. **Whether the plaintiffs are entitled to the reliefs sought.**

After considering issues i - iii together, the trial judge found that the execution against the estate of the deceased and the resultant sale and transfer of the suit property to the appellant was null and void. Consequently, he ordered, inter alia, the cancellation of the appellant's name from the Certificate of Title and restitution of that of the respondents thereto, hence this appeal, which was based on only one ground, namely, that:

The learned trial Judge erred in law and in fact when he held that the names of the appellant that were appearing on the Special Certificate of Title and Land Registrar for Kyadondo Block 245 Plot 447 at Kiwuliriza be cancelled by the Chief Registrar of Titles without proof of fraud.

At the scheduling conference conducted by the Registrar of the Court of Appeal, the two issues agreed upon:

- 1. Whether the appellant's title could be impeached in the circumstances.**
- 2. What are the available remedies under the circumstances?**

Both counsel relied on the written arguments together with the authorities contained in their respective conferencing notes. They made oral arguments in court and availed additional
5 authorities as well.

Submissions by Counsel for the Appellant:

Mr. Andrew Kibaya, learned counsel for the appellant submitted
10 that the appellant's title could not be impeached in the circumstances. She acquired the suit property lawfully following execution proceedings arising from HCCS No. 954/93 between Patrick Kirunda and Benard Mawanda.

15 Mawanda did not participate in that suit. An ex- parte judgment was entered against him in the suit and execution followed. There was a sale and she acquired the property.

The suit out of which this appeal originated was brought by the respondents citing fraud against the appellant (see: particular
20 6(a) of the Further Amended Plaintiff). Out of the ten issues agreed upon for trial by the court, issues (i) to (iv) related to the execution process. The issues concerning fraud under the Registration of Titles Act were issues (v), (vi), and (vii) and by
25 extension, viii. The decision of the court from which this appeal arose was essentially based on the first three issues. However the judge only addressed the question of fraud in passing.

In determining the first three issues the judge stated as follows, at P. 385;

“I think other issues raised on the pleadings do not merit consideration. Where an execution and sale is held to have been null and void, and the plaintiffs sought to set aside the said sale on that ground, the question of whether or not the 1st defendant was a bonafide purchaser for value without notice of any alleged fraud does not arise.”

Mr. Kibaya contended that this was an error. Since the appellant was the registered proprietor of the suit property, the judge could not, under sections 59 and 176 of the Registration of Titles Act, impeach the appellant’s title without proof of fraud.

He added that the fraud must be pleaded specifically and proved to a standard higher than the balance of probabilities required in ordinary civil cases. It must also be shown to have been committed by the appellant. In this case, although fraud was pleaded and issues framed on it, there was no proof of fraud. The judge based his decision on particular 6(a), that is, irregular execution, which is not equivalent to fraud. Counsel cited several authorities in support of his submission on this point, including: **J.W.R. Kazoora vs M.L.S. Rukuuba [1992] KLR III 51 at p.52; John Katarikawe vs William Katwiremu & anor (1977) HCB 187at 191; Kampala**

Bottlers vs Damanico SCCA No. 22/92 and Okello Okello vs Uganda National Examinations Board SCCA No. 12/87.

Mr Kibaya repeated his arguments before the lower court regarding the procedure followed by the respondents in instituting the suit. The argument was that, since the complaint arose out of the execution of the judgment in HCCS No. 193, under section 34 of the Civil Procedure Act, the correct procedure was for the respondents to bring an action in the same suit between the deceased judgment debtor and the judgment creditor from which the appellant acquired the property, instead of filing a separate suit. For that reason, the suit was incompetent and the judge should have struck it out. He relied on the decision of the Supreme Court in the case of **Francis Micah vs N. Walakira SCCA No. 24/94** for his arguments on this point.

