

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO.40 OF 2009
ARISING FROM MISC.APPLICATION NO.337 OF 2009

BUSO FOUNDATION LTD ::::::::::::::::::::::::::::::: APPELLANT

VERSUS

- 1. BOB MATE PHILLIPS**
- 2. EPHRAIM SANDE KANYANGI MUWANGA :::::::::::::::RESPONDENTS**

BEFORE: THE HON LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

a) Introduction

1. This is the judgment in an appeal from the decision of His Worship Kwizera Amos at Mengo Chief Magistrates Court. In his ruling of 15th May 2009, the trial Magistrate dismissed Misc. Application No. 337 of 2009 in which the Appellant had sought to set aside the *ex parte* judgment entered in Civil Suit No. 1386 of 2007. In this Civil Suit, the 1st Respondent had sued the Appellant, by summary suit under Order 36 of the Civil Procedure Rules (CPR), for recovery of Ug. Shs: 12,000,000/= for alleged breach of an employment contract, interest and costs.

The *ex parte* judgment had the effect of the Appellant's property comprised in Kyadondo Plot No. 435, Block 92B, Matugga, Wakiso district being sold to Ephraim Sande Kanyangi Muwanga who later allegedly sold to Mr. Sengooba Herbert. Both these transfers were on a Special Certificate for the property issued at the direction of Court.

2. The Appellant is represented by Mr. Joseph Kyazze of M/s. Magna Advocates; the 1st Respondent is represented by both Mr. Sam Ogwang and Mr. David Kaggwa of M/s. Kaggwa & Co. Advocates and the 2nd Respondent is represented by Mr. Tony Ngobi of M/s. Nsubuga K.S & Co. Advocates.

3. Based on the grounds of appeal in the Memorandum of Appeal and preliminary objections raised by the 2nd Respondent in Court, the issues agreed for resolution at the scheduling conference were:

- i. Whether this Court had jurisdiction to join the 2nd Respondent to the appeal. If so whether the said joinder is prejudicial to the 2nd Respondent.
- ii. Whether the Learned Trial Magistrate misdirected himself when he held that the Appellant had not proved sufficient cause to warrant setting aside the *ex parte* judgment under O.9 r 27 of the Civil Procedure Rules S.I 71-1.
- iii. Whether considering the subject matter of the suit as per the pleadings, the Learned Trial Magistrate had jurisdiction to entertain and adjudicate over the dispute.
- iv. Whether the sale and transfer of the suit property to the 2nd Respondent was conducted in a manner contrary to provisions of the Civil Procedure Act and Rules.
- v. Whether the Appellant is entitled to the relief sought.

b) Analysis

3. I have carefully looked at the trial record, pleadings and submissions in this appeal.

**Issue one: Whether this Court had jurisdiction to join the 2nd Respondent to the appeal.
If so whether the said joinder is prejudicial to the 2nd Respondent**

4. On 23rd April 2015 at the request of Counsel for the Appellant, in the interest of justice under Section 98 of the Civil Procedure Act, this Court ordered that the first buyer of the suit property, Mr. Muwanga, be joined as the 2nd Respondent, files his reply to the appeal by 20th May 2015 and also be party to the mediation process that was being pursued. No reply was filed by 20th May 2015. Instead, Mr. Muwanga filed Misc. Application No. 307 of 2015 seeking orders that he was improperly added as the 2nd Respondent and that he be struck off. The Appellant filed his reply to this application on 2nd March 2016.
5. On 9th February 2016, I further directed that Mr. Muwanga files his reply to the appeal by 23rd February 2016. Further orders for Mr. Muwanga to file his rejoinder to the application to be struck off by 21st March 2016 were made on 7th March 2016. I also ordered his Counsel to file his reply to the appeal by 14th March 2016. Mr. Muwanga never acted on any of these despite having been served, proof returned and no explanation was made for his failure. On 7th March, 2016 the matter was given a last adjournment for him to reply to the appeal by 7th April 2016 when the appeal was fixed for scheduling and hearing.
6. On 7th April, 2016, both Mr. Muwanga and his counsel did not appear as they had done on most of the previous adjournments nor did they file his reply to the appeal as directed by court yet he had been served with a hearing notice as demonstrated in the affidavit of service of Mr. Alex Kamukama, a process server, dated 4th April 2016 and proof returned in court. As such the application to be struck off was not heard on its merits at the time. Court ordered that the hearing of the appeal proceeds and the issue of joinder of the 2nd Respondent would be formulated as the first issue for resolution in this appeal.
7. On 13th September 2010, the 1st Respondent filed Misc. App No. 413 of 2010 in which he sought that the Notice and Memorandum of Appeal be dismissed. In paragraph 13 of the affidavit in support of this application, Mr. Moses Paul Sserwanga-the deponent, averred that Mr. Muwanga transferred the suit property to Mr. Sengooba who was now the

registered proprietor vide instrument No. KLA 437489 and a copy of the Special Certificate of Title with the said transfer was annexed thereto.

