THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 148 OF 2017

(ARISING FROM CIVIL SUIT NO 116 OF 2015)

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

1. WASSWA SIRAGI}
2. MANISULU MUKASA} ..... APPELLANTS

VERSUS

1. TOM LUWALIRA}
2. VICTORIOUS EDUCATION SERVICES}
3. REGISTRAR OF TITLES} .....RESPONDENTS

(APPEAL FROM JUDGMENT AND ORDERS OF TE HIGH COURT AT KAMPALA (HON. JUSTICE NAMUNDI) IN CIVIL SUIT NO. 116 OF 2015)

JUDGMENT OF KENNETH KAKURU JA

I have had the benefit of reading in draft the judgment of my learned brother Madrama JA. I agree with him that this appeal ought to succeed for the reasons he has ably set out in his judgment. I also agree with the declarations and orders he has proposed.

As Kiryabwire JA also agrees, the judgment of the High Court is hereby set aside and substituted with the judgment of this court as set out by Madrama JA.

It is so ordered.

Dated at Kampala this ...12th... day of June 2020

Kenneth Kakuru

JUSTICE OF APPEAL

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JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE

I have had the opportunity of reading the Judgment of Brother the Hon Justice Christopher Madrama in draft and I agree with the findings and final decisions and Orders and have nothing more useful to add.

Dated at Kampala this.....12th.....day of .....June..... 2020

Justice Geoffrey Kiryabwire J.A.

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

1. **WASSWA SIRAGI}**
2. **MANISULU MUKASA} .....APPELLANTS**

VERSUS

1. **TOM LUWALIRA}**
2. **VICTORIOUS EDUCATION SERVICES}**
3. **REGISTRAR OF TITLES} .....RESPONDENTS**

(APPEAL FROM JUDGMENT AND ORDERS OF THE HIGH COURT AT KAMPALA (HON. JUSTICE NAMUNDI) IN CIVIL SUIT NO. 116 OF 2015)

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

This is an appeal from the decision of Namundi J dismissing the Appellant's claim in High Court Civil Suit No 116 of 2015. He awarded costs to the 1st and 2nd Respondents and made to order as to costs of the 3rd Respondent.

The background to the appeal is that, the Appellants filed a suit in the High Court seeking *inter alia* for cancellation of land title in respect of Kibuga Block 4 plot 355 registered in the names of the 2nd Respondent, an order of eviction, general damages, mesne profits and costs of the suit. The Plaintiffs claimed that registered land title in respect of the suit land in the names of the 2nd Respondent was procured fraudulently.

Decision of Hon. Mr. Justice Christopher Madrama Izama Digitally maximum735securityx 2020 style KTOPHER COURT OF APPEAL Opikoleni

The facts disclosed in the judgment of the High Court are that, the Plaintiffs who are the Appellants in this appeal claimed to be registered proprietors of the suit property since 1981 having bought it from one Hajati Hawa Nampima, administratrix of the estate of the late Asinansi Zamwanguya (hereinafter referred to as the deceased) and that they had not sold the land to anybody let alone the Respondents. In the year 2000, the 1st Respondent filed Civil Suit No 1523 of 2000 against Hajati Hawa Nampima and 11 other Defendants. The 1st Respondent is said to have executed a consent judgment with Hajati Hawa Nampima to have the suit property transferred back to the estate of the deceased. The Plaintiffs asserted that at the time of the consent decree in 2005, the suit land was not available for transfer into the names of the deceased since it had already been transferred into their names. They stated that the 1st Respondent fraudulently colluded with the 3rd Respondent and created a fake title to the suit property when there was an existing title indicating therein the 1st and 2nd Appellants as proprietors. Subsequently, the land title was transferred into the names of the 2nd Respondent who had constructive notice of the fraud.

On the other hand, the 1st Defendant in the High Court who is also the 1st Respondent in this appeal, denied the claims of the Appellants and alleged that the Appellants had never been the registered proprietors of the suit property and the land title deed they possessed was a forged one. Secondly, that at the time of the consent judgment in 2005, the land was still registered in the names of the deceased. The 3rd Respondent had duly issued a gazette notice upon loss of the duplicate certificate of title whereupon it issued a special certificate of title on the application of the 1st Respondent. The 2nd Respondent carried out a search of the land registry and established proprietorship of the 1st Respondent before buying the property and denied

any collusion or constructive notice of any fraud. Secondly, the 2nd Respondent was in occupation of the suit property.

The following issues were framed for resolution of the suit namely:

1. Whether the certificate of title in possession of the Plaintiffs is a genuine and valid title in the circumstances?
2. Whether the special certificate in possession of the 2nd Defendant is a genuine and valid certificate in the circumstances?
3. Whether the acquisition of the suit land by the 2nd the Defendant from the 1st Defendant was fraudulent?
4. Whether the 2nd Defendant is a bona fide purchaser for value without notice?
5. Remedies available to the parties.

The matter went on for full trial. In the judgment, the learned trial judge found that there was no reason why the consent judgment in dispute was never reviewed under the provisions of section 82 of the Civil Procedure Act and that the current suit would be undoing a subsisting judgment of a competent court of law (a judgment reverting the suit property into the names of the deceased). Secondly found that there was no record at the Land Registry in respect of the title held by the Plaintiffs who are now the Appellants. He further found that the white page on court record was a substitute page which does not reflect anything about the title of the Plaintiffs in the possession. After considering the evidence the learned trial judge held that the special certificate of title in possession of the 2nd Respondent is valid and could not be impeached and therefore answered issues No 1 and 2 in favour of the Defendants who are now the Respondents.

On 3rd and 4th issues on whether the acquisition of the suit property by the 2nd Respondent from the 1st Respondent was fraudulent or unlawful and

whether the 2nd Respondent was a bona fide purchaser for value without notice, he found that there was no evidence of fraud which had been proved against the 1st Respondent and the 1st Respondent passed a valid title to the 2nd Respondent.

The 3rd Defendant now the 3rd Respondent had filed no written statement of defence and therefore the learned trial judge dismissed the suit with costs to the 1st and 2nd Respondents only and held that the 3rd Respondent was not entitled to costs.

The Appellants were aggrieved and filed this appeal on the following grounds:

1. The learned trial judge erred in law and fact when he held that the duplicate certificate of title and the special certificate of title were not concurrent titles.
2. The learned trial judge erred in law and fact when he held that the special certificate of title replaced the duplicate certificate of title.
3. The learned trial judge erred in law and fact when he held that the special certificate of title that was in possession of the 2nd Defendant is valid and cannot be impeached.
4. The learned trial judge erred in law and fact when he heavily relied on conjecture when he held that there were no records in the land registry pertaining to the duplicate certificate of title.
5. The learned trial judge erred in law and fact when he held that there were no procedural irregularities leading to the issuance of the special certificate of title.
6. The learned trial judge grossly misdirected himself on the law regarding review when he held that the Plaintiff ought to have reviewed the consent judgment in Civil Suit No 1523 of 2000.

7. The learned trial judge erred in law and fact when he held that the 2nd Defendant is a bona fide purchaser for value without notice.
8. The learned trial judge erred in law and fact when he held that the special certificate of title would only be impeached on proving fraud.

When the appeal came for hearing, learned Counsel Mr. Kenneth Mununguu represented the Appellant while learned Counsel Mr. Richard Kiboneka represented the 1st Respondent. The 2nd Respondent was represented by learned Counsel Mr. Joseph Kyazze. When this appeal came for hearing on 26th February, 2019, the Appellants applied for and were granted leave to adduce additional evidence. This court reserved the reasons for this decision. Additional evidence was placed on court record and the appeal came for hearing on 9th March 2020.

Submissions of Counsel

Ground 1: The learned trial judge erred in law and fact when he held that the duplicate certificate of title and the special certificate of title were not concurrent titles.

For the Appellants, Mr. Kenneth Mununguu submitted that it was an error of law and fact for the learned trial judge to have held that, the duplicate certificate of title exhibit P1 and the special certificate of title exhibited D1 were indeed not concurrent titles. Both titles were issued separately for the same piece of property in 1981 and 2009 respectively and to different individuals. Exhibit P1 was issued for land comprised in the Kibuga block 4 plot 355 approximately 0.134 ha on 25 September 1981 in the names of Hajati Hawa Nampima under Instrument No KLA 100084. On 28 October 1981 under Instrument No KLA 100433 it was transferred into the names of Afisa Namukasa, Silagi Wasswa and Haji Manisulu Mukasa. An encumbrance of the lease was registered on the title on 28th of November 1966 in the

names of Emmanuel Mutakanya. The encumbrance indicting a lease was vacated on 26th of November 1981 by way of re-entry.

The Appellants Counsel submitted that, on the other hand, exhibited D1 (the title held by the 1st Respondent and transferred to the 2nd Respondent) shows that it was issued for land comprised in block 4 plot 355 approximately 0.134 ha on 24th of February 2009 in the names of Asanansi Zamwanguya the deceased under Instrument No KLA 406548. On 15th of May 2009 under Instrument No KLA 15459 it was transferred into the names of Yoswa Kyeswa and Tom Luwalira (administrators of the estate of the late Asinansi Nambogga by virtue of a registration cause No 37 of 1887 of the High Court of Uganda). On the same day that is 15th of May 2009 under Instrument No KLA 415460 it was transferred to Tom Luwalira and finally on the 4th of May 2010 into the names of the 2nd Respondent Messieurs Victoria Education Services Ltd. There is on that title a legal mortgage in favour of DFCU bank Ltd registered on the 4th of May 2010 under Instrument No KLA 453637 and a further charge was created in favour of DFCU on 14th of November 2012 Instrument No KLA 477355. Several other instruments were registered as the encumbrances on the title.

From the above evidence, the Appellants Counsel submitted that it is clear that the 2 titles, one held by the Appellants and another by the Respondents are different but in respect of the same piece of land. The two titles were issued to different people at different times. He submitted that under section 48 of the Registration of Titles Act (RTA), instruments are entitled to priority according to the date of registration and since exhibit P1, the title held by the Appellants was registered 1981, it had priority over exhibit D1, the title held by the Respondents which was registered in 2009.

The Appellants Counsel relied on General Parts (U) Ltd versus Middle North Agencies Ltd and another; **High Court Civil Suit No 610 of 2013 consolidated with the Middle North Agencies Ltd versus New Uganda Securicor Ltd; HCCS 107 of 2003** wherein the High Court held that a certificate of title to land issued earlier supersedes the earlier one and the subsequent title should be cancelled. He prayed that this court approves the decision as good law. In the circumstances, he submitted that exhibits P1 and D1 are concurrent titles and ground one of the appeal should be answered in the affirmative.

