

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

**CIVIL APPEAL NO 19 OF 2010**

**ANDREW KISAWUZI)..... APPELLANT**

**VERSUS**

**TOM WALUSIMBI)..... RESPONDENT**

**BEFORE HON. JUSTICE CHRISTOPHER MADRAMA**

**JUDGMENT**

This judgment arises out of an appeal from the judgment and Decree of the Chief Magistrates Court at Mengo dated 26<sup>th</sup> of August, 2010 in civil suit No. 666 of 2009. The chief magistrate had dismissed the plaintiff's action in the Magistrates Court. The plaintiff had filed an action against the defendant/respondent for conversion, for a declaration that the plaintiff is the lawful owner of the motor vehicle registration number UAL 688 F whose value was stated to be over Uganda shillings 24,000,000/=, a declaration and that the motor vehicle be delivered or surrendered to the plaintiff, general damages for conversion, interest at 24 per cent from the date of institution of the suit until payment in full and costs of the suit. The appeal is against the whole of the decision on the following grounds of appeal contained in the memorandum of appeal namely:

1. The learned chief magistrate erred in law and fact when he held that there was a valid sale agreement of motor vehicle No. UAL 688 F.
2. The learned chief magistrate erred in law and fact in holding that the respondent is the rightful owner of the suit vehicle.
3. The learned chief magistrate erred in law and fact in holding that the appellant was precluded by his conduct from denying the seller's authority to sell the suit vehicle.
4. The learned chief magistrate erred in law and fact in dismissing the appellant's suit.
5. The learned chief magistrate erred in law and fact in giving judgement to the respondent on his counterclaim.
6. The learned chief magistrate erred in law in failing to evaluate the evidence on record.

The appellant seeks orders for the respondent to pay to the appellant Uganda shillings 25,000,000/= being the value of the suit vehicle, interest on the amount from the date of judgment dated 26<sup>th</sup> of August, 2010 until payment in full, general damages and interest on general damages from the date of judgment until payment in full.

At the hearing of the appeal the appellant was represented by learned counsel Dan Wegulo while the respondent was represented by learned Counsel David Kaggwa. Counsels further agreed to address the court in written submissions.

In the written submissions, the respondents counsel raised a preliminary objection on the competence of the appeal.

Learned Counsel for the respondent submitted on a preliminary point that the appellant failed to take an essential step in conducting the appeal. This is because the memorandum of appeal was filed in this honourable court on 30 August 2010 and the record of proceedings of the court was ready for collection on 21 October 2010. The appellants counsel did not serve the essential documents upon counsel for the respondent until 29 August 2012. Under order 43 rules 1 of the Civil Procedure Rules, appeals to the High Court are commenced by memorandum of appeal. Secondly under order 43 rule 11 of the Civil Procedure Rules, notice of the day fixed for hearing of the appeal shall be served on the respondent or on his or her advocate in the manner provided for the service on a defendant of the summons to enter appearance; and the provisions applicable to the summons, and proceedings with reference to the service of the summons, shall apply to the service of the notice. Also under order 43 rules 12 of the Civil Procedure Rules, the notice to the respondent shall declare that if he or she does not appear in the High Court on the day so fixed, the appeal may be heard ex parte.

Respondents counsel submitted that the only pleading commencing an appeal in the High Court is a memorandum of appeal and provisions applicable to summons in the commencement of an ordinary suit applied to service of the notice for hearing an appeal. Under order five of the civil procedure rules service of summons must be accompanied with the plaint. It therefore goes without saying that the notice to the respondent for the hearing of the appeal under order 43 of the civil procedure rules must be accompanied with the memorandum of appeal and record of proceedings. The appellant did not serve the documents within the prescribed time. This is because the memorandum of appeal was lodged on 30 August 2010. By 21 October 2010, the chief magistrate had certified the record of proceedings and was ready for collection by the appellants counsel. By the time the appeal came for hearing, to hear the evidence of Mwase Geoffrey on 22 August 2012, the respondent and his counsel had not been served with a memorandum of appeal and record of proceedings. Furthermore the record of proceedings shows that on 22 August 2012, after the appellants counsel had closed his case, he applied to file written submissions on appeal yet he knew well that he had not served the substantive appeal upon the respondent. Consequently David Kaggwa, counsel for the respondent notified the court that the respondent had not been served with the record of appeal which includes the

memorandum of appeal. Moreover there is no affidavit of service to prove service of the memorandum of appeal and the record of proceedings on the respondent. The appellants counsel admitted failure to serve the respondent with memorandum of appeal and record of proceedings. It is unconstitutional for the appellant to file his submissions before the actual appeal was served upon the respondent.

From the time the memorandum of appeal was lodged in the High Court on 30 August 2012, it was not served upon the respondents counsel until 29 August 2012, a period of exactly 2 years. An appeal to the High Court should be lodged within 30 days from the date of the decision; the appellant should also notify the respondent within the said period of lodgement. The respondent informed court that the respondent had not been served and the appellant belatedly served the memorandum of appeal after 730 days from the date of lodgement of the memorandum of appeal. Under article 21 (1) of the Constitution of the Republic of Uganda, or persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Article 28 (1) of the Constitution also guarantees any person a fair, speedy and public hearing before an independent and impartial court or tribunal established by law in the determination of civil rights and obligations.

Learned counsel relied on the case of Sheik Dawood versus Keshwala and sons civil appeal number one of 2009 for the proposition that the rules of the appellate court will apply where there is no specific rules for the service of appeals lodged in the High Court. He contended that service of the memorandum ought to have been effected by the appellant within 21 days as prescribed by order 5 of the Civil Procedure Rules. He referred to the case in Sheik Dawood versus Keshwala and sons for the proposition that service of the notice of motion which was the form of the appeal under the Act was not a formal requirement but a principle of fundamental justice.

Learned counsel contended that the omission to serve the respondent was greatly prejudicial. This is because the appellant had 751 days to prepare for his appeal while the respondent had a limited period of time to prepare for the appeal. Learned counsel further contended that the appellants counsel sound him with a written submissions on 12 September 2012 and it had after 26 September 2012 to read, understand and analyse 112 pages of the record and submissions, discuss with his client and file his submissions in court within a mere 14 days. He concluded that the respondent in this appeal has not received equal treatment before the law compared with the appellant, in contravention of article 21 and 28 of the Constitution the Republic of Uganda. Referring to the judgement of this court in MM Sheik Dawood versus Keshwala and sons (supra), he prayed that the appeal be dismissed for failure to serve the appeal/record of appeal and proceedings for two years. He prayed that the appeal is struck out with costs under order 43 rules 11 and 12 of the Civil Procedure Rules for want of the notice of appeal.

In reply the Appellant's counsel disagreed and submitted that the appellant was not in breach of any of the provisions relating to the filing and service of the appeal in this honourable court.

Counsel submitted that under order 43 rule 11 of the civil procedure rules, in the event that the appellant fixes a date for hearing the appeal then such an appellant is obliged to take notice of the day fixed for hearing the appeal and serve the same on the respondent or counsel for the respondent in the manner provided for service on the defendant of a summons to enter appearance. Counsel submitted that on 22 August 2012 upon completion of the proceedings in which the appellant adduced additional evidence on appeal or the leave of court, or parties unanimously agreed that:

- The Appellant compiles a record of appeal not as a legal requirement as the relevant law does not provide for a record of appeal but as a matter of prudence and good practice, files and serve the same on counsel for the respondent by 29 August 2012.
- The appellant files in court written submissions and serves the same on the respondent by 12 September 2012.
- The respondent files in court written submissions and serves the same on the appellant by 26 September 2012.
- Any rejoinder would be filed by 3 September 2012.
- Judgment would be on the 26th of October 2012.

Counsel contended that the provisions of law submitted by the respondent is not applicable to the instant appeal for the result that the appellant did not take out the notice of the day fixed for hearing of the appeal as the procedure adopted by the court and the directive given obviated the need to take out the said notice.