8. In his final submissions in this appeal, the 1st Respondent contended again that the suit property had already been transferred to Mr. Sengooba. At the time of writing judgement, it became apparent that just like for Mr. Muwanga the first buyer of the suit property, it was necessary to summon Mr. Sengooba to be heard in respect of his interest in the suit property. To this end on 13th December 2016, Counsel for the Appellant and the Respondents were summoned to court. Only Counsel for the Appellant and 1st Respondent appeared and were informed of the need to hear Mr. Sengooba before judgment could be delivered.
9. Summonses were issued for Mr. Sengooba to appear and be heard on 20th December 2016. Court took the opportunity to cause Mr. Muwanga to be summoned as well to appear on 20th December 2016. The purpose of summoning these two buyers of the suit property was, from the very start, to ensure that they exercise their constitutional right to be heard in regard to their interests and connection to the suit property of which they were presented as buyers and transferees.
10. In the affidavit of service of Mr. Kamukama Alex that was returned this time, the summons were received by the wife of Mr. Muwanga on the suit property on behalf of Mr. Muwanga and she also said that the summons of Mr. Sengooba should be left with her which was done. In addition as directed by Court on 13th December 2016, the Appellant effected substituted service on the two buyers on 16th December 2016 in the New Vision newspaper and returned proof thereof on 20th December 2016. All these efforts were aimed at ensuring that Mr. Muwanga and Mr. Sengooba exercise their constitutional right to be heard regarding their interest in the suit property before judgment concerned thereto would be delivered.
11. Noteworthy is the fact that when the 2nd Respondent, Mr. Muwanga was first joined as a Respondent, his counsel Mr. Ngobi Tony of M/s. Nsubuga K.S & Co. Advocates filed Misc. Application No. 307 of 2015 on 12th August 2015 and subsequently attended court to object to this joinder. He also attended mediation which failed along the way. However, once the

application to remove Mr. Muwanga as a Respondent was fixed for hearing and timelines for filing submissions given on 9th February 2016, Mr. Ngobi and/or his client abandoned attendance of court.

12. In the circumstances of this case with service of summons having been satisfactorily executed on Mr. Muwanga and Mr. Sengooba, it cannot be said that the two were denied their constitutional right to be heard. Rather I am satisfied that Mr. Muwanga and Mr. Sengooba chose to sit on their right to be heard. In all events, this court had to proceed.
13. Mr. Muwanga challenged his joinder. Under Section 98 of the Civil Procedure Act, this court can make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. In my opinion, adding Mr. Muwanga as a party to this appeal and later summoning Mr. Sengooba was necessary for the ends of justice within the meaning of Section 98 since they have rights associated with the suit property and these rights could be affected through the determination of this appeal. I therefore find Mr. Muwanga's application to strike him off as a Respondent unmeritorious. As explained above, this court has jurisdiction and wide discretion to add Mr. Muwanga and Mr. Sengooba by virtue of Section 98 of the Civil Procedure Act and such addition to exercise their right to be heard cannot be said to be prejudicial to them.

Issue two: Whether the learned Trial Magistrate misdirected himself when he held that the Appellant had not proved sufficient cause to warrant setting aside of the ex parte decree under O.9 r 27 of the CPR

14. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004** observed that the legal obligation of the first appellate court is to re-appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never seen or heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. (Also see **F.K. Zabwe v. Orient bank and others SCCA No. 4 of 2006.**) I will adopt this standard in my assessment in this appeal. Also under this issue, for clarity, I will only address sufficient cause in regard

to non- attendance of Court by the Appellant and his Counsel. This is to avoid repetition as the other issues concerned will be discussed under other issues.