In reply Mr. Richard Kiboneka, learned Counsel for the first Respondent submitted that by a consent judgment dated 16th of November 2005 in **High Court Civil Suit No 1523 of 2000; Tom Luwalira & Another v Hajati Nampima & 10 Others**, it was decreed that the land comprised in Kibuga Block 4 Plot 355 (the suit property) be transferred into the names of Asinansi Nambogga Zamwanguya (the deceased), if not already transferred to bona fide purchasers for value without notice. Based on the consent judgment, the 1st Respondent carried out a search in the land registry which confirmed that the suit property was in the names of the deceased. The 1st Respondent did not know about the whereabouts of the duplicate certificate of title and accordingly applied for a special certificate in accordance with the law. The 1st Respondent after due process obtained the special certificate of title issued by the 3rd Respondent and subsequently sold the property to the 2nd Respondent.

On the other hand, the Appellants have a certificate of title which was allegedly issued in 1981 which the appears genuine but does not have supportive documents in the land's office. The trial court accordingly dismissed the Appellants suit hence this appeal.

In respect to Ground 1 of the appeal, Mr. Kiboneka admitted that exhibits P1 and D1 are different titles but in respect to the same suit property but are not concurrent titles. He submitted that a special certificate of title issued under section 70 of the Registration of Titles Act is a total replacement of the duplicate certificate of title and is valid for all purposes and uses as the duplicate certificate of title would have been. This applies in a situation where at any time another duplicate certificate of title may be lost, destroyed or obliterated so as to be useless and in order not to leave a vacuum a special certificate of title is issued to replace the lost or destroyed certificate of title. When that is done, the 2 certificates do not become concurrent titles but one is the replacement of the other.

The 1st Respondents Counsel submitted that the authorities relied on by the Appellants in support of the argument are clearly distinguishable from the facts in this case because in all the cases there were 2 duplicate certificates of title and the court had to decide which was the genuine one. In this case, the special certificate of title replaced the duplicate in possession of the Appellants.

Ground 2: The learned trial judge erred in law and fact when he held that the special certificate of title (exhibited D1) replaced the duplicate certificate of title (exhibit P1).

On ground 2, Mr. Mununguu submitted for the Appellant that exhibit D1 could not be replaced by exhibit P1 when the two have no connection at all. Exhibit D1 is a special certificate of title and it is clear on the face of it that it replaced a title that had been issued in 2009 and not the one issued in 1981. He pointed out that the special certificate of title was issued on 27th of February 2009 under Instrument No KLA 406956 just 2 days after the original title been issued in the names of the deceased on 24th of February 2009. He further

submitted that, if it was a replacement, it is strange why it does not contain the same information as that on exhibit P1. Under section 70 of the Registration of Titles Act, a special certificate shall issue to the proprietor and such special certificate of title shall contain the exact information as that on the certificate of title in the Register of titles. He asked the court to find that it was erroneous for the trial judge to hold that exhibit D1 replaced exhibit P1 and thus ground 2 of the appeal ought to be answered in the affirmative.

In reply to ground 2, Mr. Kiboneka submitted that, this ground of appeal is the same as ground 1 of the appeal. He submitted that there is no confusion in dates on the titles or Register as alleged by the Appellants. Further, that, section 46 (2) and (3) of the Registration of Titles Act resolves the issue when the entries on the title exhibit D1 are considered together with the evidence of DW 2 Mr. Robert Nyombi. The testimony is that the date of 24th February, 2005 is the date the name of the deceased was entered in the register. According to section 46 (3) of the Registration of Titles Act, this is the date when the application to bring the deceased on the register was received. On the other hand, the application for a special certificate was received on 27th of February, 2009 and thereafter an advertisement was made notifying the public about the loss. The date the special certificate was issued is stated in the statement signed by the registrar.

Grounds 3 and 5:

The learned trial judge erred in law and fact when he held that the special certificate of title that is in possession of the 2nd Defendant is valid and cannot be impeached.

And

The learned trial judge erred in law and fact when he held that there were no procedural irregularities leading to the issuance of the special certificate of title.

For the Appellants, Mr. Mulumba submitted that exhibit D1 which the special certificate of title cannot be valid for reason that there was already an existing title issued prior in time over the same property.

Mr. Munungu submitted that that exhibit D1 cannot be valid because of an already existing title issued prior in time for the same piece of property. Secondly, exhibit D1 violates the provisions of section 70 of the RTA in so far as it is not a mirror image of exhibit P1 which is the prior title issued for the suit property. Thirdly, exhibit D1 has many inconsistencies and contradictions and the face of it which raise suspicion. The Appellants Counsel contended among other things that that that the duplicate of exhibit D1 relates to a title issued in 2009 in the names of a deceased person. However, the deceased died in 1975 and could not have a title issued in her names in 2009. With reference to section 28 of the RTA, a title can only be issued in the names of the deceased person if the person died after making the application for the registration of the certificate of title. In the circumstances the registration of the deceased was illegal and all subsequent transfers are null and void. Mr. Munungu submitted that the trial judge erred when he held that there were no procedural irregularities leading to the issuance of exhibit D1. Counsel reiterated earlier submissions to make this point. Mr. Munungu further submitted that there were many inconsistencies disclosed in the evidence. He cited the application for issuance of a special certificate of title which was filed on 20th of June 2008 by Messrs. Sendege, Senyondo & company advocates. Statutory declaration accompanying the application was sworn by the 1st Respondent on 20th of June 2008. However, Gazette notice was issued on 27th February, 2008. The transactions happened in 2008 before the white

page/original was created. The original to which exhibited D1 was created was issued on 24th February, 2009 in the names of the deceased as the 1st owner. The Gazette notice was issued on 27th February, 2008 before the application for a special certificate of title was made on 20th of June 2008. It was erroneous for the Commissioner land registration to issue a Gazette notice for issuance of the duplicate certificate of title one year before the original title came into existence. In the premises Counsel prayed that the grounds 3 & 5 of the appeal are answered in the affirmative.

In reply to grounds 3 and 5 Mr. Richard Kiboneka submitted for the 1st Respondent that the question of whether exhibit P1 is concurrent with exhibit D1 has already been discussed in other grounds of appeal. He reiterated earlier submissions.

Mr. Kiboneka submitted that section 28 of the RTA was quoted out of context as far as it relates to circumstances of a person applying to bring land under the operation of the RTA but does not refer to an existing title. When the consent judgment was executed, the land the subject matter of the suit was already registered and therefore it had already been brought under the operation of the RTA.

The Appellant referred to a litany of inconsistencies and irregularities leading to the issuance of exhibit D1 for the documents mentioned are not part of the trial and it is therefore evidence from the bar. The application for a special certificate of title and the accompanying statutory declaration were never admitted in evidence at all. Further, DW2 clarified on the minor errors of the dates during his evidence in chief and was cross examined in respect thereof.

Ground 4:

The learned trial judge erred in law and fact and heavily relied on conjecture when he held that there were no records in the land registry pertaining to the duplicate certificate of title (exhibit P1).

For the Appellants, Mr. Munungu submitted that the learned trial judge erred when he held that, there was no record pertaining to exhibit P1 in the land registry. He submitted that DW 2, the acting Commissioner land registration was not a truthful witness and hence the learned trial judge erred when he relied on his evidence. He contended that, DW2 had himself perpetrated a fraud when he issued a notice for the issuance of exhibit D1 on 27th February, 2008 well before the application for issuance of a special certificate of title was lodged in the land registry and also well before the white page/original page 2 which exhibited D1 relates was created. Moreover, DW2 testified that the application was lodged on 27th of February 2009 when it was issued on 27th February, 2008. He further testified that the time of registration of the title refers to the time of lodgment. With reference to the evidence, he submitted that the learned trial judge ought not to have relied on the evidence of DW 2 since he is the one who brought exhibit D1 into existence and was therefore an interested party who had come to cover up his fraud and illegalities.

The learned trial judge believed the evidence of DW 2 that no records existed in the land's registry regarding exhibit P1 without corroboration. In any case where there are no records, the solution is not to create a different title in the names of different proprietors but rather to create a substitute title under section 72 of the RTA.

He pointed out further problems with the testimony of DW2 and submitted that the learned trial judge erroneously relied on the evidence of DW 2 and

disregarded other evidence adduced before him. He prayed that the court be pleased to answer ground 4 of the appeal in the affirmative.

In reply to ground 4 Mr. Kiboneka on behalf of the 1st Respondent submitted that the trial judge was right to rely on the evidence of DW 2 in his capacity as acting Commissioner land registration. The duties of the Commissioner land registration are statutory and spelt out in the Registration of Titles Act. Mr. Kiboneka relied on sections 3 and 37 of the Registration of Titles Act and particularly the duty to keep the register book. Where the registrar gives evidence relating to the register book, he would be performing his statutory duty which is not open to the Appellants to blame the trial judge for relying on. The evidence is that there is no corresponding information regarding the entries in exhibit P1 in the register book.

Mr. Kiboneka reiterated earlier submissions on the dates of registration and the provisions of section 46 of the RTA. He added that under section 54 of the RTA, an instrument is only effective after registration. In the premises there was no reason for the trial judge to not to rely on the evidence of DW 2, which evidence was a credible.

In reply to the argument that DW 2 ought to have created a substitute title under section 72 of the RTA, DW2 was very clear that the records he had at the time of issue exhibit D1 showed the names of the deceased. Notice was issued and seen by the Appellants who did not bother to inform the Registrar of titles of the titles in their possession if genuine. After expiry of the 30 days' notice DW2 had no choice but to issue a special certificate based on available records. Mr. Kiboneka wondered why the Appellants did not intervene by informing the office of the registrar that they had a title to the suit property.

Mr. Kyazze, for the second Respondent considered grounds 1, 2, 3, 4 and 5 of the appeal together and in reply submitted on behalf of the 2nd

Respondent that when the Appellants filed HCCS No 116 of 2015 against the Respondents, they challenged the legality or validity of the special certificate of title and alleged that the 2nd Respondent acquired title of the suit land fraudulently. The defence of the 2nd Respondent is that it is a bona fide purchaser for value without notice having acquired its interest from the 1st Respondent who at the time was the registered proprietor. The 2nd Respondent denied any participation or involvement in the process leading to the registration of the 1st Respondent as proprietor of the suit property.