Counsel contended that the notice of hearing of the appeal was prematurely taken out by counsel for the respondent and served on counsel for the appellant according to the affidavit of Godfrey Ssebumba, a process server of the respondent. The matter was previously handled by honourable Justice Irene Mulyagonja who could not proceed for reasons that this honourable court had not received the typed and certified copy of proceedings and judgement from the trial court. Counsel submitted that the respondent was ready and prepared proceed with the appeal in February 2011 when he secured a hearing date, took out a hearing notice and effected service on the appellant. Alternatively counsel submitted that the appellant is not in default of serving the respondent with the appeal within the prescribed time. Counsel contended that even if this was the case, no injustice was occasioned to the respondent and therefore failure to serve was not fatal to the appeal. The respondent was ready to proceed with the appeal in February 2011 when he took out and served the hearing notice on the appellant. Additionally in the proceedings before the court dated 22nd of August 2012 counsel for the respondent consented to a timetable for disposal of the appeal and was afforded reasonable time to prepare his appeal. Learned counsel agreed with the decision of the court in MM Sheik Dawood versus Keshwala and sons civil appeal number 1 of 2009 as good law. He avers submitted that the facts in that case are easily distinguishable from the current appeal in that in that case the appellant failure to serve the respondent with the notice of motion of an appeal from the decision of the registrar of trademarks. The appeal was under the

trademarks act and the rules there under which prescribes time. An adjournment had been granted by the court to enable service. In the instant appeal the appellant did not take out a notice of the day fixed for hearing of the appeal, the parties willingly agreed to the compilation of the record of appeal and filing of written submissions with regard to a time frame and gave all parties adequate time for preparation. Learned counsel invited the court to rely on the case of Banco Arabe Espanol versus Bank of Uganda SCCA number 8 of 1998 judgement of Oder JSC. In that case the principle was that the substance of all disputes should be investigated and decided on the merits and errors and lapses should not necessarily debar a litigant from the pursuit of his rights. It did not mean that the rules of procedure should be disregarded that each case must be decided on the basis of its own circumstances. Counsel also denied in the case of Col Dr Besigye Kiiza versus Museveni Yoweri Kaguta and electoral petition, electoral petition number 1 of 2001 where honourable justice Benjamin Odoki CJ observed that a liberal approach should be adopted pursuant to article 126 of the constitution of the Republic of Uganda in the sense that courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice and should not defeat it. In Akon International vs. Kasirye Byaruhanga And Co Advocates [1995] volume 3 KALR at page 91 honourable justice Musoke Kibuuka held that procedural defects can be cured and article 126 (2) (e) of the constitution. The test applicable for the court to consider is whether the irregularity is serious enough to prevent the court from hearing the application and determining it on its own merits. Consequently counsel prayed that the preliminary point of law raised by the respondent is overruled and the court be pleased to exercise its appellate jurisdiction and entertain the appeal on merits.

On the merits of the Appeal, the appellant's case is that someone called Joseph stole the suit vehicle from the appellant and had no authority whatsoever to deal with the suit vehicle and could not have passed any title to the respondent. In the lower court the respondent filed a written statement of defence and counterclaims the essence of the defence being that the respondent bought the vehicle in good faith without any notice of fraud. The respondents counterclaim was based on controversial and was for orders that a declaration been made that the Contra plaintiff/respondent is the rightful owner of motor vehicle registration number UAL 688F Land Rover Free Lander. An order that the counter defendant/plaintiffs lenders and delivers the motor vehicle to the counter defendant/respondent. General damages and costs of the suit. It was an agreed fact that the vehicle was registered in the names of the appellant. The issues framed where as follows:

1. Whether the plaintiff or the defendant owns the vehicle in question.
2. Remedies available to the parties

When the trial magistrate delivered judgement in favour of the respondent the appellant was dissatisfied and appealed to this court.

Counsel for the appellant submitted that the duty of the first appellate court is to evaluate all the evidence adduced before the trial court and arrive at its own conclusions as to whether the findings of the trial court as supported by the evidence. He made reference to the case of *FJK Zabwe vs. Orient Bank and five others (2007) HCB* volume 1 page 24 at page 27. Learned counsel invited the court to consider the additional evidence of Geoffrey Mwase adduced before this court with the leave of court.

**Ground one on whether the learned chief magistrate erred in law and fact when he held that there was a valid sale agreement of the suit vehicle.**

The appellant's submission on ground 1 is that the vehicle was registered in the names of the appellant and the respondents. Defence and counterclaim was that he had acquired interest in the suit vehicle by way of purchase of which he paid for and obtained the original logbook, transfer, the vehicle and the keys. The appellant's case denies the sale and indicated that the person, who sold the vehicle to the respondent, to the vehicle and logbook from the appellant, impersonated the appellant and pledged this suit vehicle and logbook as security for the respondent for money borrowed. The burden to prove purchase of the vehicle was on the respondent. The respondent's evidence was that he was a vehicle dealer who commissioned brokers to get him a vehicle. DW 1 Masasi who was a broker connected him to the seller of the vehicle. Masasi and Another broker Karangi went to the respondent's office on 3 March 2009 whereupon they examined the vehicle and test drove it. They further obtained the necessary documents which were a logbook and signed transfer forms. The brokers informed him that they had confirmed who the owner of the vehicle is with Uganda Revenue Authority. DW 1 paid Uganda shillings 25,000,000/= in cash and was given possession of the vehicle together with the logbook and signed transfer forms but without a copy of the seller's identity card. A sale agreement exhibit E D1 was admitted in evidence. The appellant PW1 testified that one Geoffrey Mwase stole the vehicle and its logbook. He had conned the appellant that he was an interested purchaser and gained possession of the vehicle and its logbook but remained at large until he sent a note on where the vehicle could be found. PW1 got in touch with one Bukenya Siraj who eventually led the appellant where the vehicle was. The matter was reported to the police who caused the arrest of Geoffrey Mwase in Jinja. The suspect confessed stealing the vehicle but denied selling it to the respondent and stated that he only mortgaged it as collateral for a loan. Counsel submitted that the fact that the vehicle was mortgaged was corroborated by PW2 who told court how Geoffrey Mwase to someone's car a free Lander to acquire a loan. PW3 a businesswoman and reserve soldier testified that she was involved in helping PW1 to recover the suit vehicle from the respondent. She testified that someone called Siraj phoned her and told her that they should give the respondent Uganda shillings 50,000,000/= because the respondent did not purchase the suit vehicle. Siraj demanded a commission of Uganda shillings 3,000,000/=.

PW4 for Detective number 25222 testified that he knew both the appellant and the respondent. Interviewed the respondent who claimed to have bought the vehicle and who produced an

agreement which was not signed by the alleged seller but the blank transfers were signed. The respondent failed to produce an identification document of the seller which was mandatory for the transfer of a vehicle. On the other hand PW4 further testified that interrogated Mwase Geoffrey who informed him that he had stolen the vehicle and mortgaged the same to the respondent as a collateral security for a loan of Uganda shillings 9,000,000/=. The witness denied the police statement of Mwase Geoffrey.

Mwase Geoffrey was serving a sentence at Luzira prison give additional evidence on appeal. His testimony is that he knew the applicant from whom it would suit vehicle and the logbook. Someone called Siraje talking to the respondent will lend him Uganda shillings 9,000,000/= which he invested in a deal that went bad. He denied selling the vehicle and signing exhibits E D1, ED2. He conformed sending a message to the appellant to get in touch with Siraje about the whereabouts of the suit vehicle. He was supposed to pay back Uganda shillings 13,000,000/= the respondent. The trial magistrate establish that this would vehicle was registered in the names of the appellant and appreciated the testimony of PW2 and PW4. The trial magistrate however disregarded the evidence and relied on the sale agreement ED 2 which was contested and held that it was a valid sale. Consequently learned counsel submitted that the trial magistrate failed to properly evaluate the evidence in light of the challenged sales agreement ED 2.

In reply Counsel for the respondent submitted that the respondent had testified that he purchased this would vehicle from Geoffrey Mwase who impersonated the plaintiff and called himself Andrew Kisawuzi. He prayed that the court finds that Mwase Geoffrey was not a truthful witness on this point because he admitted that when he first met the plaintiff he did not disclose his true name but called himself "Joseph". He contended that it is probable that Geoffrey sold the vehicle the respondent and to do so decided to impersonate the plaintiff that the names in the logbook were his in order to dupe the respondent. The trial magistrate made a correct finding of fact that Geoffrey impersonated the plaintiff and sold the suit vehicle to the respondent who obtained the original logbook, transfers, the vehicle itself and the keys. Geoffrey was only known to the appellant. The evidence adduced on appeal was that Geoffrey went to the appellants home and paid to the appellant a sum of Uganda shillings 5,000,000/= as part payment for the purchase of the suit vehicle. This fact was not challenged in re-examination. Geoffrey testified that he paid the appellant Uganda shillings 5,000,000/= before he drove away the car. The appellant willingly handed over the logbook together with the transfer forms. The evidence of Mwase is corroborated by the appellants evidence when he said that Geoffrey had Uganda shillings 5,000,000/= at the time of negotiating the price of the car. The appellant had known Geoffrey for three days and he drafted for him an agreement but handed over the logbook before the agreement was signed.