15. The application to set aside the *ex parte* judgment was brought under order 9 rules 12 & 27. Order 9 rule 27 provides that in any case in which a decree is passed *ex parte* against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.
16. The principles governing the determination of what amounts to sufficient reason or cause for setting aside an *ex parte* decree under O.9 r 27 have been severally enunciated in the jurisprudence. In **S.C. Civil. Application No. 6 of 1987 Florence Nabatanzi v. Naome Binsobedde** (cited with approval in **Hikima Kyamanywa v. Sajjabi Chris CACA No. 1 of 2006**), it was held by the Supreme Court that “sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time.”
17. In **Nicholas Roussos v. Gulamu Hussein Habib Virani & others, SCCA No. 9 of 1993** cited in **Hikima Kyamanywa (supra)**, the Supreme Court held that a mistake by an advocate though negligent may be accepted as a sufficient cause to set aside an *ex parte* judgment.
18. From the record, in the Notice of Motion application to set aside and the affidavit in support thereto of Joel Lugolobi - its Director, the Appellant explained to the Trial Magistrate that it was never notified or made aware of the date the matter was heard *ex parte*; that the Appellant only learnt of the existence of the said *ex parte* judgment when it’s tenant was served with the notice to vacate the suit property which was long after the sale and transfer

of the same. The Appellant also explained that its lawyers then M/s. Birungi & Co. Advocates were served through a clerk who did not bring the service to the attention of Mr. Birungi Wycliffe who was Counsel in personal conduct of the matter and neither did he note the date of the hearing in the firm diary or inform the Appellant. The Appellant also explained in paragraph 6 that the clerk in issue left M/s. Birungi and Co. Advocates in January 2009, had never said anything about the hearing notice or hearing of the case. The Appellant explained further that it ought not be penalized for the negligence of counsel, that the Appellant had a good defence and that its property was sold without regard to the law.

19. It is not in dispute that the clerk of M/s. Birungi and Co. Advocates received service of the hearing notice. It is also assumed that generally once a clerk receives service, he does so on behalf of the law firm and counsel in personal conduct, all meant on behalf of the client. However in circumstances where counsel and the Appellant explained and insisted to the Trial Magistrate that the clerk did not bring it to their attention, the trial Magistrate could have found negligence on the part of the clerk and/or counsel but not visit the same on the litigant, the Appellant. It is inequitable, an injustice and prejudicial to the litigant for court to visit such negligence of counsel on the client. **(See Goloba Godfrey v. Harriet Kizito SCCA No. 7 of 2010 and Bank Arabe Espanol v. Bank of Uganda SCCA No. 8 of 1998).**
20. **Justice L.E.M. Mukasa-Kikonyogo, DCJ (as she then was) in Hikima Kyamanywa case (supra)** explained that for effective administration of justice, the courts are enjoined to investigate all disputes and decide them on merit. Errors or lapses of counsel should not be visited on litigants who have no control over advocates. Moreover in the case of **Engineering TradeLinks Ltd v. DFCU Bank Ltd Misc. App. No. 337 of 2014 (arising out of C.S No. 593 of 2012)** it was held that denying a party the opportunity to be heard shall be the last resort of court.
21. In the circumstances of this case, it is clear from the record that the Appellant applied to set aside the *ex parte* judgment because he wanted to be heard. He was interested in defending the suit. His counsel may have been disorganized in his law firm hence the failure to deliver the hearing notice to the Appellant. However for the first time fixture for the scheduling,

and without giving an opportunity for the Appellant to be served afresh for the hearing, the trial Magistrate erred in law and fact by visiting the sins of counsel on the Appellant.

22. Under Order 9 rule 27 of the CPR, an *ex parte* decree can be set aside where the summons was not duly served or other sufficient cause. The **Hikima Kyamanywa case (supra)** has similar facts to the case at hand and in that case court found mistake of counsel to be sufficient cause to set aside the *ex parte* judgment as already noted above. Clearly the omission of the advocate may be considered negligent but it amounted to sufficient cause for setting aside the *ex parte* decree under Order 9 rule 27. I make haste to add that the Trial Magistrate by visiting the sins of counsel on the Appellant unfairly, unreasonably, inequitably and unjustly denied it the right to be heard in a matter where its property was being alienated.
23. In my view, even the mere claims by the Appellant in its Notice of Motion that the attachment and sale of its property by the Respondent was fraudulent in the circumstances of this case should have caused the Trial Magistrate to see that there was sufficient cause to set aside the *ex parte* judgment and hear both parties to determine the fraud claimed. Issue two is resolved in the affirmative.

