THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 12 OF 2014

(Arising from Civil Appeal No. 107 of 2012)

UGANDA BROADCASTING CORPORATION========= APPLICANT

VERSUS

SINBA (K) LIMITED ========================== ASSIGNEE

1. **DEO & SONS PROPERTIES LTD**
2. **TWINAMATSIKO GORDON ==========RESPONDENTS**

T/A TROPICAL GENERAL AUCTIONEERS

3. **MARGRET MUHANGA MUGISA**

CORAM: HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. LADY JUSTICE FAITH E. MWONDHA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

RULING OF HON. MR. JUSTICE KENNETH KAKURU, JA

This is an application by notice of motion which is stated to arise from **Court of Appeal Civil Appeal No. 107 of 2012.** It is bought under ***Section 34 and 88 of the Civil Procedure Act (CAP) 71, Section 33 of the Judicature Act (CAP 13) and Rules 2(2), 43(1) and 44 (1***) of the Rules of this Court.

The Motion seeks the following orders.

1. *Execution of the consent decree in **Civil Appeal No. 107 of 2012** be annulled, canceled and / or set aside.*

2. *The purported attachment and sale of the applicants property comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx. 23.1 acres in execution of the consent decree in **Civil Appeal No. 107 of 2012** be declared null and void, cancelled, reversed and /or set aside.*

3. *The costs of this application be provided for.*

The grounds of the application which are generally repeated in the affidavit in support of the motion are set out as follows;-

1. *The parties entered into a consent judgment on 16th April 2013.*

2. *By the consent judgment, the respondents were obliged to jointly and / or severally surrender all interests in the suit property and hand over the certificate(s) of title to the*

entire suit property to the Applicant within a period of 60 days from the judgment.

3. *The 1st and 2nd respondents never fulfilled their obligations under the consent judgment and as such the payment was not due and owing.*

4. *The 1st and 2nd respondents in breach of the consent judgment assigned the Applicant's land to a third party.*

5. *The 1st and 2nd respondents commenced execution proceedings in this Honourable Court.*

6. *The applicant filed* ***Miscellaneous Application No. 295 of 2013*** *and* ***298 of 2013*** *in this Honourable Court for stay the execution and an interim order of stay respectively and the same remain pending.*

7. *The 1st and 2nd respondents obtained a warrant of attachment and sale of the applicant's land on 29th November 2013.*

8. *The applicant filed a complaint to the Registrar of this Honourable Court on the 11th December 2013 indicating the illegalities in the process and sought written confirmation from the Registrar as to whether the title deeds had been deposited with the Court.*

9. *The Registrar recalled the warrant on the 30th December and summoned a parties meeting to be held on 31st December 2013.*

10. *The parties attended the meeting where no sale was disclosed by the 1st and 2nd respondent, representatives and / or their advocates.*

11. *On 3rd January 2014 the 3rd respondent filed a purported return of execution and a sale agreement indicating that a sale in execution was conducted by the 3rd respondent of the 30th December who sold the applicant's land to the 4th respondent.*

12. *The purported sale was done in contravention of the law and therefore illegal.*

13. *The purported sale was unlawfully done since the warrant of attachment had been recalled by the Court.*

14. *The applicant's land was grossly undervalued hence occasioning substantial loss to the applicant.*

15. *The proceeds of the purported sale in execution were not immediately deposited with the court nor the title deeds of the suite property.*

16. *The applicant shall suffer substantial loss if this application is not granted.*

17. This application has been made without unreasonable delay

18. It is in interests of justice that this application is granted and the purported sale be reversed and / or cancelled.

In the affidavit in reply deponed by one Hassan Basajjabalaba the 1st respondent herein states as follows;-

1. That I have been advised by my aforesaid lawyers which advice I verily believe to be true that the applicant's application is grossly misconceived, bad in law, frivolous and vexatious, an abuse of Court process and brought in bad faith in that;-

(i) The Orders sought cannot impeach the title of the 4th respondent and no order has been sought to cancel the title of the 4th respondent in the said application.

(ii) No fraud has been imputed on the 4th respondent and the same has not been pleaded and the law under which the application has been brought and the pleadings cannot lead to cancellation of the 4th respondent's title.

(iii) The Court's discretion in the circumstances of this case cannot be invoked in light of the fact that the applicant was aware of the attachment of its property, and

waited for the same to be sold in execution and should have stayed execution.

a) *That I have further been informed by my aforesaid lawyers which information I verily believe to be true that the applicant is brought in bad faith, in that,*

i) *Under the consent judgment and decree executed on the 16th day of April 2013, the applicant was to pay UGX 11, 500,000,000/= less the taxed costs in HCCS No. 326 of 2011 to the 1st and 2nd respondent within 60 days from the date of executing the consent judgment but to date, nine months since the execution of the consent judgment, the applicant has not paid the said amount.*

ii) *The applicant was aware about the assignment of the consent judgment to the assignee from the 26th day of August 2013 and has never applied to set aside or cancel the deed of assignment.*

iii) *Sometime in September, 2013 the assignee applied for execution by way of garnishee proceedings and attachment of the applicant's property.*

iv) *The applicant filed Misc Application 295 of 2013 and Misc. Application No. 298 of 2013 for stay of execution and an interim order respectively which it deliberately abandoned.*

v) On the 17th day of September 2013, Misc Application No. 298 of 2013 came up for hearing and by consent of the parties execution was stayed for 14 days and the applicant undertook to pay the decretal sum to the respondents within the 14 days and the applicant was given up to the 1st day of October 2013 to pay the said amounts. The issue of assignment of the consent judgment was not raised by the applicant.

vi) By the 1st day of October 2013 the applicant did not pay the decretal sum and sought for another extension of 21 days within which to pay the said sums and the applicant was given up to the 23rd day of October, 2013 to pay the said sums. The applicant did not raise the issue of the assignment of the consent judgment or surrendering of the certificate of title.

vii) On the 23rd day October 2013, the applicant did not pay the said sums and sought for another two weeks within which to pay the said sum and was given up to the 7th day of November 2013 to pay the said sums.

viii) On the 7th day of November 2013, the applicant failed to pay the said sums and sought for a further seven days up to 21st day of November 2013.

ix) On the 21st day of November 2013, the applicant failed to pay the said sums and sought for another extension

of seven days within which to pay the said sums up to the 29th day of November 2013.

x) On the 29th day of November 2013, neither the applicant not the applicant's counsel appeared in court to explain anything to do with the status of payment.

xi) To date the applicant has not demonstrated when it will ever pay the said sums.

xii) While making all the above undertakings, the applicant did not raise any issue pertaining to the assignment of the consent judgment and the decree or the issue of the handing over of the title to it.(See record of proceedings before the Registrar Court of Appeal and a letter dated 11th December, 2013 from counsel for the applicant annexed and marked as 'B' and 'C' respectively.

xiii) The applicant's property comprised in freehold register volume 211, folio 18 plots 8-10, 12-16 and 18-20 Faraday Road was attached and advertised in execution in the Monitor Newspaper which is of wide circulation with an online edition on the world wide or internet. (A copy of the advert is attached and marked as annexture 'D')

xiv) The applicant was aware of the attachment of its property and did not endeavor to pay the decretal sum

or apply for stay of the execution (See communication from Paul Kihika to the PS office of the Prime Minister dated 10th December 2013, communication from Hon. Minister of information dated 11th December 2013, and a letter dated 11th December 2013 from the counsel from the applicant all marked as annextures 'E', 'F', and 'G' respectively)

xv) The applicant is aware that the property was sold in execution of the decree for Ug. Shs. 10, 200, 000, 000/- and has been transferred into the names of the purchaser and the Assignee is demanding for the balance of Shs. 1,300,000,000/- less the taxed costs in the High Court. (Copy of the letter dated 10th January 2014 and the demand notice are attached hereto and marked as Annextures 'H' and 'I' respectively)

xvi) In bringing this application under the above mentioned circumstances, the application is brought in bad faith.