Counsel contended that it is strange why the appellant has never adduced before the court his agreement with Geoffrey which he drafted. The burden of proof was on the appellant to prove that his conduct did not preclude him from denying Geoffrey's authority to sell the car. The

appellant willingly sold his vehicle to Geoffrey who paid him a sum of Uganda shillings 5,000,000/= out of the contract sum of Uganda shillings 25,000,000/=. The appellants only remedy at law would be to sue Geoffrey Mwase under the agreement which he drafted himself and recover the balance of Uganda shillings 20,000,000/= but not sue the respondent who is a bona fide purchaser for value without notice of any fraud.

When the respondent transacted with Geoffrey who had impersonated the appellant, he never suspected any fraud. The respondent paid the sum of Uganda shillings 25,000,000/= in exchange for the original logbook, transfers, keys and the car itself. It was given an identity card though forged, which fact he knew after the transaction.

On the hearing of the appeal Geoffrey lied to the court that he had never seen the sale agreement of the motor vehicle neither did they sign it. On cross examination on the sale agreement, Geoffrey confirmed that one Siraje Bukenya was the broker and his signature appears as a witness. The purpose of witnesses on agreements is to prove its execution. Bukenya also led the appellant to where the vehicle was, and also witnessed the agreement, and the agreement validly passed title to the respondent as a bona fide purchaser for value without notice of fraud.

Learned counsel contended the burden of proof of purchase of the vehicle was on the respondent who had discharged it. The respondent paid valuable consideration for the car without notice of fraud. Counsel submitted that in the trial court where Geoffrey Mwase was tried, there was a so-called confession by the accused. The alleged confession was doubtful because Geoffrey did not plead guilty. The confession was the effect that Geoffrey Marcy had mortgaged the suit vehicle. Counsel further submitted that the accused was tortured on the instigation of the appellant. It was doubtful whether the accused received a fair trial. Counsel referred to article 24 of the constitution of the Republic of Uganda which prohibits any form of torture, cruel inhuman or degrading treatment or punishment. He contended that the accused was arrested by policemen who beat him up and the said men came in the company of the appellant. The respondent's son had been arrested, locked up and beaten by the time the respondent rescued his son from the police cells. Counsel submitted that the appellant applied a great deal of violence and unconstitutional means in a futile attempt to recover the suit vehicle. The appellant bragged that he had hired the services of the joint antiterrorism task force, ISO, regular police and UPDF to carry out the arrest. The appellant testified that his aunt a UPDF officer arrested someone from the respondent's home. The appellant sold his car to Geoffrey Mwase and received Uganda shillings 5,000,000/= as part payment. Instead of suing for the balance of the purchase price, he resorted to violence to recover the property. Consequently the appellant has no respect for the recognised law enforcement mechanisms. Counsel further contended that the accused Geoffrey Mwase, being imprisoned and having come to testify in the appellate court could not have voluntarily testified given the appellants violent nature. Counsel concluded that Geoffrey Mwase gave favourable evidence for the appellant to escape the order to refund Uganda shillings 28,000,000/= as ordered by the trial magistrate.



The respondents counsel referred to the case of Dr Kiiza Besigye and others versus the Attorney General, constitutional petition number 7 of 2007 for the proposition that continued prosecution of the petitioners, whose human rights had been violated, could not be continued no matter how strong the evidence against them may be because no fair trial could be achieved and any subsequent trial would be a waste of time and an abuse of court process. In the case of Uganda versus Sekabira and 10 others criminal session case number 0085 of 2010, in which the trial High Court judge said free the accused persons on the basis that their human rights had been violated prior to the trial.

Counsel reasoned that though the court was not in a position to set aside the judgement and sentence in the criminal case where Geoffrey Mwase was convicted, his testimony in the appellate court which shows that he is already a convict for stealing the suit vehicle and only mortgaged the vehicle and never sold it should not be admitted because it was not given voluntarily. Counsel contended without prejudice that the evidence of Mwase Geoffrey cannot be credible because in cross examination he admitted that he is a conflict on similar facts as in the appeal and was ordered to refund Uganda shillings 28,000,000/= to the appellant which he has not done. He was arrested for stealing laptops. Owing to his criminal nature you cannot compensate the applicant with the so-called award of 28,000,000/= Uganda shillings granted by the grade 1 magistrate.

In rejoinder to the submissions on ground one as to whether the chief magistrate erred in law and fact when he held that there was a valid sale agreement of motor vehicle number UAL 688 F counsel reiterated submissions in chief. He contended that the respondents submission that the appellant sold the vehicle to Mwase Geoffrey and actually received Uganda shillings 5,000,000/= is not supported by evidence of the trial court. Whereas Mwase testified that he bought the suit vehicle from the appellant and actually paid Uganda shillings 5,000,000/= he failed to produce in court any memorandum of agreement to that effect. He did not even request for a receipt.

Counsel further submitted that it was not a transaction between the appellant and Mwase Geoffrey which formed the issue in the lower court and the ground of appeal but rather the transaction between the Mwase and the respondent. Mwase testified under oath and it made selling the suit vehicle to the respondent. He remained firm that the mortgage it for Uganda shillings 9,000,000/=. Counsel contended that the signature of Mwase Geoffrey does not appear in exhibit ED 2 and ED 1. Counsel submitted that what purports to be the signature of Mwase Geoffrey is the name Kisawuzi Andrew. There was no evidence at the trial court as to whether Geoffrey Mwase signed. The people who purportedly signed the exhibit never testified during the trial. The record shows that the respondent admitted that he paid money to Mwase Geoffrey without obtaining a copy of the identification which is to transfer a vehicle without conducting a search of the particulars of ownership from Uganda Revenue Authority. The appellants conduct is inconsistent with that of a motor vehicle dealer.

Counsel further submitted that unscrupulous moneylenders make borrowers of money execute sale agreement instead of loan agreements and the court took judicial notice of that in miscellaneous application number 276 of 2012.

There is no evidence that the Mwase testified that he was tortured. Evidence shows that he was arrested by unknown persons who beat him up. The police later became with the appellant and picked him up. Geoffrey Mwase further testified that when he gave testimony in the appellate court, he gave his evidence freely and in the absence of any fear or intimidation. The respondent had ample opportunity to cross examine Mwase at length. In the circumstances the evidence of Mwase is credible proving that he did not sell the suit vehicle but rather mortgaged it.

### **Ground two:**

#### **The learned trial magistrate again law and fact in holding that the respondent is the rightful owner of the suit vehicle**

On ground 2 the Appellants Counsel referred to paragraph 3 (e) of the amended written statement of defence and counterclaim where the respondent pleaded that the vehicle was to be transferred to Messrs Sewalu Investments Uganda limited. The sale agreement was between Kisawuzi Andrew and Sewalu Investments Uganda limited. The respondent testified that he had a company called Sewalu Investments Uganda limited which was the rightful purchaser of the suit vehicle. The appellant submitted that the respondents counterclaim did not establish the cause of action and in the alternative the respondent could not enforce an agreement that he was not a party or privy to. Despite these overwhelming oral and documentary evidence and pleadings, the trial magistrate erred in law and fact and failed to properly evaluate evidence and reached a wrong conclusion that it is the respondent who bought the vehicle and handed the same to the respondent.

In reply the Respondents Counsel submitted that the argument that the proper purchaser is Sewalu investments Ltd is self-defeating because the chief magistrate found as a fact that the purchaser was the respondent and his name was clearly written on the agreement. If the purchaser once this court to believe that the purchaser was the company referred to, then the plaintiff did not disclose a cause of action against the respondent. It also means that this appeal is incompetent as it affects the rights of a company which is not a party to the appeal.