Issue three: Whether the learned Trial Magistrate had jurisdiction to hear the summary suit

24. From the record of appeal, the amended plaint disclosed the cause of action as breach of an employment contract. In earnest, the 1st Respondent claimed that he was employed by the Appellant and not paid his salary for a year. He claimed the same in the original suit before the trial magistrate filed in 2007. The Appellant denied ever having employed the 1st Respondent and argued that the employment contract adduced by the Respondent in its pleadings before the Magistrate was a forgery. These claims clearly demonstrate that the alleged unpaid salary that the 1st Respondent was claiming in the Magistrate's court was not an obvious liquidated sum as the 1st Respondent presented. Or at least the liquidated status was in dispute.

25. Perhaps more important, the dispute as claimed was an employment dispute at the time of its filing in 2007; the applicable law was the Employment Act No. 1 of 2006. Section 93 of this Act refers jurisdiction over such a dispute to a labour officer in obligatory terms unless expressly provided by the Act or any other Act.
26. Section 207 of the Magistrates Courts Act as amended vests jurisdiction in Magistrates' courts subject to any other written law; in this case the Employment Act. The only exception to this as initiated in **Hilder Musinguzi v. Stanbic Bank HCCS No.124 of 2008** is where the suit is filed in the High Court, which is vested with unlimited original jurisdiction under Article 139 of the Constitution and Section 14 of the Judicature Act. Jurisdiction is a creature of Statute and court cannot confer jurisdiction on itself. See **National Medical Stores v. Penjuine Limited HCCA No. 29 of 2010**. The Employment Act was enacted specifically to handle employment disputes like the one the Magistrate heard in the head suit.
27. Moreover even when I consider the geographical jurisdiction, the 1st Respondent's cause of action as well as the suit property were in Matugga Wakiso District, outside the area of the Chief Magistrates' Court of Mengo under the Magistrates Court (Magisterial Areas) Instrument of 2007 and Order 7 (1) (f) of the Civil Procedure Rules on facts conferring jurisdiction on court. Clearly the Trial Magistrate erred when he heard the head suit and other applications thereunder when he had no material or geographical jurisdiction over the matter. Issue three is resolved in the negative.

Issue four: Whether the sale and transfer of the suit property to Mr. Muwanga was conducted in a manner contrary to the provisions of the CPA and CPR

28. The Appellant faulted the Trial Magistrate for sanctioning an illegality without due regard to the law of attachment and sale of land. The 1st Respondent submitted that the suit land is currently in the names of Mr. Sengooba and that there is no evidence on record to show that the sale of the land to Mr. Muwanga then to Mr. Sengooba was fraudulent. The 1st Respondent also argues that Mr. Muwanga and Mr. Sengooba who bought the suit property are not party to this appeal and did not appear. That they were not aware of the alleged

illegalities. That the title could only be impeached for fraud under Section 64 of the Registration of Titles Act after being heard. In this presentation, the 1st Respondent's theory is the same as the one adopted by the Trial Magistrate.

29. Under Order 22 rule 51(2) of the CPR, the order of attachment is to be served on the judgment debtor and further advertised as may be ordered by court. Rule 62 requires that the sale be by public auction; rule 63(1) requires that the intended sale shall be advertised while rule 64 mandates that the sale takes place after expiry of at least thirty days in case of immovable property.
30. In the case before me, although an order of attachment was issued by the Trial Magistrate on 27th March 2009, there is no evidence whatsoever that the Appellant was aware or notified of the events that were taking place. In fact the Appellant who was the judgment debtor explained in the affidavit in support of the application to set aside that it only became aware when its tenant was being evicted. This failure to serve the order of attachment on the judgment debtor was in contravention of Section 48 of the CPA and Order 22 rule 51 (2) of the CPR.
31. The Supreme Court in **Sinba (K) Ltd & Ors v. Uganda Broadcasting Corporation SCCA No. 3 of 2014** cited with approval **Rosemary Elenaor Karamagi v. Angoliga Malimound Misc. Application No. 733 of 2005 arising from H.C.C.S No. 1018 of 2004**, where Justice Geoffrey Kiryabwire (as he then was) at page 6 stated that "it is clear that the law sets out an elaborate procedure for the sale of immovable property. It would appear to me that the basic procedure where property has been ordered for sale would be for the Registrar of court to order the duplicate certificate to be delivered up to court. This order would have to be put in writing....He continues "where the judgment debtor has the duplicate certificate of title and willfully refuses to surrender it, then after a notice to show cause has been issued, the judgment debtor, can be committed to prison for a period not exceeding 30 days."
32. This meticulous and clear procedure was never followed in the case before me. I do not understand what difficulty there was in requiring the judgment debtor to surrender its

duplicate certificate in Court. Moreover even if this debtor had refused, the law has provided for such an eventuality. Nothing was done as required under the law.