b) That I have further been informed by my aforesaid lawyers which information I verily believe to be true that the application is an abuse of court process in that.

i) The applicant's property was attached in execution, advertised and sold and it did not take any steps to stay the execution yet it was aware of the attachment.

ii) There are no further proceedings in this matter since the consent judgment is not being challenged and it has been implemented substantially and the orders sought are not pending any further proceedings.

iii) The applicant has not come to this court with a clean hands since it instigated its line Minister to stop any further transaction on the property having known that it was sold in execution of a warrant of this Hon. Court.(see a copy of the letter of the Minister of Information and National guidance to the Minister of Land dated January 6th 2014 marked as 'J') .

iv) The applicant seeks from this Hon. Court orders cancelling, annulling and or setting aside the execution of the consent decree and cancellation, reversal and or setting aside the attachment and sale of the applicant's said property without first depositing the decretal sum in court and or demonstrating whether it will ever pay the said decretal sums.

v) To date there are no indicators that the applicant is in position to pay the decretal sum since Government has unequivocally stated that as body corporate, the applicant's property is liable to execution (See copy of the letter dated 8th January 2014 from applicants Ag. Managing Director to the Attorney General, letter of Deputy Secretary dated 3oth December , 2013 and loose

minute dated 13 January 2014 marked as 'K', 'L' and 'M' respectively).

vi) The matter in this Hon. Court was settled by way of a consent judgment and handing over of the certificate of the title to the applicant was not a condition precedent to payment of the decretal sum.

c) In the circumstances this application is an abuse of court process, frivolous, vexatious and bad in law.

2. That the 1st respondent makes no comment on the contents of paragraphs 1,2,3,4,5,6,7 and 8 of the affidavit of Paul Kihika in support of the application.

3. That in answer to the contents of paragraphs 10 and 11 of the affidavit of Paul Kihika in support of the application, I state that it is not true that the land was to be handed over to the applicant on or before the 19th day of June 2013 as alleged and handing over of the certificate of title to the applicant under the consent judgment was premised upon the fulfillment of payment of UGX 11,5000,000,000 (Eleven billion five hundred million) less the taxed costs to the assignee by the applicant.

4. That in reply to paragraphs 12 and 13 of Paul Kihika's affidavit in support of the application, I state that the consent judgment did not in any way prohibit its assignment to third parties and there was no breach of

any of its terms when the 1st and 2nd respondents assigned the same to the assignee as alleged by the deponent.

5. *That in further reply to paragraph 12 and 13 of Paul Kihika's affidavit in support of the application, I state that the assignment of the consent judgment and decree was lawful; and did not breach any law as alleged by the deponent and did not in any way obliterate the applicant's obligation to pay the decretal sum.*
6. *That in specific answer to paragraph 13 of the affidavit of Paul Kihika in support of the application, I state that the allegations are false as the applicant in all its communications has never stated that it is impeded by failure to hand over the title in order for it to pay the decretal sums.*
7. *That the applicant has on several occasions stated that its nonpayment of the decretal sum has been occasioned by Government bureaucracy.*
8. *That in reply to paragraph 14 of the affidavit of Paul Kihika in support of the application, I have been informed by my aforesaid lawyers which information I verily believe to be true that a decree is property of decree holder which can be assigned anytime by the holder and that there is nothing illegal in assigning the same.*
9. *That in answer to paragraph 15 of the affidavit of Paul Kihika in support of the application, I state that the applicant deliberately abandoned Misc. Applications No.*

295 0f 2013 and No.298 of 2013 and made several undertakings to pay all of which it did not honour.

10. That save for the deposition that the 1st and 2nd respondents obtained the warrant of attachment and sale, the rest of the contents of paragraph 16 of the affidavit of Paul Kihika in support of the application is admitted.

11. That the complaint the applicant filed referred to in paragraph 17, of the affidavit of Paul Kihika in support of the application was informal farfetched and could not in any way stop the execution.

12. That in answer to the contents of paragraph 18 and 22 of the affidavit of Paul Kihika in support of the application, I state that the warrant was not recalled by the Registrar of the Court as falsely alleged and in the meeting of 31st December 2013, the Registrar gave the background to the execution process and categorically ordered that the execution proceeds to its logical conclusion. (The record of proceeding of 31st December 2013 before the Registrar shall be relied upon.)

13. That by 31st day of December 2013, the 3rd respondent informed Court about the conclusion of the sale and contents of paragraph 19 of the affidavit of Paul Kihika in support of the application are false (A copy of the letter of the bailiff dated 31st December, 2013 is attached and marked as Annexture 'N').

14. That in answer to paragraphs 20 and 21 of the affidavit of Paul Kihika in support of the application, the returns filed by the 4th respondent reflect a proper and real sale of the property to the 4th respondent and did not contravene any law as falsely alleged .9 A copy of the return of attachment is attached as Annexture 'O').

15. That in answer to paragraph 23 of the affidavit of Paul Kihika, in support of the application , I am advised by one of my lawyers Caleb Alaka of M/S. Alaka & Co. Advocates that there is no legal requirement that the proceeds of the sale in execution of a decree must be deposited in Court.

16. That in specific reply to paragraph 23 of the affidavit of Paul Kihika in support of the application, I am aware that the proceeds of the sale were handed over to SINBA (K) Ltd and a receipt was issued in this regard. (A copy of the receipt is attached as Annexture 'P')

17. That in reply to paragraph 24 of the affidavit of Paul Kihika in support of the application, I have been advised by my aforementioned lawyers, which advice I verily believe to be true, that the sale was disclosed to Court upon the filing of the return by the 3rd respondent and the allegations by the deponent are false.

18. That in reply to paragraph 25 of the affidavit of Paul Kihika in support of the application, I have been informed by my aforesaid lawyers, which information I verily believe

to e true that the property was valued and the valuation was approved by court before it was sold in execution and the applicant has not attached any contrary valuation report. (See copy of the valuation report annexed hereto and marked 'Q')

19. That in reply to paragraph 27, 28, 29 and 30 of the affidavit of Paul Kihika in support of the application, I sate that the property has been sold in execution and has been transferred into the names of the 4th respondent and the question of returning the property is academic and futile in nature.

20. That in specific reply to paragraph 28 of the affidavit of Paul Kihika in support of the application. I reiterate that the applicant has on several occasions failed to demonstrate its willingness to pay in spite of repeated extensions of the period by court at its behest and has never at any one time raised the issue of assignment of failure to deposit the said certificates.

21. That I affirm this affidavit in opposition of the application in reply to affidavit of Paul Kihika in support of the application.

The 2nd respondent in his affidavit in reply adopts all the affirmation of the 1st respondent and associates himself with all the answers thereto. The 3rd respondent, a court bailiff generally pleads immunity and contends that he sold the suit property

pursuant to a court order and made a return of warrant as required by the law.