At the trial of the suit PW1 the 3rd Plaintiff was the key witness who claimed to be in possession of the duplicate certificate of title relied on by the Appellants and was the one who read the Gazette notice for issuance of a special certificate of title. She was the one who went to the land office in response to the Gazette notice and was directed to submit the duplicate certificate of title if it existed but did not. Afisa Namukasa is not one of the Appellants in the appeal and has not sought to challenge any of the findings and orders of the court.

In reply to grounds 1, 2, 3, 4 & 5 of the appeal.

Mr. Kyazze submitted that the 5 grounds of appeal are interrelated and concerned the duplicate certificate of title and the special certificate of title and ought to be conveniently considered together.

In resolving all the above grounds of appeal, he invited this court to consider the following:

a) The evaluation of the law and evidence by the learned trial judge.
b) The question of whether the duplicate certificate of title and the special certificate of title are or are not concurrent titles is a question of law and fact.

c) On the question of fact invited the court to consider the following evidence on record namely:

a. the suit property is comprised in Kibuga block 4 plot 355, Namirembe Bakuli.
b. Exhibit P1 the duplicate certificate of title adduced by the Appellants relates to land comprised in Kibuga block 4 plot 355 and exhibited D1, this special certificate of title was issued in respect of the same piece of land.
c. The Plaintiffs plead that the land was originally registered in the names of the deceased. The 1st Respondent is the administrator of the estate of the deceased.
d. The Appellants considered that the suit was the subject matter of HCCS No 1523 of 2000 against Hajati Nampima and 11 others were included the Appellants. The concede that there was a consent decree affecting the land upon which the 1st Respondent got registered as demonstrate of the estate of the deceased. The decree of the court has never been challenged.
e. The records of the land office indicated that by 2009, the registered proprietor of the suit property was the deceased and the administrator of the estate subsequently registered thereon was the 1st Respondent.
f. An application was made for the issuance of the special certificate of title for the suit land and the Gazette notice was issued notifying the public.
g. PW1 saw the Gazette notice and went to the land office and so Mr. Karuhanga. She was tasked to present the duplicate certificate of title which she claimed was in her possession for the same piece of land but you never went back to the land office or even lodge a caveat.

h. PW1 Afisa Namukasa, the 1st Plaintiff in HCCS No 116 of 2015 the not appeal against any of the findings made by the trial court. She claimed to be in possession of the duplicate certificate of title.

i. After the 30 days' notice elapsed, no objection was raised and the 3rd Respondent issued a special certificate of title. The procedure for issuing the special certificate of title was followed according to the testimony of DW2. No serious and substantive irregularity was proved by the Appellants sufficient to impeach the special certificate of title currently in the names of the 2nd Respondent. There is no proof that the 2nd Respondent participated in the process. In the premises the learned trial judge's conclusion cannot be faulted and the Appellants failed to discharge the burden on them.

j. The title is currently in the names of the 2nd Respondent. It's particulars and entries tally with the white page and the office of the registrar of titles.

k. From the evidence on record, the special certificate of title relates to the same suit property and was duly issued.

l. The contention of the Appellants that the special certificate of title never replaced the original title issued in 1981 does not have any merit. Learned Counsel for the Appellant mistakenly referred to the substitute page issued in 2009 by the land office to replace the white page as the new duplicate certificate of title apparently issued in 2009.

m. As a matter of law, the 2nd Respondents Counsel referred to section 69 and 70 of the RTA on the effect of the issuance of a special certificate of title. Secondly invited the court to consider section 176 (A) of the RTA on the question of 2 subsisting

duplicate certificate of title issued in respect of the same piece of land.

e. Mr. Kyazze submitted that the learned trial judge cannot be faulted for having come to the conclusion he did. The special certificate of title was issued by the land office and its issuance was pursuant to an application and a Gazette notice. The entries on the special certificate of title correspond with that in the white page as confirmed by DW 2. Secondly, the learned trial judge did not believe in the authenticity of the duplicate certificate of title held by the Appellants. Thirdly, DW2 did not state anywhere that the duplicate certificate of title corresponded with entries on the white page. Fourthly, the burden was on the Appellant not only to prove that exhibit P1 was genuine but also adduce evidence to prove that there were corresponding entries on the register in the land office.

Mr. Kyazze submitted that the reappearance of the duplicate certificate of title after failing to submitted to the land office in response to the Gazette notice cannot be valid. To hold otherwise would expose 3rd parties like the 2nd Respondent and would render sections 59, 69 and 70 of the RTA superfluous. Further, he submitted that PW1 conceded to acquiescence in facilitating the creation of the special certificate of title because she had read the Gazette notice and appeared before the registrar of titles. She however failed to produce the duplicate certificate of title or lodge a caveat or complaint against the issuance of a special certificate of title. He relied on the High Court decision in **Ibaga Taratizo versus Tarapke Fastina HCCS No 004/2017**.

In the premises Mr. Kyazze submitted that the learned trial judge reached the correct conclusion and grounds 1, 2, 3, 4 and 5 of the appeal should be answered in the negative.

Ground 6

The learned trial judge grossly misdirected himself on the law regarding review when he held that the Plaintiffs ought to have reviewed a consent judgment in Civil Suit No 1523 of 2000.

For the Appellants Mr. Munungu submitted that the plaint never made it an issue and it was not canvassed by the parties but the learned trial judge surprisingly referred to it. Moreover, the Appellants had no reason to review the decree in the consent judgment referred to since it was not averse to the interests. The decree clearly indicates that the plot to be re transferred into the names of the deceased if it has not been already transferred to a bona fide purchaser for value without notice. In the premises the decree was not prejudicial to the Appellants. Moreover, it was acknowledged in the decree that the suit land had already been transferred in the names of Hajati Hawa Nampima the 1st Defendant in the **High Court Civil Suit No 1523 of 2000**. To procure the title in the names of the deceased without a record of Hajat Nampima points to the fraud of the Defendants in the transaction.

The learned trial judge ignored the evidence of the Plaintiffs that they did not know of the existence of the decree and were never represented in the suit. Moreover, HCCS No 530 of 1984 between Yekosofati Mukasa and Isaac Nsumba versus the Administrator General, Hajati Hawa Nampima & Fatima Namuyomba had already settled issues relating to the estate of the deceased. He prayed that ground 6 of the appeal is answered in the affirmative. Father no consent judgment had been tendered in court relating to High Court Civil Suit No 1523 of 2000 and all that was presented was a decree which had been produced in evidence by the Defendant's Counsel through cross examination. No consent judgment had been tendered by

either party and it is a wonder how the learned trial judge reached the conclusion not supported by any evidence.

In reply Mr. Kiboneka submitted for the 1st Respondent that it did not matter that the Appellants were not parties to HCCS No 1523 of 2000 but were affected persons when they became aware of the decree. He prayed that the court answers the issues in the negative.

In further reply Mr. Kyazze for the 2nd Respondent, invited this court to consider the effect of the consent decree according to the findings and conclusions of the learned trial judge. He submitted that the Appellants were parties to the consent judgment. The submission that the Appellants were aware of the suit was never challenged. Thirdly, the fact that the decree reflected the property into the names of the deceased whose estate administered by the 1st Respondent should lead to proceedings to be taken by the Appellants for contempt against the 1st Respondent which they never did. The learned trial judge concluded that it was incumbent upon the Appellant to challenge the decree by way of review under section 82 of the Civil Procedure Act.

Ground 7

The learned trial judge erred in law and fact when he held that the 2nd Defendant is a bona fide purchaser for value without notice.

For the Appellants, Mr. Munungu submitted that that the 2nd Respondent cannot be a bona fide purchaser for value without notice in the transaction because he knew about the fraud that was conducted by the 1st and 3rd Respondents and chose to benefit from it. The Appellants Counsel relied on **Kampala Bottlers Ltd versus Damanico (U) Ltd; SCCA No 22 of 1992** where it was held that the transferee must be guilty of some fraudulent act

or must have known of such act by somebody else and taken advantage of such act.

Mr. Munungu submitted that the 2nd Respondent entered the suit land on 1st February, 2005 as the lessee of Muslim World League who were illegally leasing the land since their lease had been cancelled on 26th November, 1981 under Instrument No 210706 and a re-entry was made. The Muslim World League purported to have acquired a leasehold of the suit property in 1992 from one Emmanuel Mutakanya but that lease been cancelled on 26th November, 1981.

In 2005 when the 2nd Respondent sought to rent the suit premises from the Muslim World League, it was swimming in illegalities because it had no legal interest in the suit property. More importantly the 2nd Respondent who had been in occupation of the suit property as a tenant since 2005 could not purport to purchase the title of the suit land made in 2009. The 2nd Respondent knew that a title made in 2004 for property that it had been renting since 2005 was a forgery. The Appellants' Counsel further submitted that the testimony of DW 3, the managing director of the 2nd Respondent was a lie because he stated that prior to the purchase in 2010, the 2nd Respondent had only one rented premises for only 2 years. However, there was uncontroverted evidence showing that the 2nd Respondent started renting the premises in 2005.

Further, the 2nd Respondent purchased a title that was full of inconsistencies. This is firstly because the special certificate of title was issued in 2009 and the 2nd Respondent had been on the premises much earlier. Secondly, the special certificate of title had inconsistencies on the face of it that an innocent buyer would never have ignored such as letters of administration that had been purportedly granted in 1887. Thirdly, the special certificate of title does

not display the lease of the Muslim World League from whom he had been renting the premises since 2005 as an encumbrance. Fourthly, the title was registered in the names of Yoswa Kyeswa and Tom Luwalira on 15th of May 2009. Fifthly, a mortgage was registered in favour of DFCU bank on the 4th of May 2010 before the 2nd Respondent had been registered on the special certificate of title. Sixthly, two dates are displayed for the issuance of a special certificate of title namely 7th February, 2009 and 17th April, 2009. A bona fide purchaser for value would have seen all the anomalies and refused to enter into such a transaction.

Mr. Munungu further submitted that to prove the connivance of the 2nd Respondent with the 4th Respondent, **High Court Civil Suit No 266 of 2001** involved the very parties and Muslim world league that both parties are aware of which had similar facts and issues as the present suit yet they chose not to bring it to the attention of the trial judge. In the same suit the 2nd Respondent filed **Miscellaneous Application No 48 of 2010** against the 1st Respondent and Muslim World League. DW3 swore an affidavit on 6th July, 2010 wherein they failed to disclose that the 2nd Respondent had acquired the suit property on 4th of May 2010 but indicated that his principal was a tenant who was confused about the real owner of the suit property yet in reality they had already acquired the property from the 1st Respondent had had even transferred the certificate of title into their names.