In rejoinder on ground 2 the Appellant's counsel submitted that even if the sale of the motor vehicle was found to be valued, the respondent was not the rightful purchaser of the suit vehicle because the buyer in the agreement is Sewalu Investments Ltd. The same exhibit having the name of the company shows the words: "the company has given me cash. The transfer forms, vehicle and logbook have been handed over to the company director."

Learned counsel further submitted that the company is a different entity from its shareholders and members. He relied on the case of Salmon versus Salmon [1897] AC 22 House of Lords.

This was followed in Uganda in the case of Sentamu versus Uganda Commercial Bank and another [1983] HCB at page 61 where honourable justice Benjamin Odoki a judge of the High Court as he then was agreed with the principle of law that a limited liability company is a separate legal entity from its directors, shareholders and other members and individual members of the company are not liable for the company's debts.

The appellant on the other hand is a cause of action against the respondent. It is the appellant's evidence at page 28 of the record that he found the defendant at Citizen secondary school where the respondent admitted having possession of the suit property which had been stolen from the appellant. In the absence of any other evidence to the contrary, the appellant was entitled to sue the respondent having found him with the suit vehicle. Learned counsel invited the court to uphold the ground of appeal that the learned chief magistrate erred in law and fact in holding that the respondent is the lawful owner of the suit vehicle.

### **Ground 3:**

**The learned chief magistrate erred in law and fact in holding that the appellant was precluded by his conduct from denying the seller's authority to sell the vehicle.**

The Appellants Counsel submitted that this issue would arise only where there was a proper sale of the suit vehicle. The respondent relied on section 22 (1) of the Sale of Goods Act cap 82 which provides that: "subject to this Act, where goods are sold by a person who is not the owner of the goods and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his or her conduct precluded from denying the seller's authority to sell."

The respondent did not plead estoppels but only raised the issue of estoppels in the submissions. This was brought to the attention of the trial judge who in his judgement wrongfully found that the respondent had pleaded estoppels. Even if the respondent had properly pleaded estoppels, no evidence was adduced to prove that the owner of the goods is by his or her conduct precluded from denying the seller's authority to sell. The respondent relied on the appellants conduct of parting with the suit vehicle, or regional logbook, car keys and transfer documents which left the respondent would no doubt that Geoffrey Mwase was the owner of the suit vehicle. This was estoppels by negligence. The appellant was by his or her conduct not precluded from denying the seller's authority to sell. The trial magistrate found that by parting with this would vehicle, the logbook and car keys, the appellant did not take normal precaution to prevent the vehicle from being stolen and found that the appellants conduct precluded him from denying Mwase's authority to sell.

Trial magistrate misconstrued and misinterpreted section 22 (1) of the Sale of Goods Act and the law of estoppels in general. There was no negligence whatsoever on the part of the appellant. In the book "sale of goods, general editor Prof Ewan McKendrick LLP land and, Hong Kong 2000

paragraph 015 estoppels by the presentation is distinguished from estoppels by negligence. In estoppels by negligence, it has to be demonstrated that the original owner is the third-party patches a duty of care and the owners negligence was the proximate cause of the loss. The owner does not owe a duty to the world to keep his goods safe. The duty of care will exist where the claimant owner furnishes the rogue with documents which allow him to appear to either own the goods or to have power of disposition over them where it is known that the documents will be shown to the third-party and will be relied upon by the third-party. It must be shown that negligence must be the proximate cause of the claimant's loss. This is difficult because it is normally the fraudsters who caused the loss rather than the careless owner.

Evidence on record indicated that the appellant allowed the accused to drive the suit vehicle in which for was the original logbook to the appellant's place of work for purposes of concluding the sales agreement, not to present him as the owner of the suit vehicle or with the authority to deal in the same. The accused of Mwase Geoffrey disappeared with the vehicle and held out to be the owner and allegedly sold the vehicle to the respondent. No evidence was adduced by the respondent that the appellant owed a duty of care or that it was foreseeable that Mwase would be held out as the owner of the suit vehicle. Even if the respondent claimed to have relied on the documents namely; the logbook and signed transfer forms, these documents were not sufficient for a seasoned car dealer. There was nothing at the material time from the record to prove that the seller was Andrew and no signature of the said sale agreement was executed in the presence of the respondent.

In reply the respondent's Counsel submitted that there was a proper sale of the suit vehicle to the respondent as a bona fide purchaser for value without notice and the sale is protected under the provisions of section 22 of the Sale of Goods Act cap 82 laws of Uganda. Counsel reiterated submissions on this point submitted in the lower court.

As far as the doctrine of estoppels is concerned, counsel contended that it was pleaded as established by the learned trial magistrate. The appellant was aware of the respondent's defence that he is a bona fides purchaser for value of the suit vehicle without notice of any defect in title. The respondent led evidence to the effect that the appellant's conduct precluded him from denying the authority of Geoffrey Mwase to sell the suit vehicle.

Grounds 4, 5 and 6

Learned counsel for the Appellant reiterated his submissions on the first three grounds and invited the court to uphold these grounds with respect to ground 4 on the issue of whether the learned chief magistrate erred in law and fact in dismissing the appellants suit, ground 5 on the issue of whether the learned chief magistrate erred in law and fact in giving judgement to the respondent on the counterclaim and ground six with respect to the issue of whether the learned chief magistrate erred in law and fact in failing to evaluate the evidence on record.

Appellants counsel prayed that the decree in civil suit number 666 of 2009 be set aside orders:

- a. The Respondent pays the appellant Uganda shillings 25,000,000/=, the value of the suit vehicle.
- b. Interest on (a) from the date of judgement issued on 26 August 2010 until payment in full.
- c. The appellant is awarded general damages
- d. Interest on general damages from the date of judgement issued on 26 August 2010 until payment in full.

Counsel submitted that the power of the High Court as an appellate court is catered for under order 43 rule 27 of the Civil Procedure Rules. Which is that the High Court shall have power to pass any decree and make any order which ought to have been passed or made or pass or make such further orders or other decrees or orders as the case may require. This may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although the respondents may not have filed any appeal or cross appeal.

In reply on grounds 4, 5 and 6, the Respondents Counsel reiterated his submissions on the first three grounds and invited the court uphold the findings of the learned trial magistrate and dismiss the appeal. He contended that the so-called claim for 25,000,000/= as compensation was never proved by the appellant. He prayed that the appeal is struck out with costs.

### **Judgment**

I have carefully considered the above written submissions. The first question to be considered is whether the appeal should be struck out for failure to give notice under the rules of court. This is a preliminary point of law and will be considered first.

Section 220 of the Magistrate's Court Act Cap 16 laws of Uganda, provides that an appeal shall lie from the decrees or part of the decrees and from the orders of a Magistrate's Court presided over by a Chief Magistrate or Magistrate Grade 1 in the exercise of its original jurisdiction, to the High Court. The Magistrate's Court Act does not prescribe the procedure for institution of appeals to the High Court. The procedure is governed by order 43 of the Civil Procedure Rules. Order 43 rules 1 of the civil procedure rules provides that an appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose. Order 43 rules 8 provides that where a memorandum of appeal is lodged, the high court shall cause to be endorsed on it the date of presentation, and the appeal shall be entered in a book to be kept for that purpose to be called the register of appeals. It can be concluded that an appeal is commenced by a memorandum of appeal, and the appeal entered in the register of appeals.

Section 79 of the Civil Procedure Act provides that the appeal shall be lodged within 30 days from the date of the decree or order of the court unless otherwise specifically provided for in any other law. In computing the period of limitation prescribed by section 79, the time taken by the court for the making of a copy of the decree or order appealed from shall be excluded.

As far as service of the appeal is concerned, no specific rules of service of the memorandum of appeal have been prescribed. Among other things the High Court is required to give notice of the appeal to the court from which the appeal originates. As soon as the court which passed the decree receives notice that an appeal has been lodged, it shall with all practical dispatch send such papers or documents as may be specifically called for by the High Court. This is provided for by order 43 rules 10 of the Civil Procedure Rules. Order 43 rule 10 (3) further provides that either party to the appeal may apply in writing to the court from whose decree the appeal is preferred, specifying any of the papers of the court of which he or she requires copies to be made and copies shall be made at the expense of and given to the applicant on payment of the requisite charges. Order 43 rule 10 (3) of the Civil Procedure Rules assumes that either party to the appeal has notice of the institution of the appeal in the High Court.