The other party to this appeal is SINBA (K) LTD, it is stated to be an assignee of the 2nd respondents who is said to have been the decree holder in a consent judgment issued by court, the assignee states in the affidavit of its Director one Saraj Omar was lawfully assigned a consent judgment herein and only applied for its execution upon failure by the applicants to pay the decretal sum of Shs. 11,500,000,000/= less taxed costs. That the attached property belonged to the applicants was sold to the 4th respondent following a judicial sale. That the 4th respondent paid in cash Shs. 10,200,000,000/=. That it still demands from the applicants Shs.1,300,000,000/= as the unpaid decretal sum. Lawful judicial sale to the 4th respondent who is a purchaser for value without notice, for it paid Shs, 10,2000,000 and now demands a balance of Shs.1,300,000,000/= from the applicant. The 4th respondent contends that she is an innocent purchaser for value without notice, having purchased the suit property at a public auction held by a bailiff of court the 3rd respondent. She contends that she paid cash for the property and has since duly transferred the said property to her name free from any incumbrances.

The practice at this court is to summarize the facts giving raise to the appeal; this does not require us to reproduce pleadings as I have in this case. I have been compelled to do so by the checkered history of this application and the very lengthy

submissions of all counsel involved. Secondly all counsel in this application generally repeated the lengthy averments in their respective client's affidavits. I shall therefore not reproduce the submissions of counsel as they are already covered in the pleadings I have reproduced above. I will refer to them briefly in resolution of the issues raised herein where it is necessary to do so.

At the hearing of this application learned counsel Mr. Kiwanuka-Kiryowa and Mr. Thomas Ocaya appeared for the applicants, learned counsel Mr. John Mary Mugisha, Mr. Caleb Alaka and Mr. Obed Mwebesa, appeared for the assignee and for the 1st and 2nd respondents Mr. Gilbert Niwagaba appeared for the 3rd respondent.

Mr. Joseph Kyazze appeared for the 4th respondent.

I have listened to the submissions of all counsel and carefully taken into account all the matters raised therein. I have also very carefully perused the pleadings in this application and in other applications arising from the same appeal namely **Court of Appeal Civil Appeal No 107 of 2012** and **Civil Application No. 298 of 2013**. I have also perused the record of appeal from which this Civil Application arises, that is **Court of Appeal Civil Appeal No. 107 of 2012.**

I have kept all the above in my mind as i resolve the issues before me in this application.

The issues raised in this application as i understand them to be are as follows:-

1. ***Whether sufficient cause has been shown for annulment, cancellation and or setting aside the execution of the consent decree in Court of Appeal Civil Appeal No. 107 of 2012.***

2. ***Whether sufficient cause has been shown to declare null and void the attachment and sale of freehold land comprised in Freehold Register 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala, (herein referred to as the Suit Property) and or cancel, reverse or set aside the attachment or sale.***

3. ***Whether this Court has jurisdiction to grant the orders sought.***

Issue No. 1

Whether sufficient cause has been shown for annulment, cancellation and or setting aside the execution of the consent decree in Court of Appeal Civil Appeal No. 107 of 2012.

The applicant seeks to set aside execution and sale of the suit property herein. The said sale and subsequent transfer of the suit property followed a judicial sale. It was in execution of a warrant of attachment and sale issued by the Registrar of this Court which was carried out by the 3rd respondent a duly appointed bailiff of the High Court.

The warrant of attachment arises from a consent decree, entered into by the applicants, the 2nd and 3rd respondents and the assignee signed and seal by this Court.

The consent decree arises out of **Court of Appeal Civil Appeal No. 107 of 2012** instituted by the 1st respondent, **Haba Group (U) Ltd and Deo and Sons Properties Ltd** the 2nd respondent herein as appellants and **Uganda Broadcasting Corporation** (hereinafter referred to as **UBC**) the 1st respondent and **Mr. Paul Kihika** the 2nd respondent.

The record of appeal was filed on 24th August 2012. The appeal arises out of a Ruling of the Hon. Mr. Justice Joseph Murangira of the High Court (Land Division) dated 24th February 2012.

For the proper determination of this application i am constrained to give it a detailed background. This entails looking at and discussing the ruling and decree of the High Court from which it actually emanates. I am very well alive to the fact that i am not determining the appeal itself as it is not before this court.

I am only giving a background to this application and showing how the High Court decree affects the result of this application.

When first suit came up for hearing before the learned Judge, at the High Court, Mr. Kiwanuka Kiryowa counsel for the defendants raised preliminary issues of law which had the effect of disposing of the suit.

The first issue of law which we are concerned with here and which appears to have disposed of the suit was set out as follows in the Ruling of Hon. Murangira, J at page 14 of his judgment.

> ***"Validity of the contract of sale between Uganda Broadcasting Corporation (UBC) and Haba Group (U) Ltd"***

Following detailed submissions by counsel for all the parties the learned judge upheld the objection, on the following grounds:-

1. *Section 6(a) of the UBC Act stipulates that UBC could only sale or otherwise dispose of property subject to 'prior approval of the Minister'.*

2. *That the suit land was purportedly sold by UBC to Haba Group the plaintiff in that suit on 14th Jan 2011, the Ministers consent was obtained on 8th April 2011, by which time the sale of the suit land had already been completed and its implementation substantially carried out.*

3. *The agreement of sale of the suit property was therefore illegal, null and void as it was in contravention of express provisions of the law and on the authorities of* ***Broadway Construction Co, versus Kasule & others [1972] EA 76, Kyagulanyi Coffee Ltd versus Francis Sembuya, Civil Appeal No. 41 of 2006, Shell (U) Ltd & othera versus Rock Petroleum (U) Ltd High Court Civil Suit No. 645 of 2010, Active Automobile Spares Ltd versus Crane Bank Ltd & Rajesh Pakesh, Supreme Court Civil Appeal No. 21 of 201****1,no court could enforce an illegal contract.*

4. *The documents that incorporated the terms of the contract of sale were not executed in compliance with UBC Act.*

5. *That a court cannot sanction an illegality and he relied on* ***Makula International Ltd versus Cardinal Nsubuga Supreme Court Civil Appeal No. 4 of 1981 and Kisugu Quaries Ltd versus Administrator General (1999) 1EA 162*** *(Supreme Court).*

The Learned judge at page 38 of his ruling concluded the suit as follows:-

"In the result and for the reasons given hereinabove, all three (3) questions of law raised have merits. They are accordingly upheld. The three question of law have disposed of the main suit and the counterclaim. Accordingly the plaintiff's suit as a result is dismissed with costs to the defendants.

Further, the counterclaim is allowed with costs in the following orders; that:-

a) *The cancellation of the agreement of sale of land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala between UBC and Haba Group (U) Ltd was lawful.*

b) *The transfers to Haba Group (U) Ltd and Deo & Sons Properties Limited of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala are null and void.*

c) *The Commissioner Land Registration is hereby ordered to cancel the entries in the register book transferring the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala to Haba Group (U) Ltd and Deo & Sons Properties Limited.*

d) *The Commissioner Land Registration is hereby ordered to re-insate Uganda Broadcasting Corporation (UBC) as the registered proprietor of the land comprised in*

Freehold Register Volume 211 Folio 18 plots 8-10, 12-16 and 18-20 Faraday Road, Kampala.

e) Costs of the suit.

*Dated at Kampala this **24th** day of February, 2012.*

Sgd.