The 2nd Respondent in **High Court Miscellaneous Application No 487 of 2010** arising from **High Court Miscellaneous Application No 486 of 2010** conspicuously and capriciously obtained an interim order to prevent the 1st Respondent and the Muslim World League from evicting the 2nd Respondent from the suit premises which premises were already registered into the names of the 2nd Respondent. The 1st and 2nd Respondents were aware of the *status quo* of the suit premises but decided to hoodwink the court. In the

premises he submitted that the 2nd Respondent cannot pose as a bona fide purchaser for value without notice.

On the issue of the principles for establishing whether a person is a *bona fide* purchaser for value without notice of any defect in title, Mr. Mununguu relied on **Ndimwibo Sande & others versus Allen Peace Ampaire; CACA No 65 of 2011.** He prayed that ground 7 of the appeal is answered in the affirmative.

In reply Mr. Kiboneka on behalf of the first Respondent submitted that the Appellants introduced new evidence on this ground which was never adduced during the trial. The Appellant was giving evidence under the disguise of making submissions. For instance, the Appellants' Counsel referred to Civil Suit No 266 of 2009, Miscellaneous Application No 487 of 2010 as well as Miscellaneous Application No 486 of 2010 which were never the subject of contention in the present suit. He prayed that the part of the submission be expunged from the record and the issue answered in the negative.

Ground 8:

The learned trial judge erred in law and fact when he held that the special certificate of title could only be impeached on proving fraud.

For the Appellants, Mr. Mununguu submitted that under section 91 of the Land Act Cap 227, a certificate of title can be impeached and cancelled by the registrar where it is issued in error; contains a misdescription of land or boundaries; contains an entry or endorsement made in error and is illegally or wrongfully retained. He reiterated submissions that exhibited D1 was issued in error since there was already an existing certificate of title which had been issued for the same piece of land. Further, there are illegalities surrounding the issuance of exhibited D1 which was brought to the attention

of the learned trial judge which were not taken into account. In the premises he submitted that the title can be cancelled under section 91 of the RTA.

Furthermore, Mr. Munungu submitted that under section 176 (3) of the RTA, an action for ejectment may lie against the registered proprietor by a person who had been registered prior in time over the same piece of land. In the premises exhibit D1 ought to be deregistered having been registered after exhibit P1 had been registered in 1981.

In reply for the 1st Respondent Mr. Kiboneka submitted that the learned trial judge cannot be faulted for having held that the special certificate of title respect of the suit land is valid. The Appellants failed to prove fraud that could lead to impeachment of title. The Appellants further did not show that the certificate of title which they had was known to the office of the Registrar of Titles. The Appellants sought to rely on the certificate of title in their possession which was not known to DW2 in the register book thereby validating it without the existence of the corresponding records in the office of Registrar of Titles. In the premises, he submitted that the learned trial judge was right to conclude that exhibit D1 was a valid document and the moment he declared it to be valid, it could only be cancelled on account of fraud.

In reply on grounds 7 and 8 by the 2nd Respondent Mr. Kyazze submitted that in the determination of this ground of appeal, the court ought to consider section 59 of the RTA on the conclusiveness of the certificate of title that was produced in court and section 176 of the RTA that requires proof of fraud against the current registered proprietor before impeachment of title. He further invited the court to consider section 181 of the RTA which protects a bona fide purchaser for value without notice of any defect in title.

In the premises he submitted that the 2nd Respondent should not be affected by any alleged fraud because fraud has to be proved against the current registered proprietor and the test is higher than that on the balance of probabilities (see **Kampala bottlers versus Damanico (U) Ltd** (supra)). Further, that it is a defence that the purchaser did not have any notice of the alleged defect and is therefore protected by the provisions of the law (see **David Ssejjaka Nalima v Rebecca Musoke; SCCA No 12 of 1995**).

Mr. Kyazze further invited the court considered Appellants pleadings and the nature of the allegations against the 2nd Respondent. Particulars of fraud were pleaded against the 1st and 3rd Respondent only. Secondly, the 2nd Respondent clearly averred in the written statement of defence how it acquired interest in the suit property. There were no allegations of fraud on the part of the 2nd Respondent save for the fact that it is the current registered proprietor of the suit property.

The 2nd Respondent's Counsel submitted that the burden of proof lay on the Appellants to prove participation of the 2nd Respondent in the process leading to the registration of the 1st Respondent on the title and the creation of the special certificate of title. Secondly, upon finding that the special certificate of title is a valid title, the submission for cancellation of the special certificate of title under section 91 of the Land Act does not arise. Thirdly, the learned trial judge found that the alleged fraud was premised on the allegation that the special certificate of title was invalid the which was not the case.

After making reference to the evidence, Mr. Kyazze submitted that the 2nd Respondent carried out sufficient due diligence before acquisition of the suit property and is entitled to protection as stipulated in the law.

Resolution of appeal

I have carefully considered the grounds of appeal, the submissions of Counsel, the authorities cited, the pleadings in the High Court as well as the judgment of the learned trial judge and the law. It is clear from the 1st ground of appeal that the controversy between the parties arises from 2 titles stated to be issued for the same piece of land. One of the titles was issued in 1981 referred to as exhibit P1 in the names of the Appellants and the 2nd one was issued in 2009 referred to as exhibit D1 in the names of the second Respondent and is a special certificate of title. The 2 titles were issued in the names of 2 different people and the question before the court was which title was the valid one. In resolving the issues is the fact that the special certificate of title was obtained following the process under the Registration of Titles Act such as gazetting a notice to the general public informing the public about the loss of the title before the special certificate of title was issued.

The general duty of this court as a first appellate court is to reappraise the evidence on record as stipulated in Rule 30 (1) (a) of the Rules of this court. Rule 30 (1) (a) of the Rules of this court provides that:

> 30. Power to reappraise evidence and to take additional evidence
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and ⋯

Apparently from the wording of the rule, the duty of this court to reappraise the evidence is a discretionary duty and may depend on the controversy presented to the court. In **Peters v Sunday Post Limited [1958] 1 EA 424** at page 429, the East African Court of Appeal held that the duty of a first appellate is:

> ···to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

In this appeal the question of whether the certificate of title issued in 1981 should prevail over the one issued in 2009 depends on mixed questions of fact and law. In the joint scheduling memorandum endorsed by both parties, before the High Court, the issue presented to the learned trial judge other than the issue on remedies available to the parties were as follows:

1. Whether the certificate of title in possession of the Plaintiffs is a genuine and valid certificate of title in the circumstances.
2. Whether the special certificate of title in the possession of the 2nd Defendant is a genuine and valid certificate of title in the circumstances.
3. Whether the acquisition of the suit land by the 2nd Defendant from the 1st Defendant was fraudulent.
4. Whether the 2nd Defendant is a bona fide purchaser for value without notice.

Issues No 1 and 2 before the learned trial judge are interrelated in that they deal with the question of which certificate of title is genuine and valid. To hold that the Plaintiff certificate of title is genuine and valid would automatically mean that the certificate of title issued earlier in time in 1981 would override the special certificate of title issued in 2009. Conversely to hold that the special certificate of title in possession of the 2nd Defendant is a genuine and valid certificate of title is to find that the 1st certificate of title was invalid and replaced. In those circumstances, I accept the submission of Counsel for the 2nd Respondent that grounds 1, 2, 3, 4 and 5 of the appeal are interrelated as they deal with the same question of which certificate of

title is to be held as valid. The determination of this issue as well rests upon questions of fact related to the registration and issuance of a special certificate of title in 2009.

In the premises, I shall set out the 5 grounds of appeal and shall handle them together as they have aspects of each other.

1. The learned trial judge erred in law and fact when he held that the duplicate certificate of title (exhibit P1) and the special certificate of title (exhibit D1) were not concurrent titles.
2. The learned trial judge erred in law and fact when he held that the special certificate of title (exhibit D1) replaced the duplicate certificate of title (exhibit P1).
3. The learned trial judge erred in law and fact when he held that the special certificate of title (exhibit D1) that is in possession of the 2nd Defendant is valid and cannot be impeached.
4. The learned trial judge erred in law and fact and heavily relied on conjecture when he held that there were no records in the land registry pertaining to the duplicate certificate of title (exhibit P1).
5. The learned trial judge erred in law and fact when he held that there were no procedural irregularities leading to the issuance of the special certificate of title (exhibit D1).

Among the 5 grounds of appeal, ground 3 seems to be related to grounds 7 and 8 which deal with whether the 2nd Respondent is a bona fide purchaser for value without notice and whether the special certificate of title would only be impeached upon proving fraud respectively. However, it also deals with the issue of which certificate of title is a valid one. I also wish to point out that ground 1 of the appeal is so intertwined that to hold in ground one that the special certificate of title and the title in possession of the Appellant are

not concurrent titles also meant and led to the holding that the special certificate of title replaced any earlier certificate of title. This meant consideration of the process of the issuance of the special certificate of title was material.

The learned trial judge found it relevant that there was a consent judgment in Civil Suit No 1523 of 2000 in which the 1st Defendant one Hajat Hawa Nampima and the 3 Plaintiffs were involved. He wondered why the consent judgment was never challenged by way of review under section 82 of the Civil Procedure Act. He held as follows on this issue:

> It is my considered view that the instant case is in a way aimed at undoing a subsisting judgment of a competent court of law.

Having held that the proper remedy was for review, there was no need to go ahead and consider the merits of the suit. However, the learned trial judge thought it fit to go ahead and consider the 2nd aspect of the controversy and his statement at the beginning of the judgment is very revealing about the conclusion. He held that it is a fact that the Plaintiffs are in possession of a duplicate certificate of title which the acting Commissioner Land Registration in his evidence thought was a genuine document. Secondly, the learned trial judge noted that they were no records in the land registry pertaining to this particular certificate of title and it appears that even the white page on record is a substitute and does not reflect anything about the title in the Plaintiff's possession.

Thirdly, the learned trial judge found that at the time of the consent judgment/decree in issue, the Plaintiffs were aware but did not challenge it. The PW 1 was aware of the Gazette notice issued for the issuance of the special certificate of title. The learned trial judge relied on the evidence of DW 2 to find that there was no evidence in the land office to support the

existence of the duplicate certificate of title in the possession of the Plaintiffs. Further, he found that there was no evidence of procedural irregularities leading to the issuance of a special certificate of title in the names of the 1st Respondent. The learned trial judge also found that the document in possession of the Plaintiff could not be concurrent with the special certificate of title because the special certificate of title is issued on the presumption that the duplicate was lost or cannot be found and therefore when it turns up it ceased to have the effect and has been permanently replaced. On the basis of that finding the High Court found that the 2nd certificate in possession of the 2nd Respondent is valid and cannot be impeached and resolved issue No 1 against the Plaintiffs/applicants.