Mr Kibaya also maintained his argument regarding the issue of the alleged illegality of the court order. He contended that the purchase of the property was proper since the court issued an Execution Order against the judgment debtor. The court officer (the bailiff), an authorised officer, executed the order in accordance with Order 22 rule 51(2) of the Civil Procedure Rules, and the appellant responded to an advertisement and purchased the suit property following an apparently good court order. The respondents failed to prove that the 2nd defendant, who was acting on lawful court orders to sale the suit property, was at fault. (See: **Section 46 (2) of the Judicature Act Cap**

13 of the Laws of Uganda and the cases of **Paulo Kalule Kagodo VS Kalorina Kyagaza [1979] HCB 136** and **Gulu Municipal Council vs Nyeko Gabriel [1997]1 KLR 9).**

5 In counsel's view, the court therefore improperly questioned the appellant's title on the basis of the alleged illegality of a proper order issued by a court of competent jurisdiction. (See: **Mulla Code of Civil Procedure (Abridged) 13th Edition by P.M. Bakasi (Butterworth) at page 309 para.**

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According to counsel, the appellant was under no duty to investigate into the legality or to ensure the appropriateness of the court order as long as it was valid and proper on the face of it. The order was advertised and she paid adequate
15 consideration for the suit property.

He further submitted that the appellant was also not responsible for giving the respondents notice of execution. Even then, the respondents failed to prove that they were
20 entitled to notice before the court order was executed.

Mr Kibaya also contended that the learned judge erred in applying the provisions of the Civil Procedure Rules which provide that a person who has not participated in the
25 proceedings has no locus to challenge the action. The late Mawanda did not participate in the proceedings; he therefore had no locus to challenge the action. The respondents as successors in title to him stood in exactly the same position and

therefore had no right to be served with any court process of execution and sale. (See **O. 9 rule 10 CPR** and **Attorney General & UCBL vs Westmount Land Asia BHD & 2 Others MA 593 and 595 of 1999** and **Agard Didi vs James Namakajo HCCS 1230/1988**).

He prayed that the appeal be allowed, the orders of the lower court set aside and the appellant be awarded costs of the appeal.

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Submissions by counsel for the respondents:

Mr. Obed Mwebesa, learned counsel for the respondent strongly opposed the appeal. He contended that the respondents were challenging the sale through which the appellant acquired the said property in their capacity as holders of Letters of Administration of the late Mawanda. Their complaint was that the sale and transfer was null and void since they had no notice of execution as required by law.

He submitted further, that under S.37 Civil Procedure Act, the judgment debtor had to bring the administrators of the late Mawanda's estate before they could execute the decree in question. They did not, and this amounted to an illegality as stated by **SARKAR Commenting on The Code of Civil Procedure (Act v of 1908 in volume 1 page 414** (which is

in pari materia with s. 37 of the Civil Procedure Act) in the following words :

5 **“If execution sale takes place after the death of the judgment debtor without bringing his legal representative on record, the sale is a nullity”.**

Counsel referred to another statement by Chitaley **and S. Appu Rao** commenting on the same Act **in the 7th Edition, vol. 111** in particular **O. 22** which is the equivalent of
10 Uganda’s **O. 21 at page 3442 where** the learned authors also wrote that:

**Execution cannot proceed against the judgment debtor who is dead and whose legal representatives have not
15 been brought on record.**

He pointed out that under the law, an illegality once brought to the attention of court overrules all matters including pleadings
(See Makula International vs Cardinal Nsubuga [1982] HCB.
20

He supported the finding by the trial court that the execution against the estate of the deceased and the resultant sale of the property to the appellant, who was well aware of the
25 irregularities, was null and void.

He submitted that the appellant was affected by the irregularity because she had appointed an agent, Kibuuka Musoke, (DW2)

an advocate to establish all these and he actually found out that there were irregularities yet he went ahead to purchase the property.

5 He agreed with counsel for the appellant that issue No. (vi) was on fraud, but contended that issues (i) to (iii), concerning notice and the effect of failure to give notice of the execution to the respondents were the core issues. He contended that the appellant acquired the property through a judicial sale, not a
10 private sale. Therefore it could be challenged. He insisted that the learned trial judge properly evaluated all the evidence and came to right conclusion at P.385 referred to by Mr. Kibaya and that the learned trial judge's findings are supported by the decision in **Lawrence Muwanga vs Stephen Kyeyune**
15 **(Legal Representative of Christine Kisamba (deceased))** **SCCA No. 2/01**, a similar case, where the appellant's property had been attached and sold at an auction. He referred to P.5 of the judgment where Tsekooko JSC observed as follows:

20 ***"I agree with the opinion of the editors of Chitaley & Rao's Code of Civil Procedure that a judicial sale, unlike a private one, is not complete immediately it takes place. It is liable to be set aside on appropriate proceedings. If no such proceedings are***
25 ***taken or if they are taken and are not successful, the sale will then be made absolute."***

Regarding the procedure adopted by the respondents in instituting the suit, Mr Mwebesa contended that it was the correct one. He added that in Walakira’s case (supra) the Supreme Court made it very clear that where a bailiff is sued, the practice is to bring a separate suit. Mr. Mwebesa relied on the following observation by Odoki CJ;

“In my judgment, the learned judge misconstrued the decision in Wasswa’s case (supra). One of the main points decided in that case was that where it is sought to challenge an alleged wrongful or fraudulent execution against a court bailiff, the practice is not to bring an application under S. 35 of the CPA but to file a separate suit. Platt, Justice of the Supreme Court who wrote the lead judgment with which the other two judges agreed, said:

‘It is now established that the wording of Section 35 covering “the parties to the suit or their representatives” would cover auction purchasers, for the reason that the title was passed to the purchaser from the judgment debtor. But in the case of Court Bailiffs, the better practice is to sue them separately. It is difficult to see that the agent of the court for some other matters can suddenly be representative of the parties for other matters.’

(Underling is added for emphasis).

Regarding the authorities on fraud cited by Mr. Kibaya, Mr. Mwebesa admitted that the authorities are good law but they

are in respect of private sales not judicial sales. They are thus inapplicable to the instant case.

In conclusion, he submitted that the appeal was incompetent
5 and lacked merit. He prayed that the appeal should be dismissed with costs and the order of the learned trial judge be maintained.

Decision of the Court:

10 The respondents' major complaint was indeed that the attachment, sale and transfer of the suit property, was illegal as it was done without any notice to them as the legal representatives of the estate of the late Mawanda. (See: para 6(a) of the further amended plaint).

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The appellant's defence to this allegation was that the respondents were not entitled to any such notice under **O.19 r 19** (now **O.22 r 19**) of the Civil Procedure Rules because:

- 20 i. The application to execute the decree in HCCS No. 954 of 1993 was made within one (1) year from the date of the decree (i.e. 29/5/1995) and the warrant issued by court on the 14/2/1995.
- 25 ii. As administrators of a deceased person's estate, they could only exercise legal rights that the deceased had. Late Mawanda did not enter appearance or file a defence in HCCS No. 957/93.

iii. As beneficiaries, they were not entitled to the Notice to why execution should not issue because they were not parties to the suit (i.e. **HCCS No. 954 of 1993**) (See: paragraph 6(iv) (a) of the Amended Written Statement of Defence).

Issues (i), (ii) and (iii) were based on these pleadings.

It is true that the trial judge dealt with only the first three issues and arrived at the conclusion referred to by counsel for the appellant. However, the record shows that he considered the positions of the appellant as well as the 2nd defendant, though generally before taking a final decision.

It was also not in dispute that:

The appellant was the registered proprietor of the suit property. She acquired the property in 2000 following execution proceedings in **HCCS No. 954/93 (Patrick Kirunda vs Benard Mawanda)**. Mr. Mawanda had not entered appearance or filed a defence as required under the CPR that time. An ex parte judgement was entered against him on the 29/5/95 and a decree extracted on the same date. Mawanda died on the 12/10/1995. Thereafter, court issued a warrant of attachment and sale of the suit property dated 14/12/1995. Mawanda was the registered proprietor of the suit property. That warrant was not executed. The respondents, his widow and son/heir, were granted Letters of Administration to his estate dated 27/7/1998. Another application for issuance of a

warrant of sale was made and court issued another warrant of attachment and sale of the suit property dated 15/5/2000 to the 2nd defendant. The warrant of attachment was advertised in the Uganda Gazette on the 7/7/2000. The appellant
5 purchased the property vide an agreement of sale dated 8/8/2000 and was subsequently registered as the proprietor.