33. At the hearing of this appeal, Mr. Ogwang, Counsel for the 1st Respondent conceded that there was no advertising for this sale, the duplicate certificate was not deposited in court and the judgment debtor - the Appellant was not notified. In all events, none of these required procedures under the law were executed.
34. The trial Magistrate at the last page of his ruling (un numbered) admits that there were irregularities in the execution especially failure to deposit the title in court before the sale and the way the property was transferred and registered into the names of Mr. Muwanga but holds that Mr. Muwanga's interest as the lawful owner could only be impeached under Section 64 of the Registration of Titles Act. This reasoning is legally erroneous in the circumstances of this case.
35. The chronology of transactions is more bizzare. The *ex parte* judgment was issued on 26th February 2009, the sale was on 4th March 2009 about six days after, the return of warrant was on 7th March 2009 and the judgment debtor only became aware of all these events on 31st March 2009 when its tenant was served with the notice to vacate the premises. One wonders why the sale and all related transactions that contravened the requirements of the law set out above were conducted with such supersonic speed. The Trial Magistrate was made aware of all these irregularities, which in my view point to a high possibility of the fraud alleged by the Appellant on the part of the 1st Respondent, the judgment creditor and the 2nd Respondent, the first purchaser. This alleged fraud could only be effectively investigated by hearing the Appellant out after setting the *ex parte* judgment aside.
36. In **Rosemary Eleanor Karamagi case (supra)** at pages 10 - 11, Justice Kiryabwire quoted **James Kabaterine v. Charles Oundo & Anor HCCS 177 of 1994** where Justice Mpagi-Bahigeine (as she then was) held that "... an execution has been held to be irregular when any of the requirements of the rules of court or parties for the time being have not been complied with. When execution has been irregularly executed the court is enjoined to make an order of restoration."

37. However in this case, the Trial Magistrate conveniently chose to gloss over and sanitize these illegalities. This in my view was erroneous in law and fact, it amounted to a miscarriage of justice and was prejudicial to the Appellant now before me. Put simply, the illegalities associated with the sale of the suit property which pointed to a possibility of fraud on some parties amounted to sufficient cause to set aside the *ex parte* judgment and have both parties heard in the circumstances of this case.
38. At page 12 of the record of appeal is the return of execution to the Trial Magistrate from James Birungi - a court bailiff working with Assets Recovery Associates dated 5th March 2009 and received in court on the same date. In it the bailiff explains that in execution of the warrant of attachment and sale issued on 27th February 2009, he attached the Defendant's (now Appellant) property described as Kyadondo Block 92B, plot 435 at Matugga and sold it on the 4th of March 2009 to Mr. Muwanga who paid the bailiff 22 million. Of this, according to the bailiff, 14 million was the decretal sum paid to the Plaintiff (now first Respondent) and Ug Shs 5,215,000 was the legal fees. In the last paragraph the bailiff explains that "owing to the Plaintiff's refusal to produce to court the duplicate certificate of title, we pray that an order doth issue to the Registrar of Titles to issue a special certificate of title in the names of the buyer and to grant vacant possession to him after which I will present my bill of costs to court for taxation."
39. According to Order 22 Rule 78(2) (c) and Rule 15 of the Judicature (Court Bailiff) Rules S.I 13-16 (cited above), a court bailiff shall remit in court all proceeds of his or her execution within seven days of the execution and there after submit his or her bill of costs, including his or her fees and disbursement for taxation. See also **Civil Revision No. 2 of 2007, Noor Muhammed v. Jaffery Wanami** where it was held that this is mandatory.
40. In the case before me, as demonstrated in the return, by paying the decretal sum and legal fees directly the bailiff contravened rule 15 and Order 22 Rule 78 (2) (c) which requires that the proceeds of the sale be deposited in court within 7 days. It has been held in numerous decisions of the courts in Uganda that court bailiffs are not supposed to pay themselves or anybody else from the proceeds of the sale in execution. The bailiff's actions in the case before me were erroneous.