Because the learned trial judge held that there was no evidence of fraud, he found that the 2nd Respondent was a bona fide purchaser for value without notice of any defect in title. Most importantly, the learned trial judge held that the special certificate of title replaced and rendered inapplicable any claims of the existence of any other certificate of title for the same piece of land.

I will start with the procedural question which is a preliminary point of law captured by ground 6 of the appeal that:

6. **The learned trial judge grossly misdirected himself on the law regarding review when he held that the Plaintiffs ought to have reviewed the consent judgment in Civil Suit 1523 of 2000.**

I have carefully considered the record and there is no evidence of the said consent judgment. The evidence on record is of a decree at page 19 of the record which shows that High Court Civil Suit No 1523 of 2000 came for final disposal before his Lordship Hon. Justice Moses Mukiibi in the presence of Godfrey Bogere Mukhwana Counsel for the Plaintiff and in the presence of

the Plaintiffs as well as the learned Counsel Mr. Joseph Kiryowa for the 1st Defendant. The decree clearly indicates that the Plaintiff is the 1st Respondent Mr. Tom Luwalira and the 2nd Plaintiff is one Yoswa Kyeswa. The 1st Defendant is written as Hajati Hawa Nampima. The material question touching on the suit property is No 3 of the decree in which it is decreed as follows:

> Kibuga Block 4 Plot 355 also be transferred from the names of the 1st Defendant into the names of the late Asinansi Nambogga Zamwanguya if not transferred already to bona fide purchaser (s) for value without notice.

The 1st conclusion is that there was no evidence of a consent judgment in HCCS No 1523 of 2000 between the Appellants and the Respondents as submitted by the Appellant's Counsel. The decree may have affected property but the question is whether it adversely affected the interest of the Appellants in the suit property because the issue was that they were bona fide purchasers for value having bought from the 1st Defendant or whether it was already transferred into their names as beneficiaries of such purchasers. A close examination of the pleadings in the High Court clearly indicate that it is averred that the Respondents in breach of the decree transferred the property to one Tom Luwalira, the 1st Respondent fraudulently.

The decision of the learned trial judge rested on the conclusion that the Appellants were aware of the suit namely High Court Civil Suit 1523 of 2000. I have also deemed it fit to consider the issue of whether the Appellants to this appeal were aware of the suit, the subject of the consent judgment copiously referred to in the judgment of the learned trial judge. As far as the suit from which the appeal emanated arises, the 3rd Plaintiff Afisa Mukasa Namukasa testified as PW1. On being cross examined as to her knowledge and participation in the High Court Civil Suit No 1523 of 2000 this is what she stated:

> I was one of the Defendants. I was not served with the decree. I am not aware about the suit. I am the one who instructed my lawyers to file the current suit. I do not agree to the transfer of the land to Asinansi Zamwanga in the decree. I never challenged the decree.··· I was not a party to the decree.

The statement is clear that she was not aware of the suit. PW1 is not an Appellant in this appeal. When she was re-examined in respect of the High Court Civil Suit No 1523 of 2000, she stated that she was not aware of the said suit and she never attended court in respect of it. She only instructed her lawyers to file the suit from which the current appeal emanates.

PW2 Mr. Wasswa Siraji the 1st Appellant testified in cross examination that he was a party to Civil Suit No 1523 of 2000. Most importantly he testified as follows:

> I learnt about the about consent later in 2015. I went and perused the court record. It is Joseph Kiryowa who represented us (Me, Asifa and Manisula and other Defendants). I was not aware that my sister PW1 knew about the case. I contested the decree by coming to court. I did not consult Mr. Kiryowa about it since I had got a copy of the decree.

PW3 who is now the 2nd Appellant Mr. Mukasa Manisulu was also cross examined about High Court Civil Suit No 1523 of 2000 by Mr. Richard Kiboneka. He testified that he did not know how the case ended. He had been sick for a long time. He further testified that he did not know about the consent transferring the property back to the estate of the deceased. In further cross examination by Nasser Serunjogi, he testified that his name does not appear in the consent decree neither do the names of his co-Plaintiffs appear. Most importantly he was told by his brothers about Civil Suit No 1523 of 2000.

It is therefore clear from the evidence on record that the Appellants were not aware of High Court Civil Suit No 1523 of 2000 in which it is stated that a

consent judgment entered. They were not parties to the alleged consent judgment. PW2 perused the record and established who the lawyer was. However, it is clear from the decree that the lawyer in question did not represent them as he (Mr. Kiryowa the lawyer) only represented Hajati Hawa Nampima. The conclusion is that the Appellants were not part of the decree in High Court Civil Suit No 1523 of 2000. For emphasis, there is no record of a consent judgment between the parties. What is on record is a decree issued by the learned trial judge in that suit. The decree clearly indicates that the matter was coming for final disposal before the learned trial judge.

Most importantly, the Appellants submission is that they were not aggrieved by the decree because it left out transfer of property sold to *bona fide purchasers* for value of the suit property. In other words, the suit property in item No 3 of the decree was not supposed to be transferred into the names of the deceased if it had been sold and even transferred into the names of bona fide purchasers for value (or their beneficiary (s)). The act of transfer of the property into the names of the 1st Respondent therefore occurred not under the express wording of the decree but on the premises that there were no bona fide purchasers for value of the suit property by the time the property was transferred into the names of the Appellants or on the premises that it had not already been transferred. For item 3 of the decree in Civil Suit No 1523 of 2000 provided that:

> Kibuga Block 4 Plot 355 also be transferred from the names of the 1st Defendant into the names of the late Asinansi Nambogga Zamwanguya if not transferred already to bona fide purchaser (s) for value without notice.

Under the terms of the above decree, the transfer to the estate of the deceased of Kibuga block 4 plot 355 depended on whether the property had not already been transferred to bona fide purchasers for value without notice. For that reason, I accept the submissions of learned Counsel for the

Appellant that the problem was not the decree but the alleged acts of the Respondents in transferring the property in the circumstances. In any case, if already transferred the issue of whether the persons the title was transferred to are bona fide purchasers needed to be tried before their titles are cancelled. This is borne out by the pleadings of the parties in the lower court in High Court Civil Suit No 116 of 2015 wherein the Appellants sued the Respondents and from which the current appeal arises. In paragraph 5 of the plaint it is averred that the title was fraudulently issued to the 1st Respondent by the 3rd Respondent. It is also averred that the Plaintiffs had since 1981 been the registered proprietors of the suit property having bought the same from one Hajati Hawa Nampima who was the administrator of the estate of the deceased. Paragraphs 8, 9, 10, 11, 12, and 13 are clear about the cause of action and aver as follows:

> 8.In the year 2000 the 1st Defendant instituted Civil Suit No 1523 of 2000 against a one Hajati Hawa Nampima and 11 other Defendants contesting her administrative powers in respect of the estate of the late Asinansi Nambogga Zamwanguya who had been the original owner of the land and other similar properties.
> 9. The other 10 Defendant were sued in their capacity as purchasers of various properties that had been sold to them by Hajati Hawa Nampima in her capacity as administrator of the estate of the late Asinansi Nambogga Zamwanguya.
> 10. Pursuant to the said Civil Suit No 1523 of 2000 and 2005 the 1st Defendant consented with Hajati Hawa Nampima that the suit land should be re – transferred into the names of the late Asinansi Nambogga Zamwanguya.
> 11. The said consent was reduced into a decree of the court and it was approved by the respective party Counsel and sealed by this honourable court on 16 March 2005. (*A copy of the decree attached marked "C"*).
> 12. The Plaintiff shall aver and contend that by the time of this decree in 2005, the suit land was not available for the transfer into the names of the late Asinansi Zamwanguya since it had way back in 1981 been transferred into the names of the Plaintiffs.

13. Aware of the existence of the decree, the 1st Defendant fraudulently and without any colour of right colluded with the 3rd Defendant and created a fake title to the suit land in 2009. (*Copy of forged title is hereto attached and marked "D"*).

Further it was averred in paragraph 15 that using the fake title, the 1st Defendant fraudulently and without any colour of right sold the property to the 2nd Defendant. They further alleged that the 2nd Defendant had actual and constructive notice of the fraud because the Plaintiffs had in 2004 sold to property comprised in block 4 plots 267 and 588 which property is annexed the suit property and both properties had previously belonged to the estate of Asinansi Nambogga Zamwanguya.

Particulars of fraud were further averred and I do not need to go into that for the moment. The 1st Respondent who was the 1st Defendant *inter alia* averred in the written statement of defence that the Plaintiffs/Appellants have never been registered proprietors of the suit property and what is in possession of the Plaintiffs/Appellants is a forged certificate of title only known to the Plaintiffs/Appellants and not known to the 3rd Respondent. On the other hand, the 1st Defendant/Respondent averred that the Plaintiffs ever since they became aware of the special certificate of title have never produced a duplicate certificate of title to the 3rd Respondent for fear of exposing their forgeries which are apparent on the face of the certificate of title.

For its part the 2nd Respondent claimed to be a bona fide purchaser for value without notice of any defect in title having purchased the property from the 1st Respondent after doing a due diligence of searching for the true ownership at the land registry.

It is clear both from the plaint and the written statement of defence that what was included in the claim was *inter alia* that the 1st Respondent in disregard of the decree in High Court Civil Suit No 1523 of 2000 went ahead and

transferred the property into the names of the deceased when there was an existing title in the names of the Plaintiffs who bought the property from Hajati Hawa Nampima. The real question in controversy therefore is whether the Appellants who were the Plaintiffs in the lower court were bona fide purchasers for value and or the transferees registered as proprietors on the title in terms of the decree. The remedy of the Appellants was not to file an application for review of the decree because they were not aggrieved by the terms of the decree. Secondly, they were not parties to the decree even if it had been reached by consent of the parties. Thirdly, the trial judge tried the issue of which title between the duplicate certificate of title and the special certificate of title was the valid title. Last but not least, the matter did not arise as a consequence of enforcement of the decree because it is alleged that the transfer was fraudulent in disregard of the decree. It was not the decree which transferred the property to the Appellants. The contention is that the decree protected the Appellants from having their property transferred into the names of the estate of the deceased.