From the foregoing, it is clear that the decree was executed after more than one year, (actually four years) after the date of
10 issue. Therefore, the person against whom execution was to be carried out was entitled to notice under **Order 22 r 19 (formerly O.19 r 19)** of the Civil Procedure Rules which provides that:

“(1) where an application for execution is made -

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(a) more than one year after the date of the decree

(b) against the legal representative of a party to the decree

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the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her except that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one

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year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representatives of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him or her.” (underlining was added for emphasis).

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As the learned trial judge rightly held, the exception in sub-rule 19 does not apply to the instant case since the last order against the late Mawanda was made on 14/12/1995 when the court first issued a warrant of attachment. The warrant of attachment was dated 15/5/2000, which was, over four years from the date of the decree.

As stated earlier, the person against whom execution was applied for, that is, late Mawanda, was entitled to notice under O.22 r 19. Unfortunately, Mawanda had died by the time of execution. In that case, his legal representatives were the ones entitled to notice. But then they were not brought on record by the judgment creditor at the time of execution, so the decree was executed without bringing them on court record in accordance with section 37 of the CPA which provides that:

“(1) Where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to

execute the decree against the legal representative of the deceased, or against any person who has intermeddled with the estate of the deceased.”

5 As the learned trial judge rightly observed:

10 **“Kirunda Patrick DW3 as the decree holder, had a duty of applying to court for bringing the legal representatives of Mawanda, the plaintiffs, on record. He should have brought the fact of Mawanda’s death to the notice of the court, and the court had to know as a fact who the legal representatives of the deceased were. Kirunda (DW3), the decree holder, should, after bringing the plaintiffs on record, have applied to court to**
15 **execute the decree against them as legal representatives of the deceased.**

For the reason that;

20 **(i) the application for execution of the decree was made more than one year after the date of the decree, and;**
(ii) the application for execution should have been made against the legal representatives of the late Mawanda, the judgment debtor, the court executing
25 **the decree should have issued a notice to show cause why the decree should not have been executed against them.”**

We agree with the learned judge that the effect of failure to give notice rendered the sale void. The passage from **Mulla on the Code of Civil Procedure Act V of 1908 4th Edition Vol 11 P.1417** which the learned trial judge relied on, which is
5 persuasive authority, the learned author states as follows:

*“ This gives rise to the question whether the omission to give notice as required by this rule renders a sale in execution of a decree absolutely void for want of jurisdiction, or whether the
10 omission is a mere irregularity so as to render the sale merely voidable, that is, valid until it is set aside.*

*IN GOPAL CHUNDER VS GUNAMONI DAS [1893] 20 CAL 370 (where there was no notice to a legal
15 representative) the High Court of Calcuta held that a notice under this rule is necessary in order that the Court should obtain jurisdiction to sell property by way of execution, and that the omission to give notice is by itself sufficient to render the sale void. This decision was approved by the PRIVY COUNCIL
20 in RAGHUNATH DAS VS SUNDER DAS [1914] 14.1 A.251; 42 Cal 72; 24 I.C. 304.*

The learned author further wrote at P. 1418 that:

*“It has been held that failure to issue notice is a
25 matter of jurisdiction, not in the sense that the court is not competent to entertain the proceedings*

but that they are invalid, and not binding on the judgment debtor.”

The learned judge was therefore right when he nullified the
5 appellant’s Certificate of Title which was based on a sale and
execution which he had declared null and void.

It is also not entirely correct that he did not consider the
question of fraud. The record shows that he did so, albeit
10 briefly and counsel for the appellant conceded to this fact, in
his submissions before court.

The record shows that, the learned judge, after making that
finding, actually went on and evaluated the evidence in respect
15 of the position of the appellant and the 2nd defendant as well
and found that the appellant was the wife of Allan Williamson.
She is a Ugandan citizen. Mr. Williamson was one of the
tenants who held leases on the suit property. He was also
invited for the meeting held in the Administrator General’s
20 Office to sort out the issues concerning the estate of the late
Mawanda. Frederick Kabanda (PW2), told court that Allan
Williamson had leased a portion of the suit land from the
deceased. In 1996, he attempted to exercise control over the
suit property when he claimed to have registered a lease of the
25 whole plot. Around July, 1996, counsel Kibuuka (DW2) and
Allan Williamson were among the tenants who attended the
meeting in the Administrator General’s office. Patrick Kirunda
(DW3) testified that he attended the same meeting where the

Administrator General told them that the widow and Mutebi (the respondents) had applied for letters of administration.