Specific provision is made by order 43 rules 11 of the Civil Procedure Rules for service of notice on the respondent of the day fixed for hearing of the appeal. The rule provides that the provisions applicable to the summons and proceedings with reference to service of the summons shall apply to service of the notice. Order 43 rule 12 provides for the contents of the notice. The notice is supposed to specify that if the respondent does not appear in the High Court on the day so fixed, the appeal may proceed ex parte. Provisions relating to service of summons are catered for by order 5 of the Civil Procedure Rules. In as much as order 5 deals with the issuance of summons, it specifies what happens after summons has been issued under the rule. Firstly it provides that summons shall be served within 21 days from the date of issue. Secondly under order 5 rule 2 every summons is accompanied by a copy of the plaint. Provisions relating to service of the appeal were considered in the case of **MM Sheik Dawood versus Keshwala and sons civil appeal number 14 of 2009**. Both parties addressed the court on the implications of my decision in that case on the issue raised therein that the memorandum of appeal was not served on the respondent for about two years from the time it was lodged in the High Court. Before considering the implications of the decision to the objection of the respondent that failure to serve the memorandum of appeal in this appeal until in the year 2012 was fatal to the applicants appeal, reference has to be made to the facts.

The appellant's memorandum of appeal was lodged in the High Court at Kampala on 30 August 2010 and endorsed on the same day by the deputy registrar of the Commercial Court Division. The memorandum reads in part that "a copy is to be served on Kaggwa and Company Advocates plot 3 Pilkington Road". Kaggwa and Company Advocates are counsel for the respondent. The judgement of the chief magistrate is dated 26th of August 2010. There is no controversy about when judgment was delivered by the chief magistrate. The controversy only relates to the service

of the appeal and particularly the memorandum of appeal. The decree issued by the court shows that the matter came for final disposal or delivery of judgement on 26 August 2010 in the presence of counsels for both parties. Four days later a memorandum of appeal was lodged in the High Court. The record shows that the appeal was fixed for hearing before Justice Irene Mulyagonja on 22 March 2011. The appeal was fixed by court and counsel for the appellant was served with a hearing notice. The court noted that the record of the lower court was not yet in the High Court. The honourable judge directed that the appellant should follow it up and the appeal was adjourned sine die. An affidavit of service by one Godfrey Ssebuuma of Kaggwa and Kaggwa advocates was filed on the court record on 21 February 2011. It shows that on 9 February 2011, he received the hearing notice to be served upon the appellants lawyers. Thereafter he served the hearing notice on the appellant's lawyers on 14 February 2011. In a letter dated 6<sup>th</sup> of December 2010 the deputy registrar of the High Court wrote to the chief magistrate requesting for the original file with certified copies of proceedings and judgement for the appeal to commence.

The record further shows that the appellant's lawyers on 24 November 2010 wrote a letter to the deputy registrar High Court of Uganda Commercial Division and lodged it on the record on 28 November 2010. The letter is copied to the chief magistrate Mengo court (which is the trial court) and the appellant. It reads as follows:

***"We act for the appellant in the appeal in caption.***

***We are reliably informed that the typed record of proceedings and judgement of the trial court are ready and certified.***

***The purpose of this letter is to humbly secure indulgence in the matter to call up for the file so that the appellant can proceed with the appeal."***

The record shows that letter of the appellants lawyers was received by the trial court on 2 December 2010. The record shows that in a letter dated 23rd of February 2012, the chief magistrate wrote to the deputy registrar of the civil division, High Court Kampala, a letter by which the trial court send the original file together with certified copies of proceedings and judgement.

There is no explanation as to why the judgment and record of proceedings of the trial court was not forwarded to the High Court until the year 2012.

In the case of **MM Sheik Dawood versus Keshwala & Sons Civil Appeal No 14 of 2009**, an appeal had been lodged by the appellant under sections 33, 38 (1) and (3) (a) of the Judicature Act, section 51 of the Trademarks Act cap 217, rule 15 of the Trademarks Rules, section 98 of the Civil Procedure Act and order 52 rules 1 and 3 of the Civil Procedure Rules. The court noted that the notice of motion was lodged in the High Court on 30 November 2009 and issued by the registrar on 1 December 2009. Objection was taken about failure to serve the appeal. In that case

the notice of motion had not been served on the respondent. The issue for determination was whether failure to serve the notice of motion on the respondents in the circumstances of the case was fatal. In that case because there were no specific rules dealing with service, I held that the provisions for service under order 52 of the Civil Procedure Rules which deals with notices of motion were applicable. In the ruling I noted that order 43 of the Civil Procedure Rules deals with appeals to the High Court from subordinate courts. I held that under the Trademarks Regulations an appeal was commenced by notice of motion and not a memorandum of appeal as provided for by order 43 rules 1 which is couched in mandatory terms. I therefore considered the fact that the action or the appeal was commenced by notice of motion and was an originating motion. In terms of order 5 rule 1 of the Civil Procedure Rules, service was supposed to be effected within 21 days from the issuance of the notice of motion. It is trite law that a notice of motion is supposed to be accompanied by an affidavit attaching all the necessary materials for the hearing of the motion. The memorandum of appeal on the other hand does not attach any materials and the judgement and the record of appeal of the trial court is supposed to be obtained the subsequent to the lodgement of the memorandum of appeal.

I also noted that the notice of an appeal had to be served on the respondent within a reasonable time. I therefore held that the appeal was incompetent for failure to serve the same on the principal party against whom it had been brought and was accordingly struck out with costs under order 52 rules 4 of the Civil Procedure Rules for want of notice of the appeal.

Both counsels agree with the above decision. However learned counsel for the appellant submitted that the facts of this appeal are different. I agree that this is an appeal from a magistrate's court whereas the appeal in the case of **MM Sheik Dawood versus Keshwala and sons** (supra) arose from the decision of the registrar of trademarks and is governed partially by specific rules. In the circumstances of this case and after receiving due attention, the court can decide the issue on its own merits. The issue is whether failure to serve the appeal is fatal in the circumstances of this case. Provisions for service of the appeal from a judgement of the subordinate court to the High Court are complex. This is because there is no specific rule under order 43 of the Civil Procedure Rules which deals with service of the memorandum of appeal. I have carefully reviewed the provisions of order 43 of the Civil Procedure Rules. First of all under rule 10 of order 43, it is the duty of the appellate court to give notice to the court where the decree appealed from originates of the lodgement of an appeal. Secondly either party to the appeal is entitled to apply in writing to the trial court specifying any materials or documents which he or she requires for the prosecution of the appeal (see order 43 rule 10 (3)). It is assumed by rule 10 (3) that both parties to the appeal have notice of the appeal. Rule 10 (1) imposes a duty on the High Court to give notice to the trial court about the appeal. Secondly it imposes a duty on the trial court with all practical dispatch to send all material papers of the suit to the High Court. The question then is who gives notice to the parties? This is because the respondent is entitled to apply to the trial court to send specific documents he/she/it may need for the prosecution of the appeal.



Thirdly, order 43 rule 11 of the Civil Procedure Rules specifically provides that notice of the hearing of the appeal shall be served on the respondent or on his or her advocate in the manner provided for the service of the defendant of the summons to enter appearance and or provisions applicable to summons and proceedings with reference to the service of the summons shall apply to the service of the notice. The provisions deals with notice of the day fixed for hearing of the appeal. The question is what happens if a day has not been fixed for hearing of the appeal for two years?

The respondent's submission is that it extracted a hearing notice and served the appellants counsel. Even then it was not served with the memorandum of appeal or the record of proceedings. This is a strange submission because by pretending the hearing notice it is assumed that the respondent had notice of the lodgement of an appeal and by extension of the memorandum of appeal. However, it is not the duty of the respondent to extract a hearing notice of the appeal and serve the appellant.