In the premises, ground 6 of the appeal has merit and hold that the trial judge erred to hold that the Appellants ought to have applied for review of the decree. In any case, there was no consent judgment that had been adduced in evidence as to bar the Appellants by estoppels. If there was any consent, the Appellants were not party to the consent leading to the decree.

As far as grounds 1, 2, 3, 4 and 5 of the appeal is concerned, it is clear that the trial proceeded on erroneous premises of the provisions of section 46 and 48 of the RTA and section 70 of the RTA which deal with concurrent registration of titles for the same piece of property and the issuance of a special certificate of title respectively. Secondly, it was a matter of evidence as to whether the Appellants were registered proprietors by 1981. The question could have been whether if the evidence was established, that the

title could only be impeached under the provisions of section 176 of the RTA on the ground that they procured registration as proprietors through fraud. I have carefully considered this section 46 of the RTA which deals with concurrent registration.

> **46. Effective date of registration; the duly registered proprietor.**
>
> (1) Subject to section 138(2), every certificate of title shall be deemed and taken to be registered under this Act when the registrar has marked on it—
>
> (a) the volume and folium of the Register Book in which it is entered; or
>
> (b) the block and plot No of the land in respect of which that certificate of title is to be registered.
>
> (2) Every instrument purporting to affect land or any interest in land, the title to which has been registered under this Act, shall be deemed to be registered when a memorial of the instrument as described in section 51 has been entered in the Register Book upon the folium constituted by the certificate of title.
>
> (3) The memorial mentioned in subsection (2) shall be entered as at the time and date on which the instrument to which it relates was received in the office of titles together with the duplicate certificate of title and such other documents or consents as may be necessary, accompanied with the fees payable under this Act.
>
> (4) The person named in any certificate of title or instrument so registered as the grantee or as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate or instrument shall be deemed and taken to be the duly registered proprietor of the land.

Section 46 (1) of the Registration of Titles Act (RTA) deals with the first registration of the title under the provisions of the RTA. In other words, it deals with bringing the land under the RTA. Secondly it also provides for the date and time of registration as being the date and time when the instrument is entered in the register book. Thirdly, it deems when and the instrument registration is deemed to be effectual. This should be read together with

section 48 of the RTA that deals with priority of registration of instruments in case of any conflict between instruments affecting the same interest. Section 48 of the RTA provides as follows:

> 48. Instruments entitled to priority according to date of registration.
>
> (1) Every instrument, excepting a transfer, presented for registration may be in duplicate and shall be registered in the order of and as from the time at which the instrument is produced for that purpose, and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.
>
> (2) Upon the registration of any Instrument Not in duplicate, the registrar shall file and retain it in the office of titles, and upon the registration of any instrument in duplicate, the registrar shall file one original and shall deliver the other, hereafter called the duplicate, to the person entitled to it.

Section 48 (1) of the RTA clearly provides that instruments are entitled to priority according to the date of registration and not according to the date of the instrument. In other words, the instrument registered prior in time takes precedence over the instrument registered afterwards. For emphasis section 48 (1) provides that: *instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.*

It is a resolution of a question of fact to establish whether the Appellants were registered prior in time. The circumstances however, show that the question for the court was whether the title held by the Appellant was a genuine title. Moreover, the instrument from which the 1st Respondent derived title is a decree of the court in HCCS No 1523 of 2000. On the other hand, the instrument envisaged by the provision of the law is an instrument

that affects title and not the title itself. An example of such an interest could be a transfer deed. The conclusion of the learned trial judge was that there were no records of the registration of the Appellants on the title. Having found so, the question of priority of instruments does not arise.

Thirdly, I have also considered the issue of the issuance of a special certificate of title on the premises that the duplicate certificate of title which the Appellant's claim to be in their possession was lost or destroyed. The question that arises is not whether the special certificate of title should not be issued as it was. The actual matter in controversy that I see is that the particulars in the special certificate of title did not include the names of the Appellants as written in exhibit P1 which is the duplicate certificate of title. This was based on the premises that there was no other record demonstrating that the Appellants were ever registered. To hold that the Appellants were registered would resolve the appeal. It is therefore incumbent upon this court to scrutinise the testimony of DW 2 as well as examine the special certificate of title and compare it to the duplicate certificate of title to establish whether the Appellants were ever registered and whether it was erroneous to omit their names from the special certificate of title. It is my finding that this is the crux of the matter in this appeal and ought to have been the question for determination in the lower court.

The above notwithstanding, I have duly considered the provisions of section 70 of the RTA under which the special certificate of title was issued. Section 70 of the RTA provides that:

> **70. Lost grant.**
>
> If the duplicate certificate of title is lost or destroyed or becomes so obliterated as to be useless, the persons having knowledge of the circumstances may make a statutory declaration stating the facts and the particulars of all incumbrances affecting the land or the title to the land to the best of the deponents' knowledge,

> information and belief; and the registrar if satisfied as to the truth of the statutory declaration and the bona fides of the transaction may issue to the proprietor a special certificate of title to the land, which special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it, and shall state why the special certificate is issued; and the registrar shall at the same time enter in the Register Book notice of the issuing of the special certificate and the date of its issuance and why it was issued; and the special certificate shall be available for all purposes and uses for which the duplicate certificate of title so lost or destroyed or obliterated would have been available, and shall be equally valid with the duplicate certificate of title to all intents; but the registrar before issuing a special certificate always shall give at the applicant's expense at least one month's notice in the Gazette of his or her intention to do so.

All that the registrar needed was information that the duplicate certificate of title was lost or destroyed of obliterated and had become useless whereupon after issuing the necessary statutory notice in the Gazette, he would issue and another certificate of title called a special certificate of title. Without going into the issue of inconsistencies in dates as submitted by the Appellants' Counsel, the issuance of a special certificate of title does not change the particulars in the register and so the issue before the court was not about the propriety of the special certificate of title but the issuance of the title in the names of another person other than the Appellants. Section 70 of the RTA requires the registrar to issue a special certificate: *which special certificate shall contain an exact copy of the certificate of title in the Register Book and of every memorandum and endorsement on it.* It was therefore incumbent upon the Appellants to prove that the property had been registered in their names and a special certificate of title was erroneously issued in the names of another person and did not contain every memorandum and endorsement on it.

As a matter of fact, DW2, the Commissioner for land registration was clear that the duplicate certificate of title in possession of the Plaintiffs (exhibit P1) appeared to be a genuine document. On being cross examined by Mr. Munungu about the special certificate of title, he stated that the white page tallies in terms of entry with a special certificate of title that was lost as explained by the applicant. He stated that the dates tally with the owner's copy in possession of the bank. At this stage it is important to note that the encumbrances of DFCU bank on the special certificate of title were registered in the year 2010. They were registered after the issuance of a special certificate of title. DW 2 further admitted that it was not the 1st title meaning that there were earlier titles. He further testified that there was a substitute title which had been made in which the registered owner was Asinansi Zamwanguya. He noted that one Mr. Kyeswa and Tom Luwalira were registered as administrators of the estate of the deceased on 15th of May 2009. The original white page showed that the letters of administration were issued in 1997 and not 1887 as shown in the registration. Most importantly he noted that the entries, seals et cetera on the duplicate certificate of title exhibit P1 appear to be genuine and was issued in 1981. He only handled the transaction regarding the special certificate of title on the basis of documents that were available to him at the time. This is what DW2 stated:

> PEXH1 looks like a genuine title. The entries, the seal et cetera appear to be those of the office of titles and generally the document does not reveal forgery. It is in respect of the Block 4 Plot 355. It shows it was issued in 1981. I handled the transaction regarding the special certificate of title on the basis of documents that were available to me at the time. PEXH 1 is in the respect of the same land. The actions of the office of titles in respect of substitutes, special certificates and registration of administrators transferring to the current owners – was based on the records available at that time. While issuing a substitute to replace a lost original registry copy, reliance is on record that can be ascertained. The records that could be ascertained were that Asinansi Zamwanguya was the registered

owner. Any evidence to the contrary is within powers of court to rectify. The Commissioner has powers to rectify but the matter is now before court.

In re-examination he testified that the register shows that Asinansi Zamwanguya (the deceased) was the registered owner. The decree admitted in court however shows that the registered owner of the property was the 1st Defendant in High Court Civil Suit No 1523 of 2000 namely one Hajati Hawa Nampima and the terms of the decree required the property to be transferred back into the names of the deceased if it was not already transferred into the names of a bona fide purchaser for value. In other words, the white page as well as the special certificate of title issued which reflects the white page does not have any record of what past registrations were before May 2009 when the 1st Respondent was registered on the title. This is very strange in light of the fact that the transfer into the names of the deceased was made on the basis of a decree. DW1 Mr. Tom Luwalira in his written testimony that was admitted in evidence as his testimony stated as follows in paragraphs 1 up to 7 of his statement:

1. That I am an adult male of sound mind and a resident of Mengo, Church Zone in Kampala District.
2. That I profess the Christian faith and I am the 1st Defendant in the above Civil Suit.
3. That I was one of the Plaintiffs in High Court Civil Suit No 1523 of 2000: Tom Luwalira & another versus Hajati Hawa Nampima & 10 others.
4. That the said suit was concluded on 16th of March, 2005 when I entered into a consent judgment with the Defendants.
5. That under clause 3 of the consent decree, it was expressly provided that:

   Kibuga Block 4 Plot 55 also be retransferred from the names of the 1st Defendant into the names of the late Asinansi Nambogga Zamwanguya if not transferred already to bona fide purchaser (s) for value without notice.

6. That after the consent decree, I went to the lands office in Kampala to find out who was the registered proprietor of the land comprised in Kibuga block 4 plot 355 so that I could give effect to the terms of the consent decree.
7. That upon search in the Lands office, I found that Asinansi Nambogga was still the registered proprietor.
8. That was advised by the registrar of titles to apply for a special certificate of title since I did not know the whereabouts of the duplicate certificate of title which was originally issued in respect of the suit land.

On cross examination DW1 testified that the title was reregistered in the names of the deceased in 2009 according to the decision of the judge in 2005. He was applied for a special certificate of title which was issued on 24th of February 2009. On further cross examination by Counsel Roscoe Iga DW1 testified that he was not the one who carried out the search but it was his lawyer who handled the transaction for him. He decided to transfer the property into his names because his co-administrator had passed away. On the title he is registered as an administrator and later as owner who sold the land to the 2nd Defendant (who is the 2nd Respondent).