5 The learned judge deduced, rightly in our view, that from the said meeting, Allan Williamson should have known that the respondents had applied for Letters of Administration. This evidence was corroborated by his own advocate, counsel Kibuuka - Musoke (DW2) who testified that he came to know about the suit property from Allan Williamson, the proprietor of
10 M/S Al's Dining Club, a business on the same plot. Allan had brought him a warrant of attachment of that plot.

Notably, that was even before any advertisements in the papers were made for the sale of the suit property. According
15 to the witness, Mr. Williamson told him that he was interested in purchasing the plot. He instructed the witness to make a search about the warrant of attachment. Counsel Kibuuka further testified that upon receipt of instructions from Mr. Williamson, he set out to find out whether all requirements
20 concerning the execution had been complied with. That is when he contacted Mr. Emoru, (RIP) who had all along represented the judgment creditor in the suit between Patrick Kirunda and Late Mawanda and he who also knew that Mawanda was dead. DW2 told court that he advised Mr.
25 Williamson that he could not purchase mailo land but his wife, being a Ugandan citizen, could do so. As a result, they agreed that it would be the wife to bid for the suit property. The record shows that the same advocate carried through the bid for the

suit property by the appellant, handled the sale and finally ensured that it was transferred to the appellant.

The judge concluded from the foregoing evidence that:

5 ***“... information that Benard Mawanda was a dead judgment debtor was available to the 1st defendant from her husband; Allan Williamson, or her counsel Mr. Kibuuka Musoke.”***

10 As for the Court Bailiff, the learned judge also evaluated the evidence on record and his findings were that:

15 ***“Mr. Oguro (DW1) told court that he was instructed by the Registrar to execute the decree by attaching property belonging to Benard Mawanda, the suit property. He immediately went with the law clerk to M/S Emoru & Co. Advocate who knew the plot. That Mr. Emoru (RIP) informed him that Mr. Mawanda was dead. Patrick Kirunda (DW3) the decree holder also told him the same thing. Mutebi, the 2nd respondent also told him that he was the son of the deceased and attacked him and the Clerk from Emoru’s Chambers for selling his land.”***

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The judge reached the conclusion from the above evidence
25 that:

“One thing is clear to me from the 2nd defendant’s testimony, and it is that he saw the warrant of attachment issued against Benard Mawanda, and he

knew from both the decree holder and his counsel that Benard Mawanda was dead.

5 ***In my view, the 2nd defendant knew that he had been instructed to execute the decree against Mawanda Benard, a dead judgment debtor.”***

10 We have perused the entire record of proceedings and we are satisfied that the findings by the learned trial judge are supported by the evidence on record. We are further of the firm view that the above evaluation was thorough and the findings took care of the issues no. (v), (vi) and (vii). Definitely, there was collusion and fraud in the execution and transfer of the suit property to the appellant by all the concerned parties.

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Regarding the procedure adopted by the respondents, we find that the respondents instituted the suit to challenge the alleged fraudulent or illegal execution and the court bailiff was cited as a party. It was proper. (See: **Francis Micah vs N.Walakira (supra)**).

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The answer to the first issue is therefore in the affirmative.

25 The second issue concerns the remedies available under the circumstances. In light of our findings on the first issue, the order by the learned trial judge remains intact.

In the premises and for the foregoing reasons, we would dismiss this appeal with costs to the respondents in this court and the court below.

5 Dated at Kampala this...**18th** ...day of ...**March...2013**

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HON. C.K. BYAMUGISHA
10 **JUSTICE OF APPEAL**

.....
HON. S.B.K. KAVUMA
15 **JUSTICE OF APPEAL**

.....
HON. M.S. ARACH AMOKO
20 **JUSTICE OF APPEAL**