MURANGIRA JOSEPH

JUDGE"

Following the above ruling the defendants' advocates Kiwanuka & Karugire Advocates extracted a decree and filed it in Court on 1st March 2012. It appears at page 773 of the record of appeal from which this application arises and the relevant part reads as follows;

"IT IS HEREBY ORDERED and DECREED that:-

a) The plaintiffs suit is dismissed.

b) Costs to the defendant.

c) The Counter Claim is allowed with following orders:-

i. The cancelation of the agreement of sale of land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala between UBC and Haba Group (U) Ltd was lawful.

ii. The transfers to Haba Group (U) Ltd and Deo & Sons Properties Limited of the land comprised in

Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala are null and void.

iii. *The commissioner land registration cancels the entries in the register book transferring the land comprised in Freehold Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala to Haba Group (U) Ltd and Deo & Sons properties Limited.*

iv. *The Commissioner Land Registration reinstates Uganda Broadcasting Corporation (UBC) as the registered proprietor of the land comprised in freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala.*

GIVEN *under my hand and seal of this Honourable Court..... day of....., 2012.*

DEPUTY REGISTRAR.

EXTRACTED BY:
KIWANUKA & KARUGIRE ADVOCATES,
PLOT 5A2 ACACIA AVENUE,
KOLOLO,
P.O.BOX 6061
KAMPALA."

As already sated the plaintiffs then appealed to this Court. The memorandum of appeal set out the grounds of appeal as follows:-

1. *The learned trial judge erred in law and in fact when he disposed of the whole case on the basis of pleadings without calling evidence.*

2. *The learned trial judge erred in law and in fact when he misconstrued the Law on cancellation of Title of a registered proprietor hence cancelling the 2nd Appellants' Title to the suit land without affording the 2nd Appellant a hearing.*

3. *The learned trial judge erred in law and in fact when he misconstrued the law applicable to the disposal of land by Uganda Broadcasting Corporation.*

4. *The learned trial judge erred in law and in fact when he cancelled the 2nd Appellant's title to the suit land in total disregard of the principle of a bonafide purchaser for value without notice of fraud.*

5. *The learned trial judge erred in Law and in fact when he cancelled the 2nd Appellant's title to the suit land on a preliminary objection without giving the parties an opportunity to be heard.*

6. *The learned trial judge misguided himself both in law and in fact regarding the principles of the law of contract and made wrong conclusions.*

7. *The learned trial judge erred in law and in fact when he failed to evaluate the evidence on record thereby coming to a wrong conclusion that there was not consent of the Minister in the transaction leading to disposal of Uganda Broadcasting Corporation's land to the 1st Appellant.*

Before the appeal could be heard the appellant in the main appeal sought and obtained an order staying the High Court *decree*, pending the hearing and determination of the appeal.

As the appeal was pending, the parties entered into a "Consent Judgment" and filed it in this court seeking to settle the matter.

The said consent judgment is set out in the following terms.

"Consent Judgment"

By consent of both parties it is agreed that this Appeal be settled and judgment is hereby entered by consent in the following terms:

1. *That the 1st Respondent pays to the 1st Appellant the sum of UGX 11,500,000,000/= (Uganda Shillings Eleven Billion Five Hundred Million only) less the taxed costs in HCCS No. 326 of 2011 within 60 days from the date hereof.*
2. *The Appellants shall jointly and/or severally surrender all interests in the suit property and hand over the*

certificate(s) of title to the entire suit property i.e. the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx.23.1 acres to the 1st respondent within a period of 60 days from the date hereof.

3. *The Appellants hereby withdraw the above appeal.*
4. *Each party to this settlement shall bear its own costs of the appeal.*
5. *This consent judgment settles the entire dispute between the parties.*

*DATED at Kampala this **16th** day of April 2013.*

_____	_____
HABA GROUP (U) LIMITED	*UGANDA BROAD CASTING CORPORATION*
FIRST APPELLANT	*FIRST RESPONDENT*
_____	_____
DEO & SONS PROPERTIES LTD	*KIHIKA PAUL*
SECOND APPELLANT	*SECOND RESPONDENT*
_____	_____
COUNSEL FOR THE 1ST APPELLANT	*COUNSEL FOR THE 1ST RESPONDENT*
_____	_____
COUNSEL FOR THE 2ND APPELLANT	*COUNSEL FOR THE 2ND RESPONDENT.*

*GIVEN under my hand and seal of this Honourable Court this **19th** day of **April 2013**.*

.....
REGISTRAR.

DRAWN JOINTLY BY:

Ms. Kavuma Kabenge & Co Advocates

Plot 9A Martin Road,

P.O.Box 6392,

Kampala.

M/s Kiwanuka & Karugire Advocates

Plot 5A2, Acacia Avenue Kololo,

P.O.Box 6061,

Kampala".

The consent judgment indicates it was signed by the parties to the Appeal on 16th April 2013 and endorsed and seal by the Registrar of this court on 19th April 2013.

Although the above consent judgment purports to be a judgment of this Court, the terms set out in the consent judgment bear no relation at all to the grounds of appeal set out in the memorandum of appeal which I have already set out earlier in this ruling.

Secondly the consent judgment stipulates under item 3 as follows:-

> ***"3. The Appellants hereby withdraw the above appeal".***

Having withdrawn the appeal, which admittedly the appellants had a right to do upon complying with the Rules of this Court the parties could do no more.

They could not again make orders as they did in items 1, 2 & 3 of the said consent. There would have been no basis of doing so.

Mr. Alaka counsel for 1st & 2nd respondents argued that the inclusion of item 3 in the consent judgment was an oversight and that it was superfluous. I do not think so. I think the parties were looking for a way of settling the 'decree' of the High Court in this Court without having the appeal heard. I shall return to this issue later in this judgment.

The decree of the High Court which the parties intended to settle amicably which is part of the record of appeal has already been set out earlier in this judgment.

It makes no order directing UBC to pay or refund Shs. 11,500,000,000/= to Haba Group (U) Ltd, at all. Indeed the orders of the learned judge do not include such a refund.

It was submitted for 1st and 2nd respondents in court that the learned judge did make such an order.

During the drafting of this ruling a document was filed in court titled;

> ***"Re clarification on Miscellaneous Application No. 12 of 2014, Uganda Broadcasting Corporation versus SINBA (K) LTD & Others***".

It was filed by Niwagaba & Mwebesa Advocates. It sought to clarify that indeed the learned judge of the High Court had issued

an order directing UBC to refund the said amount of Shs. 11,500,000,000/= to Haba Group (U) Ltd was at page 36 of his judgment her stated as follows:-

> *"The suit land therefore belongs to UBC. Haba Group (U) Ltd shall receive the initial payment of Shs. 6,600,000 for UBC. And if the disputed payment was put on the account that belonged to UBC, the same should be returned to Haba Group (U) Ltd. Then Deo and Sons Properties shall claim a refund of money it paid from Haba Group (U) Ltd".*

With respect I do not agree, that the above amounted to an order of court.

Firstly it seems to have been just an observation made in passing. I say so because it was not included in the orders of court that followed.

Secondly it was never included in the decree that was filed in court on 1st March 2012. This in my view is an indication that the parties agreed that no refund of money had been ordered.

Thirdly and most importantly the judge having found that the contract upon which the suit was founded was illegal being in contravention of the law, he could not thereafter have enforced the same contract with an order directing that the same contract a party to an illegal contract be paid the money stipulated above.