41. Under Section 48(1) of the Civil Procedure Act, the duplicate certificate of title had to be deposited in court before the sale; under subsection 2, the court ordering the sale has power to order the judgment debtor (in this case the Appellant) to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate of title should not be delivered up. Under subsection 3, where the court is satisfied that a judgment debtor has willfully refused or neglected to deliver up such certificate when ordered to do so, the court may commit him or her to prison for a period not exceeding 30 days and under subsection 4, where the court is satisfied that such duplicate certificate of title has been lost or destroyed or that the judgment debtor can not be served with an order under this section or is willfully withholding such certificate, the court shall call upon the Registrar of Titles to issue a special certificate as prescribed by the Registration of Titles Act .
42. The return demonstrates clearly that Section. 48 of the CPA was violated. The sale took place before the duplicate certificate of title was deposited in court. It would appear the Trial Magistrate ordered the Registrar of Titles to issue a special certificate on the presentation of the bailiff in the return without causing the Appellant to appear and explain why it refused to produce to court the duplicate certificate as required under S. 48. Needless to say the issuance of a special certificate is a delicate matter that should be exercised only in exceptional circumstances where the Court satisfies itself of the impossibility for the duplicate certificate to be adduced. Here though the Trial Magistrate acted rushedly, listening only to the bailiff and making no effort to cause the Appellant to appear and explain why. This too was erroneous.
43. It is not satisfactorily explained why the trial Magistrate ordered the Registrar of Titles to issue a special certificate for the suit property in the circumstances of this case when the Appellant was in possession of the duplicate certificate. There is no demonstration that the Appellant as the owner of the property to be sold was notified of the sale or required to lodge the duplicate certificate in court prior to the sale in line with Section 48 of the CPA and Order 22 rule 51(1) of the CPR.

44. Even the Special certificate ordered was required to be lodged in Court before the sale under these provisions but this was not done. In these circumstances, the special certificate that was issued for the suit property and all transactions thereon were erroneous and are easily seen as part of a grand scheme to dispossess the Appellant of its property.
45. The Appellant explained to the Trial Magistrate in Mr. Lugolobi's affidavit that it only became aware of the attachment and sale when it was given notice to vacate through its tenant on the suit property. In paragraph 4 of the Appellant's affidavit in support of the application to set aside the *ex parte* judgment, Joel Lugolobi the Appellant Director, explained that he only became aware of the *ex parte* judgment on 2nd April 2009 when the tenant occupying the premises in issue was served with an eviction notice dated 31st March 2009 informing the tenant that the property had been sold to Mr. Muwanga by a court order. The property had been sold on 4 March 2009, 9 days after the warrant of attachment and sale issued on 27 February 2009. This evidence of the Appellant was never disputed by the 1st Respondent and there is no demonstration on record that the Trial Magistrate believed the presentation of the bailiff in the return and not this explanation by the Appellant in satisfying himself to order the issuance of the special certificate or to deny setting aside the *ex parte* judgment.
46. Without such an assessment and with the explanation of the Appellant that was not considered being reasonably, possibly true, the Trial Magistrate wrongly evaluated the evidence on record and erroneously upheld the *ex parte* judgment. In summation, all the above provisions of the law were completely disregarded thereby causing a grave injustice to the Appellant.
47. The foundation of Mr. Sengooba's transfer and ownership of the suit property is Mr. Muwanga's purchase, which is crafted in illegalities as demonstrated above and cannot stand. It follows therefore that neither Mr. Muwanga nor Mr. Sengooba can claim to be bonafide purchasers in the circumstances of this case.