According to DW2 the registration of the deceased was made on the basis of available information. I wish to point out that other available information was available to the learned trial judge and the time of the hearing.

The question of fact which remained was whether indeed other persons had been registered on the title deed whose entries were not in the register were not in the special certificate of title exhibit D1. Before I examine the respective certificates of title, I have considered the provisions for the issuance of a substitute certificate of title under section 72 of the RTA which provides as follows:

72. Copy of lost or destroyed certificate.

> If any original certificate of title is lost or destroyed or so obliterated as to become illegible, the registrar may cause a copy of it to be prepared and to be endorsed with all such entries as were upon the original so far as they can be ascertained from the records of the office and other available information and shall make and sign a memorandum upon the copy stating that it is a substitute to be used in place of the original, and what has become of the original so far as known or supposed, and from the date of the copy being so signed it may be bound up in the Register Book and used in place of the original for the purpose of dealings.

Upon the issuance of a substitute certificate of title, the information as far as can be ascertained should be the same as that of the original certificate in the register. This is clear from section 72 of the RTA which provides inter alia that the registrar upon an application for a substitute certificate of title shall: *cause a copy of it to be prepared and to be endorsed with all such entries as were upon the original so far as they can be ascertained from the records of the office and other available information.*

It would have been sufficient for the Appellants to prove that the property had been purchased in 1981 from the administrator of the estate of the deceased and had been transferred into their names and was therefore not available for reregistration into the names of the deceased. However, the matter proceeded on the premises of the issuance of a special certificate of title that could have replaced an earlier certificate of title, the duplicate having been lost and secondly on the issue of whether the duplicate certificate of title was issued earlier in time and the special certificate of title was a concurrent title. It would have been sufficient to establish whether the terms of the decree did not apply to the suit property by establishing that the Appellants were bona fide purchasers for value without notice or had acquired title even before the suit was filed. Moreover, the Appellants were stated to be registered proprietors and what needed to be proved *inter alia* was whether they were registered proprietors or whether the certificate of

title they held was a genuine one. For emphasis, the decree in High Court Civil Suit No 1523 of 2000 did not vest the suit property into the names of the deceased if it could be established that the property had been transferred to a bona fide purchaser for value. Was the title a forgery?

DW 2, the Commissioner for land registration testified that the title appeared to be genuine. There were however no records in the land registry about the entries which were in the duplicate certificate of title exhibit P1. The outcome of the suit primarily turned on the finding of the learned trial judge that there was no evidence in the records of the 3rd Respondent showing that the title of the Appellants existed at all. Secondly, the decision turned on whether the Appellants ought to have applied for review of the decree.

I have carefully considered the testimony of DW2 Mr. Nyombi, the Commissioner for land registration who was examined on the matter. It is clear that he thought that the register could be rectified (in light of exhibit P1) if the matter was in the hands of the Commissioner for land registration however it was in court and it was up to the court to rectify it.

At the hearing of this appeal, this court allowed the Appellants to adduce additional evidence in support of the appeal. Before considering the additional evidence, it is incumbent upon the court to examine the exhibits adduced before the trial court. Exhibit P1 shows that on 25th September, 1981 under Instrument No KLA 100084, Kibuga block 4 plot 355 was registered in the names of Hajati Hawa Nampima. This is consistent with the decree in HCCS No 1520 3/2000 and in which clause 3 of the decree was to have **the property transferred back to the estate of the deceased if it had not already been transferred into the names of bona fide purchasers by the 1st Defendant**. It is therefore clear that the 1st Defendant in HCCS No 1523

of 2000 was considered to be the registered proprietor of the suit property and exhibit P1 confirms this fact.

Secondly, exhibit P1 shows that on 28th October, 1981 by Instrument No KLA 100433 Afisa Namukasa, Silagi Wasswa and Haji Manisuli Mukasa were registered jointly as proprietors/transferees of the suit property namely Kibuga Block 4 Plot 355. If the title is a genuine title, then it could only be impeached on proving in a court of law that it was registered fraudulently. For emphasis DW-2 the Commissioner for land registration said that the seal and the stamps on the title appeared to be genuine.

Thirdly, exhibit P1 shows that there was an encumbrance of a lease on the title deed dated 28th of November 1966 under Instrument No KLA 46260 showing that the property was leased to one Emmanuel Mutakayana. The lease was cancelled by re-entry on 26th of November 1981 by Instrument No KLA 210706.

Fourthly, exhibit D1 which is the special certificate of title on the face of it shows that it was registered in the name of the deceased on 24th February, 2009 under Instrument No KLA 406548. According to the testimony of DW1, this was pursuant to the decree of the court. However, from whose names was it transferred back from? Subsequently, on 15th of May 2009 it was registered under Instrument No KLA 415459 in the names of **Yoswa Kyeswa & Tom Luwalira as administrators of the estate of Asinansi Nambogga.** On the same day on the 15th of May 2009 it was registered in the names of the 1st Respondent to this appeal by Instrument No KLA 415460. Subsequent to the registration of the 1st Respondent several other encumbrances by DFCU bank Ltd were registered on the title deed the last of which was registered on 15th January, 2016. There is no encumbrance of the leasehold of 1966 on the title.

Going back to the testimony of DW2 the acting Commissioner for land registration, it is clear that the title does not contain any details before the year 2009. Consequently, the registration of the 1st Defendant in HCCS No 1523 of 2000 namely Hajati Hawa Nampima was not reflected. This is contrary to section 72 of the RTA quoted above. Secondly, the registration of the leasehold encumbrance of 1966 is also not available in the encumbrance page contrary to section 72 of the RTA.

Last but not least, with leave of court the Appellant adduced in evidence the leasehold certificate of title which was originally in the names of Emmanuel Mutakayana registered in November 1966 under Instrument No KLA 46260 as indicated in the encumbrance page of the mother title and duplicate certificate of title exhibit P1. Additionally, the leasehold certificate of title shows that it was a lease of 49 years with effect from 1st of January 1966. It was transferred to the Muslim World League on 12 October 1992 under Instrument No 254443. The lease agreement itself shows that it was granted by the deceased Asinansi Zamwanguya to Mr. Emmanuel Mutakayana and the agreement was duly registered. Also, in evidence is a letter written by Messrs. Sendege Senyondo and company advocates dated 6th April 2010 addressed to the director World Muslim League indicating that the above-described land had been leased by the Mailo owner to Mr. Emmanuel Mutakayana and that they had been registered as new lessees without consent of the landlord. Consequently, the Mailo owner filed High Court Civil Suit No 266 of 2009 for cancellation of the lease agreement for breach of a fundamental covenant. Also adduced in evidence is the lease agreement between the Muslim World League and the 2nd Respondent by which the Muslim World League agreed to lease the property to the 2nd Respondent to this appeal with effect from February 2005.

From the testimony of DW2, the acting Commissioner for land registration, the information about the lease was missing from the available records. In other words, the available records contain the information that only had the 1st Respondent as the registered owner after the estate of the deceased.

All the evidence points to the authenticity of exhibit P1 which has an encumbrance of the lease title issued by the original Mailo owner. On the balance of probabilities, the evidence of the authenticity of exhibit P1 is more credible than the testimony of DW1 who stated that the property was registered in the names of the deceased by 2009. In the very least, the record should have shown that the property was registered in the names of the 1st Defendant in HCCS No 1523 of 2000 one Hajat Hawa Nampima. If the property was not registered in the names of the 1st Defendant as indicated above, and was registered in the names of the deceased, it was not necessary to use the decree in HCCS No 1523 of 2000 and all the 1st Respondent needed to do was to apply to be registered as an administrator of the estate upon revocation of any previous letters of administration granted to someone else.

It follows that when the special certificate of title was issued by the Commissioner for land registration, it ought to have included the Appellants as the registered owners and all other entries in exhibit P1. It also proves that the registration of the estate of the deceased was irregular and unlawful. The fact that the records were incomplete does not confer title on the estate of the deceased. The property had already been registered in the names of the Appellants in 1981 as the Mailo owners after it had been registered in the names of the 1st Defendant in HCCS No 1523 of 2000 Hajati Hawa Nampima. Failure to bring up the title when there was an application for a special certificate of title cannot take away the fact of registration which ought to be in the records of the land registry. Even the special certificate of title ought

to have all the details. Moreover, the special certificate of title was issued before the transfer of the property into the names of the 2nd Respondent. It was firstly issued in the names of the deceased and then with the 1st Respondent and another as administrators of the estate. Most importantly, the 2nd Respondent purported to rent the premises from a leasehold owner at a certain stage. In conclusion exhibit D1 could not lawfully replace exhibit P1 because it does not have the same particulars and I agree with the submissions of the Appellants Counsel.

In the premises while ground one of the appeal cannot be faulted on a matter of law that a special certificate of title replaces the lost certificate of title, the holding does not resolve the dispute. On the other hand, the correct holding should have been that the special certificate of title ought to have contained the names of Hajati Hawa Nampima and the Appellants as the successor transferees in title inclusive of all other entries that had been registered on the title. Had that been done, the 1st Respondent would have no mandate whatsoever to move the registry of lands to register the property in the names of the deceased on the basis of the decree in High Court Civil Suit No 1523 of 2000. Secondly, the holding that the special certificate of title replaced the duplicate certificate of title is also erroneous because the special certificate of title ought to have included the names of the Appellants and therefore there would have been no transfers as occurred to the Respondents. These two certificates of title were not two titles but the same titles contained in two different documents one being the duplicate certificate of title and another being the special certificate of title. The documents ought to contain exactly the same information.

Grounds 1 and 2 of the appeal are allowed. For emphasis on ground 2 of the appeal, a special certificate of title does not replace a duplicate certificate of title in the particulars. It only physically contains the same information in

another certificate of title called the special certificate of title. It is issued in place of the lost duplicate certificate of title. Technically it is not a replacement of title but of the owners copy of the certificate of title issued in another document with exactly the same information on the footing that the duplicate certificate of title is lost or destroyed.

Grounds 3 & 5 proceeded on the same erroneous premises. The special certificate of title should have the same entries as that in the duplicate certificate of title which is lost or cannot be found or is destroyed. It does not replace the duplicate as far as particulars are concerned but is only recognised as the current owners copy of the certificate of title, the duplicate having got lost. Thirdly, ground 3 of the appeal is allowed because the special certificate of title even if validly issued, contain invalid entries such as the names of the 1st Respondent and the 1st Respondent had no authority or power or title to transfer the title into the names of the 2nd Respondent.