It is my finding that based on the authorities cited and relied upon by the learned judge himself already set out above namely:-

1. **Makula International Vs Cardinal Nsubuga 1982 HCB 11**
2. **Kisugu Quaries versus Administrator General (supra)**
3. **Broadway Construction versus Kasule (supra)**
4. **Kyagulanyi Coffee Ltd versus Fraqncis Sembuya (supra)**
5. **Active Automobile spares Ltd versus Crane Bank Ltd & Another (supra)**

He could not make an order of refund.

In fact he could not make any orders against any party to that contract. There was no contract to enforce. In his own words at page 26 of his Ruling the learned judge correctly states the position of the law as follows:-

> *"No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal once the illegality is duly brought to the notice of the Court".*

He went ahead to rely on the Supreme Court case of **Active Automobile Spares versus Crane Bank & Rajesh Pakesh (supra)** in which the Supreme Court held that courts of law will not enforce an illegal contract. In that case the Supreme Court went on to hold that where a person invoking the aid of the court is implicated in the illegality courts of law would not come to his assistance. And that it matters not whether the defendant has

pleaded the illegality or not. If the plaintiff proves illegality the court ought not to assist him.

The above principle of law was followed recently by this court in the case of **Nipun Norattam Bhatia Versus Crane Bank Ltd** (Civil Appeal No. 76 of 2006) (unreported) in which this court refused to enforce an illegal contract and declined to make any orders that would assist any of the parties. By doing so it refused, for good reason I must add to allow itself to be made an instrument of enforcing obligations arising out of a contract it had held was illegal.

Clearly, the judge having held that the contract was illegal had no power to enforce it by making an order of refund or otherwise.

Again, the learned judge could in my view not make an order of refund after having dismissed suit entirely. At page 38 of his judgment he states:-

> *"The three questions of law have disposed of the main suit and the counter claim. Accordingly the plaintiff's suit as a result is dismissed with costs to the defendants".*

Once the suit was wholly dismissed the judge could not again make orders against the defendant in favour of the plaintiff, whose suit he had just dismissed.

It is important to note that the judge made remarks on the issue of refund set out earlier in this judgment before coming to the

above conclusion, and before dismissing the suit. That is why I have stated earlier that refund was not one of the orders made by the judge.

It seems to me that the judge was merely observing that the 1,500,000,000 was recoverable, probably under a separate cause of action as money had and received, since the consideration for which the money had been paid had failed, under the principle of unjust enrichment.

The principles of unjust enrichment and that of recovery of money had and received was set out in the now famous case of **Fibrosa Spolka Akajjna vs Fairbran Lawsan Combe Barbour Ltd (1943) AC 32** in which Lord Wright observed as follows on the doctrine of unjust enrichment and the remedy of restitution.

> *"The claim in the action was to recover a prepayment of pounds 1,000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies of cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of*

the common law which has been called quasi-contract or restitution (emphasis added)

Restitution is an equitable remedy. Courts have long held that actions for money had and received lie "for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances".

These two principles do not apply in this case. In the Fibrosa case (supra) the contract was not illegal at the time it was made. Parties had entered into a contract before the second world war broke out. Before the contract could be fully executed the war broke out and Poland fell into German hands. As Britain had declared war on German, trading with an enemy was prohibited. But Fibrosa who had already paid part of the price sought to recover it. It was held that the money paid was recoverable.

In this particular case before us, the judge held that the contract was illegal, null and void *abnitio*. Accordingly the principle of unjust enrichment as set out in the Fibrosa case (supra) is not applicable, because in that case the contract was valid at the time it was made. It became illegal subsequent to the execution and part performance.

I am inclined to think that all the parties to the High Court suit were very well aware that the court had not ordered a refund and that is why as i have already stated they consented to a decree that did not indicate anywhere the issue of refund.

That decree was filed in court on 01-03-2012. Shs.6000/= was paid as filing fees and the court issue receipt No. 955804. The decree is neither signed nor dated.

The parties again extracted another decree which is Annexture 'A' to the affidavit of the second applicant in support of the notice of motion. That decree is stated to have been extracted by Kiwanuka and Karugire Advocates. It does not form part of the record of appeal filed by the respondents in the main appeal herein. Interestingly it was signed and approved by the parties on 20th March 2012 but is signed and sealed by the Registrar of this Court on 19th March 2012; a day earlier!

However, on its first page it bears a High Court of Uganda, Land Division Stamp, which indicates that it was filed on 1st March 2012and Shs. 6000/= was paid as filing fees and a receipt No.955804 was issued.

The particulars on that stamp match exactly with those of the unsigned decree earlier set out in this judgment which was filed on 1/3/2012.

The procedure of filing a decree or order in the High Court as I understand it to be is that counsel for a successful party extracts

an order or a decree, submits to the other party or counsel for approval. Upon approval it is filed in court and fees are assessed and paid. It is then signed and seal by the Registrar or Judge.

It is not possible that the decree (Annexture 'A' to Kihika's affidavit) could have been filed in court on 1st March 2012, upon which fees were paid, then signed/sealed by the Registrar on the 19th of March 2012, then finally approved by the parties on 20th March 2012.

It appears clearly to me that this very decree was prepared much later. It was smuggled into the court record and the court file and substituted for the decree had been filed on 1st March 2012, upon which filing fees had been paid.

The receipt in respect of filing fees was issued when the first decree was filed on 1/3/2002. It was the same receipt that was used for decree that was filed later and since the date and the number could not be altered, the subsequent decree was given the same number and date as the first one. It seems the first decree was thereafter removed from the court record. This appears to me to be an outright fraud, or at least it is a transaction that is tainted with illegalities.

It is this decree that was filed later, illegality that contains the refund clause. The pertinent part of that second decree reads as follows:-

"It is hereby ordered and decreed that:-

1. *The plaintiff's suit is dismissed.*
2. *UBC shall refund the sum of Shs.11, 500,000,000/= (Eleven Billion Five Hundred Million) to Haba Group (U) Ltd.*
3. *Costs of the suit to the defendants"*

It is this particular 'refund' clause in the substituted decree that the parties reproduced in the consent judgment entered into before this Court.

For the reasons given in this judgment I find that the decree of the High Court annexture 'A' to the affidavit in support of the notice of motion was illegally extracted and filed and such is null and void and of no effect. In any event for the reasons I have already given it did not express the decision of the judge correctly and was in that account alone invalid.

I find that order of the learned judge purporting to enforce an illegal contract by ordering UBC the 1st applicant to pay Haba Group (U) Ltd the respondent a sum of 11,500,000,000/= is null and void and of no effect.

I find that the order of the learned judge granting the defendant in that suit who is the applicant herein costs in a suit based on an illegal contract is null and void and of no effect.

I accordingly set aside these orders.

However, i uphold the order of the learned judge in respect of the counter claim.

It is trite that a counter claim is a separate suit. In this case the counter claim was not based on the illegal contract but on the right of the plaintiff in that counter claim to recover land.

In fact it was the case for the plaintiffs in the counter claim that no contract existed between the parties the purported contract having been revoked. It may be argued that the respondents werenot heard on the counter claim. However the counter claim was grounded on any one fact that no valid contract existed between the parties. That issue was determined by the court when it found that indeed no contract existed between the parties. Nothing remained for parties to argue in the counter claim.

This brings me to the validity of the consent judgment filed in this court.

I have already stated earlier that I do not think that a party may withdraw an appeal in this court and in the same transaction consent to other orders, other than an order relating to costs, resulting from the withdrawal.