It is further clear that by the time the matter was fixed before Justice Irene Mulyagonja on 22 March 2011, there was no record from the trial court and the matter was adjourned sine die. As we noted the record was only send by letter of the trial chief magistrate's court on 23 February 2012 and received in the High Court commercial division on the same day. We have noted that it is the duty of the trial court to send the record of proceedings. However it is the duty of the appellant to extract a hearing notice. The appellant duly applied to the trial court forward the necessary documents to the High Court. We also noted that this letter was written by 24 November 2010, and copied to the trial court and the appellant. At this stage it is pertinent to conclude that the appellate court has to fix the appeal for hearing as soon as it has received the record which is essential for the prosecution of the appeal. A hearing date cannot be obtained if there is no record of appeal. Because it is the appellants appeal, the duty is on the appellant to ensure that the record of appeal has been forwarded to the appellate court and also to extract a hearing notice.

There may have been dilatory conduct on the part of the appellants counsel in the prosecution of the appeal. There is no evidence that the appellants counsel extracted a hearing notice. Order 43 rule 11 presumes that a hearing notice is extracted by the appellant who would proceed to serve the respondent. If rules 11 and 12 are to be harmonised, a day for hearing of the appeal has to be fixed expeditiously so that the respondent can exercise the right given by order 43 rule 10 (3) of the Civil Procedure Rules to apply for specific documents to be made available to the appellate court. In conclusion, the court did not duly carry out its duties to forward the record of appeal. The appellants counsel did not diligently pursue the record of proceedings and any documents for forwarding to the appellate court. The lacuna in the law is that the memorandum of appeal has to be served with the hearing notice. There might be in need for the rules committee to revisit this issue.

Counsel for the respondent's contention is that the appellant did not collect the record of proceedings which was due for collection on 21 October 2010. He did not serve the essential documents upon counsel for the respondent until 29 August 2012. Consequently by the time the appeal came for hearing of the evidence of Mwase Geoffrey on 22 August 2012, the respondents had not yet been served the memorandum of appeal and record of proceedings. The contention of the respondents counsel is that the appellants counsel had 751 days to prepare for his appeal after its lodgement between 30th of August 2010 and 12th of September 2012 but the respondent had a mere 14 days to prepare. Consequently the respondent had not received equal treatment before the law compared with the appellant contrary to articles 21 and 28 of the Constitution of the Republic of Uganda. I have carefully considered this contention. The schedule for filing of written submissions was agreed upon by both counsels. As far as fair treatment is concerned, the issue should have been whether the time given to the respondents counsel was adequate to prepare for and respond to the submissions of learned counsel for the appellant. The question of whether the time was adequate is relative. It is not based on comparison as to whether the respondent had 751 days to prepare his appeal but rather after agreeing to the schedule, whether the time was sufficient for the preparation of the response. This comes against a background that additional evidence was adduced on appeal pursuant to miscellaneous application number 276 of 2012. Additional evidence was adduced pursuant to the ruling of the court delivered on the 17<sup>th</sup> of August, 2012. The question of whether the record of appeal had been served or not ought to have been raised at that stage. This would have, if the objection had been successful, prevented the appellant from incurring more costs in the prosecution of the appeal. As it were, this honourable court delivered a ruling on the 17<sup>th</sup> of August, 2012 after hearing submissions and allowed the appellants application to adduce additional evidence on appeal. There was absolutely no reason to argue miscellaneous application number 276 of 2012, if the appeal was not going to be heard. In those circumstances, inasmuch as a point of law can be raised at any stage of the proceedings, the respondent had elected to have the appeal heard on the merits as it stayed its objection on the competence of the appeal by choosing to argue the issue of whether additional evidence should be adduced on appeal before the appeal can be decided. The respondent also cross examined the witness who testified on appeal. The proper time to raise an objection to the hearing of the appeal on the merits would have been in the application to adduce additional evidence on appeal. This is because the evidence was supposed to be considered on the merits of the appeal. In other words, the principle of waiver operates to debar the respondent from contesting the competence of the appeal on the ground of the procedural irregularity. The doctrine of waiver is defined in words and phrases legally defined third edition R – Z at page 405. Quoting from the case of **Kamins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871** at 894 per Lord Diplock the doctrine of waiver is defined as follows:

*"The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise the particular defence or so conducts himself as to be stopped from raising it" (see WORDS AND PHRASES legally defined third edition R – Z page 405)*

Estoppels by conduct are imported by section 114 of the Evidence Act cap 6. In this particular case, the conduct of the respondent not to raise the question of whether the appeal was competent on the ground of failure to serve the memorandum of appeal, at the time when miscellaneous application number 276 of 2012 was argued, debarred the respondent from challenging the appeal on the ground of procedural irregularity. When additional evidence was adduced, and the respondent proceeded to cross examine the witness, the respondent conducted himself as to lead the court and the appellant to believe that the evidence of the additional witness would be considered on the merits in the appeal itself. In the circumstances the respondent waived his right to have the appeal proceed to be heard on the merits. This is not to say, that the respondent cannot raise a point of law. However the question of whether the memorandum of appeal had been served is a procedural question that has to be handled preliminarily to avoid costs. The court therefore does not have to decide whether the failure to serve would have been fatal. In the circumstances of this case the issue will not be decided and the appeal will be considered on its merits.

Grounds 1, 2 and 3 of the memorandum of appeal are intertwined in that they deal with the validity of the sale of motor vehicle number UAL 688F to the respondent. These grounds will be considered together and are reproduced for ease of reference.

- 1. The learned chief magistrate erred in law and fact when he held that there was a valid sale agreement of motor vehicle no. UAL 688 F.*
- 2. The learned chief magistrate erred in law and fact in holding that the respondent is the rightful owner of the suit vehicle.*
- 3. The learned chief magistrate erred in law and fact in holding that the appellant was precluded by his conduct from denying the seller's authority to sell the suit vehicle.*

There seems to be no disagreement about the fact that Geoffrey Mwase impersonated the appellant who is the original owner of the vehicle in question. The crux of the appellant's case is that Geoffrey Mwase did not sell the vehicle but rather mortgaged it to the respondent. The trial magistrate had found that there was a valid sale of the motor vehicle to the respondent. The decision of the trial magistrate revolved around interpretation of section 22 (1) of the Sale of Goods Act. Section 22 (1) deals with the sale of goods by a person who is not the owner of the goods and who sells it is not under the authority or with the consent of the true owner. The provision provides that the buyer acquires no better title to the goods than the seller had with the exception that the buyer would acquire a good title to the goods if the owner of the goods by his or her conduct is precluded from denying the seller's authority to sell.

The purported seller Mr Geoffrey Mwase was armed with the logbook, the car keys, and transfer forms. The learned trial magistrate relied on the case of **Bishopsgate Motor Finance Corporation versus Transport Brothers Ltd [1949] 1 KB 332**. The learned trial magistrate

held that the doctrine of estoppels may apply against the owner of the vehicle on the basis of the representation or by negligence on the part of the owner. He wondered why the owner trusted Geoffrey Mwase to the extent of giving him the car keys, allowing a stranger to drive his car, handing over to him the logbook and transfer forms. He therefore found that the respondent had no reason to believe that the seller was not the true owner of the vehicle. He also found that the appellant handed over the vehicle to Geoffrey Mwase on 3 March 2009 when Mwase disappeared with the vehicle. The appellant did not immediately report to the police and instead the matter was reported to a UPDF officer. The trial magistrate found that the plaintiff did not take normal precaution to prevent the vehicle from being stolen if indeed it was truly stolen. He disbelieved the plaintiff's witnesses.

Last but not least the trial magistrate was addressed on the question of whether the vehicle was sold to Sewalu Investments Ltd and not the respondent. He found that whereas the agreement states that the appellant sold the vehicle to Sewalu investments Uganda limited, the buyer at the bottom is mentioned as the respondent. The signature does not indicate that was endorsed on behalf of the company. He further found that whatever the case may be, the vehicle was sold anyway and it did not matter whether it was sold to the defendant or the company which bought it. He held that the plaintiff still lost the vehicle. Finally the trial magistrate held that the vehicle was sold and the plaintiff was precluded by his own conduct from denying the authority to sell. On the basis of the findings, the trial magistrate decided that the defendant is entitled to take away the vehicle from the custody of the court and the suit of the plaintiff was dismissed with costs.