In relation to ground 4 of the appeal, the learned trial judge had materials showing that the special certificate of title omitted material entries. DW2 only testified about existing records at the time he handled the matter. Evidence before the learned trial judge showed that the registry record was incomplete. The decree in HCCS No 1523 of 2000 confirms in the very least that the property was in the names of the 1st Defendant in that suit. Ground 4 of the appeal is allowed.

With regard to ground 5, there were procedural irregularities in not including all the records of the land registry in the special certificate of title. Ground 5 of the appeal is therefore partially allowed in that the special certificate of title purported to issue in the names of a deceased person whose estate had passed on proprietorship interest to another transferee in title. The transferee in title passed on the title to the Appellants in 1981. Last but not least, the

decree of the High Court which was used did not authorise the transfer of the property from the Appellants back to the estate of the deceased and any transfers as made was erroneous.

The above holding also resolves ground 8 of the appeal which is that:

The trial judge erred in law and fact when he held that the special certificate of title could only be impeached in proving fraud.

It was erroneous not to include the Appellants as the registered proprietors. Had the learned trial judge found that the Appellants were the registered proprietors based on the testimony of DW2 who found their duplicate certificate of title to be genuine with no evidence of forgery, he would have found that the names of the 1st Respondent was erroneously registered after the erroneous registration of the name of a deceased person contrary to the decree of the High Court in HCCS No 1523 of 2000. The Appellants title could only be impeached in a suit where it is alleged that they were registered fraudulently. However, HCCS No 1523 provided that the property should not be transferred if it has already been transferred in the names of bona fide purchasers.

The learned trial judge had evidence which showed that the title had been transferred into the names of the Appellants by 1981. This evidence was not rebutted by the testimony of DW2, the Commissioner for land registration. On the contrary DW 2 testified that he found that the title exhibit P1 appeared to be genuine even though he did not have the record in the registry. DW2 further testified that the record could be rectified but the matter was in court. He corroborated the testimony of the Appellants that they had a genuine title and the property had been transferred into their names in 1981. It was therefore erroneous to find that there was no evidence in the registry. The evidence had been adduced in court and the

Commissioner for land registration could not fault it. In the premises, ground 8 of the appeal is allowed.

That takes me to ground 7 on the issue of whether the 2nd Respondent is a bona fide purchaser for value without notice.

Ground 7: The learned trial judge erred in law and fact when he held that the 2nd Defendant is a bona fide purchaser for value without notice.

First of all, the predecessor in title of the 2nd Respondent did not have a lawful title to pass to the 2nd Respondent. The 2nd Respondent derived title from a decree which did not command his registration on the title because the Appellants were already registered on the title. The special certificate of title contained unlawful entries purporting to enforce a High Court decree and omitted to include material entries showing a different proprietorship of the suit property. The only reason that the transfer was made is the concealment of the registration of the Appellants. The decree itself is self – explanatory and therefore the 1st Respondent was erroneously and unlawfully registered as the proprietor of the suit property.

In any case, evidence has been adduced showing that the 2nd Respondent purported to rent the premises from a registered lessee of the suit property. The records in exhibit P1 which show that there was a lease on the property and also indicated that the Appellants were the registered proprietors. The only other record testified about by DW2 on the basis of which the property was sold to the 2nd Respondent did not have any lease encumbrance on the suit property. The title had literally been mopped clean of encumbrances that had existed on it.

I have duly considered the fact that this court reserved its reasons for allowing additional evidence to be adduced by the Appellants. The discretion

of the court to allow the taking of additional evidence is enabled by rule 30 of the rules of this court which provides that:

> 30. Power to reappraise evidence and to take additional evidence.
>
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and
>
> (b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.
>
> (2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent.

The question was whether there was sufficient reason to take additional evidence. We allowed the Appellant to adduce additional evidence on the basis of sufficient reason. The evidence intended to be adduced was documentary proving the existence of a lease which was also an encumbrance on exhibit P1 that was already in evidence. The Respondents ought to have been aware of these encumbrances and did not suffer any prejudice by its production. Further, the interest of justice is not to shut out the Appellants who were the registered proprietors of the property by the time the special certificate of title issued in the names of the deceased in May 2009 was issued. There was therefore sufficient reason to produce the additional documents to further consider the authenticity of exhibit P1.

Finally, DW3 Mr. Yeri Apollo Ofwono, the managing director of the 2nd Respondent testified on behalf of the 2nd Respondent in the High Court. He further testified that he was directly involved in the acquisition of the suit

property. In his written testimony adduced in evidence, he was notified by the 1st Defendant who is also the 1st Respondent to this appeal that he intended to sell the property. He was shown a special certificate of title and noted that the particulars in the special certificate of title corresponded with that on the white page. Secondly, there was no encumbrance on the title deed. Thereafter the property was transferred into the names of the 2nd Respondent. He noted that the 2nd Respondent was not aware of or privy to all allegations levelled against the 1st Respondent by the Appellants in the High Court.

On being cross examined about this testimony by Mr. Munungu, DW 3 did not recall when they started renting the suit property. He thought it could have been like two years back before they acquired the suit property. He admitted having rented the premises from Muslim World League.

Evidence adduced in court in the testimony of Wasswa Siragi, the 1st Appellant demonstrates that the 2nd Respondent had rented the leasehold in the names of Muslim world league, the registered proprietors of the lease title. The 2nd Respondent was therefore aware of the encumbrances on the title deed. The Muslim World league had been registered on 12th October, 1992. By 1992 there was no Mailo land but a leasehold by conversion of Mailo Land of 99 years from 1975. The lease was therefore a sublease. In the Constitution of the Republic of Uganda 1995, Mailo tenure was reintroduced. Secondly, the 2nd Respondent rented the premises with effect from 1st February, 2005 from the Muslim world league. It was therefore not true that the 2nd Respondent was not aware of any encumbrances in the suit property. On the contrary by 6th April, 2010, Messrs. Sendege, Senyondo & company advocates wrote a letter to the Director Muslim World League copied to the 2nd Respondent that they had purported to sublet the premises to the 2nd Respondent without consent of the registered owner. Thereafter they bought

the property from the 1st Respondent. It was therefore the concealment of facts to show that the property had no encumbrances and that the special certificate of title contained all the entries in the registry. The 2nd Respondent ought to have been aware of the lease entries in the minimum even if they had been cancelled.

It is therefore my finding that apart from the 1st Respondent having no title to pass over to the 2nd Respondent, the 2nd Respondent was not a bona fide purchaser for value without notice of the defect in title of the 1st Respondent having deliberately concealed from court past transactions relating to the suit property.

In the premises I would allow the appeal and grant the reliefs prayed for as hereunder.

The Appellant prayed for general damages, mesne profits and interest on the mesne profits and general damages at commercial rate from the date of filing the suit until payment in full as well as for the costs of the suit. These are the remedies the Plaintiff sought in the trial court but the Plaintiff's suit had been dismissed with costs.

As far as mesne profits are concerned, the evidence shows that the property had at one time been rented to the 2nd Respondent by the Muslim World League. The Muslim World League is not a party to the suit or the appeal.

Secondly, in the circumstances of this appeal, the testimony of PW1 the 3rd Plaintiff in the High Court clearly shows that she never occupied the suit property and had acquired the land through her parents. In other words, it was registered in her names without her participation. In her witness statement she stated that her father purchased the suit property from Hajati Hawa Nampima and registered in their names. According to the record, on 24th April 2016 she was 49 years old. By deduction she was born in 1967 if 49

years is subtracted from 2016. That means that by 1981 she was 14 years old and a minor. Secondly, PW2 who is the 1st Appellant to this appeal was stated to be 48 years by 13th of April 2016 meaning that he was about 13 years old. He is a stepbrother of PW1 according to the record. On the other hand, PW3 who is the 2nd Appellant to this appeal was 41 years old in 2016. That means that was born around 1975 and was about 6 years old in 1981. This therefore means that the Plaintiffs/the Appellants to this appeal were minors in 1981 when the property was acquired in their names. PW4 testified that the rent for the suit property was about US$2067 per month. The grievance of the Appellants cannot be against the 2nd Respondent per se since the 2nd Respondent purported to derive title firstly from having rented the premises from Muslim world league and secondly from the 1st Respondent.

I have carefully considered the issue and note that the 2nd Respondent was already on the premises and regularised the tenancy with the 1st Respondent. As far as the tenancy is concerned, I cannot find that the 2nd Respondent was initially in illegal occupation of the suit premises. They had been on the premises with the permission and on the basis of a tenancy agreement with the registered proprietor of a leasehold title before cancellation of the leasehold title by the action of the 1st Respondent. Thereafter they were made to pay rent to the 1st Respondent.

In the premises I would grant the following reliefs:

1. The decision and orders of the High Court are hereby set aside and substituted with this judgment.

2. A declaration issues that Exhibit D1 being the special certificate of title registered in the names of the 2nd Respondent as proprietor is null and void.

3. The duplicate certificate of title exhibit P1 is the only valid title to the suit property.

4. This court cancels and directs the registrar to cancel the special certificate of title from the register as well as cancel from the register entries of the Asinansi Zamwanguya Nambogga (deceased), the 1st Respondent and the 2nd Respondent made in 2009 and 2010 respective and restore the register to the position up to when the Appellants were the registered proprietors in 1981.

5. A permanent injunction issues restraining the 1st and 2nd Respondents from interfering with the Plaintiff's ownership of the suit property.

6. The 2nd Respondent shall give vacant possession of the suit property to the Appellants.

7. The 1st Respondent shall pay a sum of US$2067 per month with effect from May 2010 up to the date of judgment of the High Court on 4th of May 2017 to the Appellants as mesne profits.

8. General damages are awarded against the 1st Respondent and the 2nd Respondent jointly and severally in the sum of Uganda shillings 50,000,000/=.

9. The 3rd Defendant who is the 3rd Respondent to this appeal did not carry out its duties leading to loss. It is declared that the 3rd Respondent was negligent and committed breach of its statutory duties by the issuance of a special certificate of title without the relevant entries in

the register and general damages are awarded against the 3rd Respondent for breach of statutory duties in the sum of Uganda shillings 10,000,000/=.

10. I would award interest on all the above awards from the date of judgment to the date of payment at the rate of 10% per annum.

11. The appeal of the Appellants succeeds with costs in this court and in the lower court.

Dated at Kampala the 12th day of June 2020

Christopher Madrama Izama

Justice of Appeal