I have also already held that Decree or order of the High Court did not and could not have contained a clause requiring the defendant to pay to the plaintiff in that suit, the money stated therein when the plaintiff’s suit had been dismissed.

I find that the plaintiff whose suit had been dismissed with costs could not at the same time be a decree holder in that very suit.

The consent decree therefore executed by the parties in this court was at variance with the judgment and decree of the High Court. It effectively reversed and or varied the judgment and decree of the High court.

The effect and legality of a consent decree on appeal was recently discussed by this court in a recent decision of **Edith Nantumbwe & 3 others versus Miriam Kuteesa, Court of Appeal Civil Appeal No. 294 of 2013**.

This court observed and held as follows at P.19

The general rule is that this court or any appellate court will not allow an appeal to be settled by consent. There is no law providing for consent judgments on appeal, as far as we could ascertain. This proposition of the law is set out in ***Slaney versus Keane [1970] Ch 243****, where it was stated that*

"An appeal of course could be dismissed by the consent of the appellant thereby merely giving up his right of appeal and the decision of the court or tribunal below is left standing. Under the general law an appellate court will not

allow an appeal by consent. If it were to do so, it would be making an order holding that the decision below was wrong and it would be doing this merely on agreement of the parties and without hearing the case"

Even if we had found that in this case there was a pending appeal, we would still have set aside the consent judgment herein on account that upholding it would have the effect of reversing the decree of the High Court without hearing the appeal.

In the Edith Nantumbwe case (supra) this court followed the decision of the Supreme Court (at the time called the Court of Appeal of Uganda) in **Bulasio Konde versus Bulandina Nankya (Court of Appeal Civil Appeal No. 7 of 1980**(Unreported).

In that case the Court of Appeal held at page 6 of the judgment of the Court as follows:-

"The general rule is, as we know, that an appeal could not be allowed by consent without hearing it. This rule was stated in Lees versus Motor Insurers' Bureau [1953] W.L.R. 620 by the English Court of Appeal then hearing an appeal from a decision of Lord Goddard, CJ. The Plaintiff's claim had failed before Lord Goddard, C.J, but on appeal his counsel stated

that the defendant, the Motor Insurers' Bureau, had voluntarily agreed to pay the whole of the claim; and he sought an order that the appeal be dismissed. At this Denning, L.J said:

> *"An appeal could not be allowed by consent, for that would be reversing the judgment of Lord Goddard, C.J. without hearing the appeal".*

A similar point arose in Lloyd versus Rossleigh Ltd [1961] R.V.R.448. We do not have the report of this case, but it is referred to in Slaney v. Kean [1970] Ch.243, a case we will shortly refer to. The following facts are taken from the report of Slaney's case at P.247. It was a rating appeal from the Lands Tribunal, and the successful ratepayers had agreed with the valuation officer that the appeal should be allowed. When the Court of Appeal was told this by Sir Derek Walker Smith .C.J who appeared for the valuation officer, Sellers, L.J. said:

> *"They cannot do that. They can agree different figures, but they cannot allow the appeal. We alone can do that.*

You will either have to withdraw or dismiss it. I am sorry, but we never allow an appeal unless we have heard it. It has the same effect; but I do not think it is fair to the Lands Tribunal or anybody else to allow an appeal by consent. It has never been done in the Court of Appeal, so far as I am aware Sir Derek".

In the following discussion, Sellers, L.J. said:

"We cannot state the law by an agreement between the parties," and Devlin L.J. said:

".....you are asking us to straighten the law without satisfying us what has gone crooked, merely because you say two members of the Bar have agreed that it has gone crooked. Plainly we cannot do that".

Furthermore in that judgment the learned Justices of Appeal went on to hold thus;

"The law as enunciated in these cases shows that:-

(1) The parties cannot by consent reverse a judgment of the court.

(2) Only an appellant court can reverse a decision of the court below after hearing the appeal.

(3) Issues of law cannot be subject to consent orders".

I have found it necessary to repeat what this court held in the Edith Nantumbwe (supra) because of the detailed arguments of counsel on this matter made in my view in complete oblivion of these decisions and the position of the law.

The consent judgment in this application from which the execution emanated cannot therefore stand, not only it is tainted with illegalities, it is also illegal.

It was submitted by counsel for the 4th respondent that the decision of the Supreme Court in **British American Tobacco Ltd versus Sedrach Mwijakubi SCCA 1 of 2012** is to the proposition that parties may by consent, or compromise appeals, and that the Registrar of this Court may enter judgment by consent at the request of parties.

I have read that authority, with all due respect to learned counsel i do not find any such proposition in the said authority.

In that particular case there was no consent order or settlement. There was an attempt to compromise the appeal by filing a consent order. However the order was neither signed nor sealed.

The court therefore had no opportunity to deciding whether or not the appeal could have been settled by consent. At page 15 of the judgment the Court held as follows:-

> *"It is therefore not necessary to consider whether the Advocates for the respondent had authority to enter into a compromise or to represent the respondents in this Court"*

The Supreme Court alluded to the provisions of the Civil Procedure Rules – specifically order 50 Rule 2 and Order 25 Rule 6. It also alluded to the cases of **Wasike versus Wamboko [1976-85]EA 625** and to **Ismail Harai versus Kassan 1952 EA 131.**

With utmost respect to the learned Justices of the Supreme Court, I respectfully do not agree that the provisions cited of the Civil Procedure Rules apply in the Supreme Court or in this Court.

Section one of the Civil Procedure Act stipulates as follows:-

> "***1: APPLICATION***
>
> ***This Act shall extend to the proceedings in the High court and in Magistrates Courts"***

The application of the Civil Procedure Act and the Civil Procedure Rules was to that extent was made *per incuriam*.

Parties are free to settle or compromise suits at the High Court and at Magistrates Courts because at that stage, the suits are not yet heard and the disputes are not yet determined. On appeal this is not so. There is already a judgment or ruling of the lower court and parties cannot by agreement reverse or vary it.

It appears to me that in the B.A.T versus Sedrach Mwijakubi case (supra) there was an attempt by counsel to withdraw the appeal and settle the matter out of court. At page 4 of the judgment the court observes:-

> *"The consent order was filed in court but was never signed nor sealed by the court. On 29th July learned counsel for the appellant Dr. Byamugisha wrote a letter to the Registrar of the Court of Appeal requesting him to sign and seal the consent order and advising the Registrar that the appeal was accordingly being withdrawn"*

The Supreme Court went on to hold that for an appellant at the Court of Appeal to withdraw the appeal he or she has to comply with the provisions of **Rules 94** of the Rules of this Court. In that particular case (British American Tobacco Vs Mwijakubi Sedrach) (supra) the rules had not been complied with and therefore court held there was no valid withdraw.

Interestingly the Supreme Court noted as follows at page 15 of the judgment:-

"The Rules are silent on withdrawal of appeals after the appeal has been called for hearing, but it should be possible with the leave of Court"

Rule 94 (1) of the Rules of this Court which reads as follows:-

"An appellant, may at any time after instituting his or her own appeal in the court and before the appeal is called for hearing, lodged in the Registry a notice in writing that he or she does not intend to prosecute the appeal"

The judgment of J.W. Tsekooko (JSC) in **Supreme Court Civil Appeal No. 7 of 2005 Geoffrey Gatete and Angella Maria Nakigonya versus William Kyobe (unreported)** citing the decision of the Supreme Court in **G.M Combined (U) Ltd versus Fulgence Mungereza (Supreme Court) Civil Appeal No. 16 of 1998)** seems to suggest and I agree, that once the appeal has been called for hearing the appellant may not withdraw it even with consent of the respondent.