Judgement was delivered by the trial court on 26 August 2010. Subsequently Mwase Geoffrey was prosecuted in the criminal case number 347 of 2011 with theft of a motor vehicle contrary to section 254 and 265 of the Penal Code Act. He was convicted of the charge on 15 December 2011 about one year after the judgement of the trial magistrate's court. He subsequently testified on appeal after leave was granted to adduce additional evidence on appeal in miscellaneous application number 276 of 2012. Mwase Geoffrey testified on 22 August 2012. He was produced in court on the production warrant from Luzira prison where he has been serving sentence of one year imprisonment since conviction on the 15<sup>th</sup> of December 2011.

The subsequent fact of conviction of a seller for theft of goods he or she sold is relevant in determining the title of the buyer to the goods. The question is, whether the subsequent conviction of the alleged seller of the vehicle should be taken into account in arriving at the question of whether the buyer has a good title to the goods. The trial court did not have the benefit of any evidence of conviction of Geoffrey Mwase, which conviction was subsequent to the delivery of judgement in civil suit number 666 of 2010.

The foundation of the trial courts finding for the respondent in the lower court, is the principle summarised by Lord Denning in the case of **Bishops gate Motor Finance Corporation Ltd v Transport Brakes Ltd [1949] 1 All ER 37 CA**. In order to obtain good title to the vehicle

which had been sold, the buyer had to prove that the vehicle had been sold in market overt. Because the vehicle had been sold by private treaty the issue was whether it had been sold in market overt. The Court of Appeal found that a vehicle can be sold by public auction or by private treaty in market overt and in the circumstances it had been sold in market overt and the buyer acquired good title.

According to the Sale of Goods by P.S. Atiyah and John Adams 9th edition, at page 319, in all cases the law has to choose between rigorously upholding the rights of the owner to his property on the one hand, and protecting the interests of the purchaser who buys in good faith and for value on the other hand. These competing interests as summarised by Lord Denning in the **Bishops gate case** (supra) at page 46:

*“In the development of our law, two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our own times. The modification here in question is one conferred by the common law itself.”*

The first principle that no one can give a better title than he himself possesses is often couched in the Latin phrase *nemo dat quod non habet*. According to Atiyah this principle is wider than the provisions of section 21 of the Sale of Goods Act which only applies to sale of goods by a non-owner. The learned trial magistrate found that the buyer’s situation fell within the exceptions to the rule of *nemo dat quod non-habet*. The first important distinction in this case is that there is no evidence whatsoever that the respondent bought from market overt. The learned trial magistrate was not addressed on whether the facts of the case disclosed a sale in market overt. Before applying the first principle that no one can give a better title than he himself possesses, it must first be established that the transaction or the sale was made in market overt. “Market overt” is a place where goods are sold according to the usage of the market. According to **Words and Phrases Legally Defined volume 3 third edition K – Q at page 105** the word “Market Overt” means:

*“Where goods, other than goods belonging to the Crown, are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. However, the title is liable to be defeated in the case of stolen goods. The rule is for the protection of the buyer, and the seller is not protected by it and an action for wrongful interference with goods lies in conversion against one who wrongfully sells and delivers the goods of another in market overt. ... The place where the goods are sold must be a public and legally constituted market or fair, and the modern statutory market is within the rule as to sale in market overt...”* ... “The

*market to be a market overt must be an "open public and legally constituted one" (see Lee v Bayes (1856) 18 CB 599, per Jervis CJ.) ... "This shop in London must be one in which goods are openly sold; that is, as I take it, when they are sold in the presence and sight of any one of the public who may come into the shop upon legitimate occasion. The keeping shop is an invitation to anyone which was to come to deal with the shopkeeper to enter... In the case of the showrooms treated as that in the present case there is no such invitation." Hargreaves v Spink [1892] 1 QB 25 at 26, 27 Per Wills J."(Emphasis added)*

In this case, as I have noted above there is no evidence that the vehicle in question was sold in market overt. Market overt by definition is an open marketplace which according to the usage is where such goods are sold to anybody who may go there to buy them.

Secondly, an important element has been introduced at the appellate level by the subsequent conviction of Geoffrey Mwase in criminal proceedings referred to above. He was convicted of theft. An attempt was made by the respondents counsel to attack the conviction on the ground inter alia that Geoffrey Mwase was tortured and therefore the conviction was not proper. The court cannot consider whether the conviction was proper or not in this case because the accused never appealed. As it were, it has been established that the seller of the vehicle to the respondent had stolen the vehicle and was convicted and is serving sentence. This is supported by the fact that he impersonated the owner of the vehicle at the time he made a deal with the respondent. The controversy as to whether he mortgaged the vehicle or outright sold it to the respondent would not be material if it is established that the seller had stolen the vehicle. The question of obtaining goods by theft or trickery and selling them was considered in the case of **Pearson vs. Rose and Young Ltd (Little, third party; Marshall, fourth party) [1950] 2 All ER 1027**. Lord Denning held that Parliament has protected the true owner by making it clear in the case of a mercantile agent such as in that case, that he does not lose his right to goods when they are taken from him without his consent for instance when they are stolen from his house. Parliament has not protected the true owner if he himself consented to a mercantile agent having possession of the goods. His Lordship considered several case scenarios and came to the conclusion that the logbook had been taken from the owner through trickery he said at pages 1033 - 1034:

*"This brings me to the critical question in this case: Did the plaintiff consent to Hunt having possession of the log book as well as the car? On the findings of fact by Devlin J the answer is clearly "No." On 8 March 1949, the plaintiff simply let Hunt have the log book in his hands to inspect it for a few moments. The plaintiff gave Hunt the barest physical custody of it while he was still there himself. He never consented to Hunt having possession of it. Then Hunt, by a trick, managed to get the plaintiff called away while he, Hunt, still held the book. Armed thus with the log book, Hunt was able to sell the car on the very same day to an innocent purchaser, which, without it, he could not have done. On those facts the plaintiff no more consented to Hunt having*

*possession of the log book than if Hunt had stolen it from his pocket. The Factors Act does not operate, therefore, to give a good title to the dealer who bought from Hunt, nor to the buyers in succession from him....”*

Lord Denning came to the above conclusion reluctantly after citing of the law about sales in market overt. The general statement of the law appears at page 1031 where he says:

*“In the early days of the common law the governing principle of our law of property was that no person could give a better title than he himself had got, but the needs of commerce have led to a progressive modification of this principle so as to protect innocent purchasers. We have had cases in this court recently about sales in market overt and sales by a sheriff, and now we have the present case about sales by a mercantile agent. The cases show how difficult it is to strike the right balance between the claims of true owners and the claims of innocent purchasers. The way that Parliament has done it in the case of mercantile agents is this. Parliament has protected the true owner by making it clear that he does not lose his right to goods when they are taken from him without his consent, as, for instance, when they have been stolen from his house by a burglar who has handed them over to a mercantile agent. In that case the true owner can claim them back from any person into whose hands they come, even from an innocent purchaser who has bought from a mercantile agent. Parliament has not protected the true owner if he has himself consented to a mercantile agent having possession of them, because, by leaving them in the agent’s possession, he has clothed the agent with apparent authority to sell them, and he should not, therefore, be allowed to claim them back from an innocent purchaser.*

*The critical question, therefore, in every case is whether the true owner consented to the mercantile agent having possession of the goods. This is often a very difficult question to decide. There are three points of principle which arise for consideration in the present case.”*

I have already held that there was no sale in market overt and that should have concluded the appeal. This is because the principle of estoppels or negligence which are exceptions to the doctrine of *nemo dat quod non habet*, only come into play when there is a sale in market overt. However it may be suggested that section 22 (1) of the Sale of Goods Act deals with any sale by a person who is not the owner whether in market overt or not. Such an assertion would not be supported by authority. According to Halsbury's laws of England fourth edition reissue volume 29 (2) paragraph 1026, though the doctrine of market overt was abolished by the Sale of Goods (Amendment) Act 1994, it previously provided that where goods other than goods belonging to the Crown were sold in market overt according to the usage of the market, the buyer acquired a good title to the goods provided he bought in good faith and without notice of any defect or want of title on the part of the Seller. The trial chief magistrate relied on the case of **Bishopsgate Motor Finance Corporation Ltd Versus Transport Brakes Ltd [1949] 1 All ER 37 CA.**

According to Atiyah the principles set out in the Bishopsgate Case (Supra) has been affirmed by the Sale of Goods Act 1979, which Act consolidates the original Sale of Goods Act of 1893 and amendments made prior to 1979 and particularly under section 21 (1) thereof which reads as follows:

***“Subject to this Act, where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.”***

As can be seen the above section is in *pari materia* with our section 22 (1) of the Sale of Goods Act. Counsels addressed the court at length on the provisions of section 22 (1) of the Sale of Goods Act which provides as follows:

***“22. Sale by person not the owner***

***(1) Subject to this Act, where goods are sold by a person who is not the owner of the goods and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his or her conduct precluded from denying the seller's authority to sell.”***

The above provision is subject to the Act. Consequently section 24 which deals with subsequent conviction of the seller for theft of the goods sold to the buyer is a statutory exception to section

***“24. Revesting of property in stolen goods on conviction of offender***

***(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods or his or her personal representative, notwithstanding any intermediate dealing with them, whether by sale or otherwise.***

***(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in the goods shall not revert in the person who was the owner of the goods or his or her personal representative, by reason only of the conviction of the offender.”***

Section 24 of the Sale of Goods Act gives two cases scenarios. The first case scenario is where the seller is convicted of theft of the goods. The conviction nullifies all intermediate dealings in the goods whether by sale or otherwise. In other words it is immaterial whether the goods are sold or mortgaged. The stolen goods revert to the owner from whom they were stolen. The reversion of the ownership of the goods upon the rightful owner operates upon the conviction of the seller of the goods for stealing it. It was incumbent upon the trial magistrate who convicted Mwase Geoffrey, to make an order restoring the property to its rightful owner under the



provisions of section 24 of the Sale of Goods Act. As we shall later note, no such order was made and no appeal was preferred from the trial and conviction of Geoffrey Mwase.

The second case scenario deals with fraudulent or other methods of obtaining the goods not amounting to theft. In the very least the trial magistrate would have considered whether the goods were obtained through fraud or other wrongful means not amounting to theft before dealing with the question of sale in market overt. The learned Chief Magistrate clearly erred in law when he did not consider how the goods were obtained but went ahead to exclude any oral testimony to vary the terms of the sale agreement relied on by the defendant. It was a material consideration as to whether the sale agreement was executed through a misrepresentation of who the actual owner of the vehicle was. The question of whether the agreement was a forgery or made by a person who impersonated the true owner was preliminary. It is a finding of fact of the trial chief magistrate that there was uncontroverted evidence that Geoffrey Mwase represented himself as the appellant/plaintiff at page 4 of his judgement he states as follows:

***"The document itself is headed "sale agreement" the plaintiff cannot therefore adduce oral evidence or otherwise contradict the content of this document which was not even challenged to have been executed by the defendant and Mwase then calling himself Kisawuzi Andrew."***

It is therefore clear that the sale agreement or mortgage agreement whatever the case may be was procured by someone calling himself Kisawuzi Andrew. This someone was that Geoffrey Mwase who has since been convicted of stealing the vehicle in question. He is currently serving his sentence if he has not yet completed the same. It is also very clear from the record that the trial court was swayed by the evidence showing that Geoffrey Mwase had been in possession of the vehicle with the consent of the appellant, and was armed with the logbook, and transfer forms. There was however no evidence to suggest that he acted as an agent of the appellant. The evidence is clearly that Geoffrey Mwase impersonated the appellant. Such an impersonation is fraud on the face of it. Before considering whether the suit came within the exceptions to the general rule that a seller cannot pass a good title that he has, the trial court was under a duty to consider whether the goods had been fraudulently obtained or stolen rather than excluding evidence on the basis of an agreement made subsequent to the fraud or stealing.

In conclusion the learned trial Chief Magistrate came to an erroneous conclusion on the basis of the belief of the respondent that the seller of the vehicle was the owner of the vehicle and therefore relied on exceptions to the general rule that a seller cannot pass any greater title than he or she has. Such a conclusion was erroneous on the ground that there was no sale in market overt as such. The conditions for there to be a valid sale in market overt were not considered. According to Halsbury's laws of England (supra) these conditions are that the sale has to be made in the usual marketplace or place for the fair, upon the lawful day, and during the usual hours for holding the market or fair and not at night. Secondly the goods must have been exposed for sale and delivery must have begun and been concluded openly in the market. The sale need not

necessarily have been made by a trader and a private sale at the market where goods are usually sold by auction is not contrary to the usage of the market in terms of the case of ***Bishopsgate Motor Finance Corporation Ltd (supra)***. Thirdly the sale must have been a real sale by a person of contractual capacity. The goods must have been openly offered for sale. If the market dues are payable in the market, it must have been paid. Last but not least Halsbury's laws of England fourth edition reissue volume 29 (2) paragraph 1027 provides that where the property has been stolen or obtained by fraud or other wrongful means, the title to the property will not only be affected by reason of the offenders conviction, but the court has discretion to make orders for restitution by which the owner may recover his goods. This succinctly states the law as embodied under section 24 of the Sale of Goods Act cap 82 laws of Uganda.

In the premises, grounds 1, 2, 3, 4 and 5 of the memorandum of appeal succeeds. As far as ground 6 is concerned, the learned chief magistrate properly evaluated the evidence on record but only applied erroneous principles of law. All in all the appeal succeeds.

As far as remedies are concerned, both parties to the appeal were disadvantaged by a third party who is not a party to the suit. The respondent asserts that he paid Uganda shillings 25,000,000/=. Geoffrey Mwase claims to have received the sum of Uganda shillings 9,000,000/=. On the other hand the trial magistrate in criminal case number 347 of 2011 at the chief magistrates court of Makindye ordered that the accused compensates the appellant to the value of Uganda shillings 28,000,000/= for the loss occasioned him. The High Court is likely going to add to conflicting orders of courts of law. The order of the Magistrate Grade 1 was made subsequent to the orders of the trial court in the civil suit. The order for restitution/compensation was made under criminal proceedings against the third-party who allegedly sold or mortgaged the vehicle. An order for compensation presupposes that title passed on to the respondent in this appeal. Such a presumption has been negated by the holding of this court that the seller could not pass any greater title than he had. In other words the seller had no title and therefore could not pass any to the respondent.

In order to harmonise the conflicting and, potentially conflicting judgments, there has to be a real trial of some of the questions relating to the appropriate remedy available to the parties. First of all, it is the inevitable result of the holding in this appeal that the title to the suit vehicle reverts to the appellant. It can immediately be seen that this conflicts with the order to compensate the appellant. For there to be a real trial of some of the issues touching on the appropriate remedy it would be necessary to make Geoffrey Mwase a party. Order 43 rule 27 permits the High Court on appeal to pass any decree and make any order which ought to have been passed or made and pass or make such further orders or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although the respondents may not have filed any appeal or cross appeal. Additionally section 80 of the Civil Procedure Act permits an appellate court to frame issues and refer them for trial or order a new trial.

In the premises, the issue of the appropriate remedy as between Geoffrey Mwase, the appellant and the respondent shall be tried afresh by the trial Chief Magistrate. This reference is without prejudice to my holding that Geoffrey Mwase did not pass any title of the goods to the respondent. On the basis of my holding, the title to the vehicle reverts to its owner who is the appellant in this appeal. The vehicle shall therefore be delivered to the appellant.

The remedies to be determined by the trial court shall not detract from the holdings in this appeal. Because Mwase Geoffrey is a necessary party, he shall be added to the trial. The order in the criminal trial as directs Mwase Geoffrey compensate the appellant cannot be enforced as it is contrary to section 24 of the Sale of Goods Act. The appropriate remedy in the criminal trial should have been made under section 24 of The Sale of Goods Act. This question will be revisited in the trial between Mwase Geoffrey and the Respondent by the trial court. It was alleged by Mwase Geoffrey on appeal that he received Uganda shillings 9,000,000/= from the respondent. This shall be investigated by the trial court.

In the premises the appeal succeeds and the vehicle will be returned to the appellant. Other remedies between the parties shall be tried by the trial court afresh as directed above. The appellant is awarded the costs of this appeal.

**Hon. Mr. Justice Christopher Madrama**

**Judge**

Wandera Michael holding brief for Dan Wegulo for the appellant,

John Kaggwa for the respondent

Sheila Catherine Abamu, Research Assistant

Charles Okuni: Court Clerk

**Hon. Mr. Justice Christopher Madrama**

**Judge**