48. It is boggling to the mind how the transfer to Mr. Sengooba and his registration on 2nd December 2009 at 9:40 am could be effected during the subsistence of a caveat lodged by the Appellant vide Instrument No. KLA 425399 lodged on 10th August 2009 without any notification to the Appellant, the caveator. This on its own is a good ground for cancellation of the transfer to Mr. Sengooba. The existence of a special certificate and the duplicate certificate does not change anything because the land registry that issued both would reveal in any search that the two titles concerned the same suit property. There was no need for a special certificate to be issued.
49. Having carefully considered the submissions of the parties on record, it is easily discernable that the 1st Respondent used the court system and the office of the Registrar of Titles to illegally sell the suit property of the Appellant to Mr. Muwanga who also allegedly transferred the same to Mr. Sengooba. The sole purpose of these two sales was to conclusively and unfairly deprive the Appellant of its property. This court cannot be seen to certify such illegalities and possible fraud as the Trial Magistrate did through the denial to set aside the *ex parte* judgment.
50. The reasoning of the Trial Magistrate is similar to that of Counsel for the 1st Respondent that since that attachment and sale are complete, the buyers are lawful owners of the suit property. The implication of such reasoning is that matters should be let to lie since in any case the attachment and sale have already been concluded. The position of the law in such a situation where sale transactions such as the one before me are tainted with illegalities was well articulated by **Justice Bashaija in Enid Tumwebaze v. Mpeire Stephen and Anor HCT CA 39 of 2010 (High Court)** and in **Karooli Mubiru & 21 Others v. Edmond Kayiwa & 5 Others (1979) HCT 212(Court of Appeal)** where the Courts after explaining that a court of law cannot sanction an illegality once brought to its attention held that “ in any case the fact that a judgment had been satisfied and execution had been completed is not a good reason for not quashing a judgment which was a nullity since an execution completed under such a judgment was *void ab initio*.”
51. This court accordingly finds that beyond the order of attachment and sale that was issued by court, all the transactions that led up to the sale of the Appellant’s land and the sale itself

were illegal *ab initio* and the *ex parte* judgment is accordingly quashed and set aside. Issue 4 is resolved in the affirmative.

Remedies

52. In **Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor (1982) HCB 11** it was held that a court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. In **Sinba (K) Ltd (supra)**, court relied on **Kanoonya David v. Kivumbi & 2 Ors HCCS No. 616 of 2003 (unreported)** for the principle that “an illegality vitiates the transfer of title with the result that the sold property remains the property of its owner. In this case the property cannot vest in the owner and at the same time vest in the purchaser the second defendant.”
53. In **Rosemary Eleanor Karamagi (supra)** at pages 10 - 11, Justice Kiryabwire quoted **James Kabaterine v. Charles Oundo & Anor HCCS 177 of 1994** where Justice Mpagi-Bahigeine (as she then was) held that “... an execution has been held to be irregular when any of the requirements of the rules of court or parties for the time being have not been complied with. When execution has been irregularly executed the court is enjoined to make an order of restoration.”
54. The principles in these cases apply to the case before me. The illegalities and irregularities demonstrated above vitiated the sale to the 2nd Respondent and the suit property remained the property of the Appellant. This Court is accordingly enjoined to order the restoration of the suit property to the Appellant.
55. In **Rosemary Eleanor Karamagi (supra)** court relied on **Eldreda Muchope v. Diamond Trust Bank (U) Ltd & Anor MA 70 of 2006 (Ruling No. 2)** for the position that in such a situation, the purported buyer of the suit property shall be entitled to the refund of his money. Following these authorities, I find that Mr. Muwanga’s remedy is a refund of his money from the 1st Respondent. In the same way Mr. Sengooba is entitled to a refund of any consideration made from Mr. Muwanga.

56. Based on all the above, in the interest of justice, the appeal is allowed, the *ex parte* judgement is set aside with the following orders and declaration:

- i. The sale and transfer of the Appellant's land was illegal, null and void *ab initio*.
- ii. The Registrar of Titles is hereby ordered to cancel the transfer and ownership of the suit land in the names of Mr. Sengooba and/or Mr. Muwanga immediately.
- iii. The Registrar of Titles is ordered to restore ownership of the suit land to the Appellant immediately. Only after such transfer or in relation there to should the Appellant's caveat be removed.
- iv. If the 1st Respondent is still interested in pursuing his claim against the Appellant, he should file a complaint before the Labour Officer as prescribed under Section 93 of the Employment Act of 2006.
- v. Mr. Sengooba can claim any consideration for the transfer to him from Mr. Muwanga.
- vi. Mr. Muwanga can claim any consideration for the transfer to him from the 1st Respondent.
- vii. The Appellant must be given vacant possession of the suit property at the latest within one month from the date of this judgment.
- viii. The Appellant is awarded costs of this appeal and in the lower Court to be paid by the 1st Respondent.

I so order

LYDIA MUGAMBE

(JUDGE)

22/12/2016