The appellant may then only withdraw it with the consent of Court.

In that case therefore the appellant who intends to withdraw an appeal which has already been called for hearing has to make a formal application which in my view would have to be heard and determined by the Court hearing the appeal and not by a Registrar.

The consent judgment in this application was therefore irregular and unlawful in so far as it attempted to have an appeal withdrawn by consent in contravention of **Rule 94** of the Rules of this Court.

I find that the consent Judgment filed in this Court by the parties to the appeal is tainted with illegalities. It is irregular and unlawful and is therefore null and void *abnitio* and of no effect. I find that the purported assignment of the "decree, the Judgment debt" and "Security" was illegal, unlawful and is null and void *abnitio*

Having found as above I also find that the application for execution resulting from the said consent was irregular, as there was no decree to execute. I find that the warrant of attachment was a nullity at its inception and was incapable of conferring any rights upon any of the parties there in.

Needless to say, i find and hold that the purported execution and sale of the suit property was null and void *abnitio* and was of no effect.

I also find that the execution and sale of the suit property was irregular and illegal for other reasons.

A glance at the certificate of title of the suit property which is annexture 'F' to the affidavit of the respondent indicates clearly that by the time the warrant of attachment was issued on 29th November 2013, for the attachment and sale of the property, that property did not belong to the "Judgment debtor".

The property whose particulars are clearly set out in the schedule to the warrant of attachment belonged to the second appellant also named as the assignor who was effectively also a judgment creditor, Deo And Sons Properties Limited. This fact is ascertainable also from the valuation report made by property valuers M/s **OSI International** at the request of the 3rd respondent. It describes the proprietorship of the suit property as follows:

> ***"The grant is free hold one, indicated to be registered in the names of DEO & SONS PROPERTIES LTD of P.O Box 6714 Kampala"***

Clearly therefore, the warrant of attachment was issued and executed against a property that did not belong to the "Judgment debtor". There was therefore no valid sale and no valid warrant on that account alone.

All the respondents were at all material times aware of the above fact. The Registrar of this Court was also aware of this fact or at least ought to have been aware as the valuation report was available to him before the warrant was executed. He had a duty to ascertain that the property set out in the schedule to the warrant of attachment belonged to the "Judgment debtor" and nobody else.

I find that the 3rd respondent was acting unlawfully and fraudulently when he executed a warrant of attachment in respect of a property which he very well knew was not

registered in the name of the "Judgment debtor". The 3rd respondent was not executing a lawful warrant, and as such he was not lawfully executing his duties, when he purportedly sold the suit property.

Mr. Joseph Kyazze learned counsel for the 4th respondent submitted passionately and articulately that the 4th respondent is a *bona fide* purchaser for value without notice

The facts of this case as presented do not in the least support any of his arguments. In her affidavit the 4th respondent does not mention that she made a search at the land registry to ascertain the proprietorship of the property the subject of sale. She had all the time to do so. The advert in the news paper (annexture 'C' to the affidavit of the 3rd respondent) stipulated as follows;

> *"Duly instructed by the Registrar of the Court of Appeal, we shall proceed to sale by public auction / private treaty the under mentioned land belonging to the respondents...."*

The respondents were named in the advert as Uganda Broadcasting Corporation and Paul Kihika. At the time of 'sale' there was already available to her a valuation report indicating that the registered proprietor, was **Deo and sons properties Ltd**.

She had a duty and obligation to ascertain the proprietor of the property even before attempting to bid for it. Had she done so she would have found out that the property she was bidding for did not belong to the respondents and that the advert was false and misleading. At least she was on full notice.

It appears to me that she actually was well aware of the fact that the respondent was not the registered proprietor but she went ahead to buy the property anyway. She cannot turn around and contend that she is an innocent purchaser for value without notice.

Innocent she is not. The ownership of this property was changed from the names of the 2nd respondent to the names of the Uganda Broadcasting Corporation the 1st applicant on 14th January 2014 long after she had purportedly bought it. Uganda Broadcasting Corporation the 1st respondent was reinstated as owner on 10.1.2014 at 2.42 pm. At 2.44 pm on the same day a special certificate of title was issued. At 2.46 pm Margret Muhanga Mugisa the 4th respondent was registered as proprietor of the said property.

Clearly in my view all the transaction in respect of the suit property carried out at the Land Registry of 10th January 2014 were made at the same time. It is inconvincible that transfer forms could have been prepared signed and lodged within 2 minutes by the 4th respondent. It is not possible that the 4th respondent who had the duty to effect transfer of the title into

her names could have had the property valued by the Government valuers, given a value, had stamp duty assessed, paid stamp duty, lodged the receipts at the land Registry, had the transfer forms endorsed, filed them for registration and had the registration completed ALL in a period of two minutes. This may not be a finding of fact but it certainly raises a very red flag.

I find that the submissions of Mr. Kyazze are devoid of any merit and truth. I reject them.

I find that Margret Muhanga Mugisa the 4th respondent was part and parcel of this well planned fraud, she participated at each and every phase with a clear intention of defrauding the respondents of the property, or at least she was aware of all the illegalities outlined above and took advantage of them.

It is inconvincible that she could have carried Sh.10,200, 000,000/- (Two billion two hundred million) in cash and paid it to the bailiff at the fall of the hammer as indicated in the 3rd respondent's affidavit. The 3rd respondent's office is on sixth floor, Room 12, Plot 15 Luwum Street Kampala. And there after that the 3rd respondent could have then paid that huge amount again in cash to SINBA (K) LTD at the same place, at the same time as annexture 'c' to the affidavit of the 4th respondent a cash receipt issued by SINBA (K) LTD indicates.

In this regard I would adopt the holding of Masika CJ in **Edward Musisi versus Grindlays Bank (U) Ltd & 2 others 1983 HCB 39** when he held as follows:-

"1. In this sale of property two seemingly clear and distinct acts took place namely the sale of the property and the registration of it. But the acts of sale registration of one and the same property are not so separate and isolated that the circumstances of one are or may be so divorced from the other. The two are the extremities of a series of acts forming one transaction. The act of registration is the mere formal entry of particulars in the register book relating to that land. Fraud may thus intrude into the long process at any one stage but that would not render the other stages free and the whole transaction becomes tainted with fraud. It was therefore immaterial in the instant case at what stage the fraud was committed.

2. The 3rd defendant could only be covered if it could be shown that it was either a party to the fraud or was sufficiently aware of it so as not to quality as a bona fide purchaser for value. A person who becomes a registered person through a fraudulent act by himself or to which he is a party or with full knowledge of the fraud so as not to be a bona fide purchaser for value is "the person registered as proprietor of such land through fraud" within the meaning of S.184 of the Registration of Titles Act (Cap. 205). The 3rd defendant was therefore covered by the exception under S.184 (3) and accordingly his registration as proprietor of the disputed title was impeachable. Consequently, he was not protected by S.184"

In this particular case the 4th respondent was involved in the illegalities and the fraud or at least they were committed with her full knowledge. She cannot therefore claim to be a *bona fide* purchaser for value without notice.

Even if I had found the 4th respondent to be bona fide purchaser for value without notices I would still have ordered for cancellation of the transfer to her names. This is because sale having been annulled there was no property available to transfer.

I would adopt the reasoning of Hon Justice Ntabgoba, PJ in **Kanoonya David versus Kivumbi & 2others HCCS No. 616 of 2003 (unreported)** in which he held as follows at P.20 of his judgment:

> *"An illegal sale vitiates the transfer of title with the result that the sold property remains the property its owner. In this case the property cannot vest in the owner and at the same time vest in the purchaser the second defendant"*

I do not agree with the submissions of counsel that a sale in execution of a court order is complete at the fall of the hammer or when the auctioneer has sold off the property at an auction and has made a return of warrant to the court, which issued it.

The law in this regard was clearly stated by the Supreme Court in **Lawrence Muwanga versus Stephen Kyeyune (SSC Appeal**

No. 12 of 2001) in which His Lordship Tsekooko JSC held as follows:-

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

In the circumstances therefore such as in this application, there is no requirement to plead and prove fraud on part of the registered proprietor. It is sufficient to prove that the transactions leading to the sale and transfer were illegal and or fraudulent.

Again it is not correct to state as it has been argued over and over now and again by advocates that a title of a registered proprietor can only be impeached upon proof of fraud which fraud must be attributed to the transferee, having been specifically pleaded.

The Court of Appeal (as the Supreme Court was then called) in Edward Rurangaranga versus Mbarara Municipal Council and 2 others Supreme Court Civil Appeal No. 10 of 1996 (unreported) hinted on this matter in the judgment of W.W. Wambuzi, CJ, at page 11 of his judgment he observes as follows:-

> *"What is the effect if a title to land is issued without authority as in this case? The matter was not argued nor did*

the learned trial judge allude to it. He appears to have assumed that nothing could be done unless fraud was proved. In his own words:

> *'This does not, however, dispose of this case because the plaintiff is the registered title holder of Plot 13 Mahkan Singh Street, and the registration can only be challenged - S.(1) (c) (sic) in case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud.....'*

I am not so sure that this is entirely correct. In so far as is relevant S.69 of the Registration of Titles Act provides:-

> *"In case it appears to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error.....*
>
> *or that any entry or endorsement has been made in error on any certificate of title or instrument, entry or that any certificate of title, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that any certificate of title or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom such document has been so issued or by whom it has been so obtained or is retained to deliver up the same for the purpose of being*

cancelled or corrected or given to the proper party, as the case requires.....”

On the face of it, it would appear that the Registrar of Titles has power to cancel a certificate fraudulently or wrongfully obtained or retained. In my view it was open to the court in the case before us to declare that the certificate of title was wrongfully obtained. This would open the way for the second and third respondents to pursue their rights before the first respondent and the Registrar of Titles. I am aware of the provisions of Sections 56 and 184 of the Registration of Title Act but in this case the action was brought by the appellant and not by the respondents...”

In that judgment, Wambuzi, CJ discussed the provisions of **Section 69** of the RTA. That Section was re-enacted in the Land Act as Section 91. The pertinent part stipulates as follows:-

*“**91 (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 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). is illegally or wrongfully obtained; or

e). is illegally or wrongfully retained,

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

A certificate of title therefore can be cancelled where it contains an illegal endorsement, is illegally or wrongfully obtained or is illegally or wrongfully retained. This can be done by the registrar even without referring the matter to Court.

My understanding of the judgment of Wambuzi, CJ is that courts of law can order cancellation registration and transfer of titles on account of illegalities without the parties necessarily having to just plead and prove fraud. I think this is also the gist of the Supreme Court decision in **Makula International Ltd versus Cardinal Nsubuga (supra)** which emphasizes illegalities as opposed to fraud.

I am inclined to believe that in view of the above authorities a purchaser's title can be defeated on account of an illegality alone without proof of fraud.

In this particular case the transfer to the 4th respondent was fraudulently done and as such was a nullity.

The question of her being an innocent purchaser for value without notice therefore does not arise at all.

I agree with Mr. Kiryowa that the Registrar of this court failed to follow the mandatory procedure in execution of court decrees and orders, specifically **Section 48** of Civil Procedure Act which provides as follows:-

> *"**48 (1)** The court may order, but shall proceed no further with the sale of any immoveable property under a decree of execution until there has been lodged with the court the duplicate certificate of title to the property or the special certificate of title mentioned in subsection (4) refers to a situation where the certificate of title has been lost or destroyed)"*
>
> *(2) The Court ordering such sale shall have power to order the judgment debtor to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate should not be delivered up.*
>
> *(3) Where the court is satisfied that a judgment debtor has willfully refused or neglected to deliver up such certificate when ordered to dos o, the court may commit*

him or her to prison for a period not exceeding thirty days...” (emphasis mine).

In this regard I agree with and I adopt the reasoning of Hon Justice Kiryabwire, J (as he then was) in **Rose Mary Eleanor Karamagi versus Angolina Malimond High Court Misc. Application No. 733 of 2005 (Commercial Division) unreported** in which he held as follows, in respect to **Section 48** of **CPA** (supra).

“It is clear that the law sets out an elaborate procedure for the sale of immoveable property. It would appear to me that the basic procedure where property has been ordered for sale would be for the Registrar of Court to order the duplicate certificate to be delivered up to court. This order would have to be put in writing. Where such a certificate is lost or destroyed the Registrar of court can order the Registrar of Titles to issue a special certificate.

Where the judgment debtor has the duplicate certificate of title and willfully refuses to surrender it, then after a notice to show cause has been issued the judgment debtor, can be committed to prison for a period not exceeding 30 days. I am unable to see from the record that this was done. I do understand the difficulty of getting judgment debtors to surrender their land titles but the law has provided for such an eventuality. So this part of the execution was irregular”

This procedure was not followed in this case presumably because the certificate of title was not with the applicant and this fact was known to all the parties. Had this procedure been followed, the sale would never have taken place, because for sure the Registrar would have been able to ascertain that the property was not registered in the name of the judgment debtor!

This on its own vitiated the sale.

I find that this whole transaction from beginning to end was a well thought out and culturated fraud by all the parties involved the applicants inclusive. The Advocates involved must also have been aware. The Commissioner for land registration was very well aware and participated in this fraud.

I have to repeat here what the Supreme Court said in **Active Automobile Spares Ltd versus Crane Bank Ltd & Another (supra)** that court will not allow itself to be made an instrument of enforcing obligations arising out of illegal transactions.

This Court accordingly has refused to be used as an instrument of perpetuating fraud and illegalities.

In the result this application is hereby allowed in part. I make the following orders;

1. **That the decree of the High Court signed and sealed by the Deputy Registrar of that Court on 19th March 2012 is hereby set aside and**

substituted with the decree filed in that Court on 1st March 2012 which appears at page 773 of the record of appeal in the main appeal herein – (Court of Appeal Civil Appeal No. 107 of 2012).

5

2. **The consent judgment filed in this court and signed and sealed by the Registrar of this Court on 19th April 2013 is hereby struck out.**

10 3. **The sale of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday road Kampala to the 4th respondent is hereby set aside.**

15 4. **The Commissioner for Land Registration is hereby ordered to cancel the registration of the 4th respondent as the proprietor of the land set out in Par.3 above and to re-instate as proprietor, Uganda Broadcasting Corporation.**

20 No order is made as to costs.

Dated at Kampala this 27. day of March. **2014**.

.....

HON KENNETH KAKURU

JUSTICE OF APPEAL.