IN THE SUPREME COURT OF UGANDA
AT MENGO

CORAM: ODOKI C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, AND KATUREEBE, JJ.S.C.

Civil Application No.17 of 2007

BETWEEN

ORIENT BANK LIMITED::::::::::::::::::::::::::::::::::::::APPLICANT

AND

1. FREDRICK ZAABWE
2. MARS TRADING LIMITED:::::::::::::::::::::::::::RESPONDENTS

[Application arising from judgment of the Supreme Court (Tsekooko, Karokora, Mulenga, Kanyeihamba and Katureebe JJ.S.C) dated 10th July 2007 in Civil Appeal No.4 of 2006]

RULING OF THE COURT.

In this application, Orient Bank Limited, the applicant, asks this Court to recall its judgment in Civil Appeal No.4 of 2006 dated 10th July 2007 ***"so as to set it aside or to alter it and/or correct errors in it".*** The applicant bank, which is one of the two unsuccessful respondents in the said appeal, was held liable, together with Mars Trading Limited, the 2nd respondent herein,

for loss resulting from fraud committed against Fredrick Zaabwe, the appellant in the appeal and now 1st respondent herein. The application is by Notice of Motion dated 24th July 2007, initially stated to be under rules 2(2), 35 and 42 of the Supreme Court Rules. In an amended Notice of Motion dated 3rd September 2007, the application is in addition stated to be under Articles 126(2) (e), 131(1) and 144(1) of the Constitution of Uganda and sections 7 and 39(2) of the Judicature Act. As amended, the application is supported by two affidavits, one sworn by Dick Omara and another by Andrew Kibaya.

Background

The judgment that the applicant asks this Court to recall arose out of litigation that the 1st respondent initiated in the High Court for recovery of the suit property, which the applicant, as mortgagee thereof, sold upon default by the 2nd respondent, as mortgagor, in the repayment of an overdraft loan.

The detailed facts of the case are set out in the judgment that is the subject of this application. Here, it suffices to highlight only the facts pertinent to the application. In 1996, the 2nd respondent, through its director, undertook to borrow the sum of shs.1m/- for the 1st respondent if he granted to it a power of attorney over the suit property. The 1st respondent accepted the proposal, and granted the proposed power of attorney by an instrument dated 7th

November 1996. On strength of the power of attorney, the 2nd respondent mortgaged the suit property to the applicant as security for repayment of an overdraft loan of shs.15,000,000/-, which the applicant extended to the 2nd respondent solely to finance the latter's own business transaction. The 2nd respondent did not avail to the 1st respondent the money it undertook to borrow for him. Ultimately, the 2nd respondent even defaulted in repayment of the overdraft loan, whereupon the applicant, as mortgagee, sold and transferred the suit property to one Ali Hussein. On 19th May 1999, the 1st respondent was evicted from the suit property.

The 1st respondent then sued the applicant and the 2nd respondent together with several other persons, challenging the mortgage and subsequent sale and transfer of the suit property, on allegation of fraud on the part of all the defendants in the suit. The High Court dismissed his suit and the Court of Appeal in turn, dismissed his appeal. He brought a second appeal to this Court, which was heard on 6th December 2006 by a panel of five Justices that included Justice Karokora. The unanimous decision of the Court allowing the appeal as against the applicant and the 2nd respondent only, was pronounced in separate judgments of the five Justices on 10th July 2007, by which date Justice Karokora had retired from service. The Court held *inter alia* that -

- the execution of the mortgage over the suit property to secure the borrowing by the 2nd respondent, which to the applicant's

knowledge was neither on behalf of the 1st respondent nor for his benefit, exceeded the authority given by the power of attorney;

- further, the mortgage was invalid by reason of noncompliance with the provisions of sections 115, 147 and 148 of the Registration of Titles Act;
- in getting the 1st respondent to grant to it the power of attorney and surrender the certificate of title over the suit property, and in mortgaging the suit property to secure its own borrowing, the 2nd respondent acted fraudulently with clear intention to defraud the 1st respondent;
- in as much as the applicant knew that the 1st respondent was the sole proprietor of the suit property that was offered as security for repayment of the 2nd respondent's loan, and that the 1st respondent had no interest in that loan, the applicant had constructive notice of the fraud but chose to ignore it and participated in the mortgage transaction that was null and void;
- at the time the applicant sold the suit property to Ali Hassan, a caveat lodged by the 1st respondent on the title of the suit property was subsisting and so the said Ali Hassan was not a *bona fide* purchaser without notice;
- the applicant and the 2nd respondent were liable for the loss thereby incurred by the 1st respondent.

Accordingly, this Court ordered the Registrar of Titles to cancel registration of the mortgage and the transfer of the suit property to Ali Hassan and

reinstate the 1st respondent as the registered proprietor thereof. In the alternative, the Court ordered that in case prior to the judgment, the suit property was lawfully transferred from the said Ali Hassan to a bona fide purchaser, the applicant and the 2nd respondent shall jointly and severally pay to the 1st respondent the current market value of the suit property. In addition the Court ordered the applicant and the 2nd respondent jointly and severally to pay to the 1st respondent aggravated damages in the sum of shs.200m/- together with interest and costs.

Alternative prayers

In the application, there are two broad alternative prayers. First, the applicant asks the Court for "a slip order" to alter its judgment by amending several of its aforesaid orders so as to exonerate the applicant from liability and render the 2nd respondent alone liable for the payments ordered in the judgment, and also to substitute the award of "aggravated damages" with one of "general damages". The prayer is grounded on the assertion that as a result of accidental slips and/or omissions, the Court made erroneous findings of fact and of law. Secondly, the Court is asked in the alternative, to invoke its inherent powers and set aside its judgment on the grounds, (a) that it was obtained by fraud because it was based on the 1st respondent's false testimony; and (b) that it was invalid because at the time of its delivery the court was not competently constituted.

Scope of inherent power and slip rule

It is trite law that the decision of this Court on any issue of fact or law is final, so that the unsuccessful party cannot apply for its reversal. The only circumstances under which this Court may be asked to re-visit its decision are as set out in Rules 2(2) and 35(1) of the Rules of this Court. On the one hand, Rule 2(2) preserves the inherent power of the Court to make necessary orders for achieving the ends of justice, including orders for *inter alia* –

> "… ***setting aside judgments which have been proved null and void after they have been passed, ...*"** (Emphasis is added)

On the other hand, under Rule 35(1), this Court may correct *inter alia* any error arising from accidental slip or omission in its judgment, in order to give effect to what was its intention at the time of giving judgment. The rule reads thus -

> "***A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.*"**
> (Emphasis is added)

It is not clear why the application is stated to be brought under, not only those two rules, but also under the provisions of the Constitution and the Judicature Act cited in the amended notice of motion. From both the said motion and the written submissions, it appears that learned counsel for the applicant, wittingly or unwittingly, seeks to go beyond the confines of the

two rules. We allude to this because notwithstanding the assurances in the applicant's written submissions that ***"the Court is not being invited to sit on appeal against itself";*** there are aspects of the application that can hardly be described in any other way. Apart from three out of the fifteen grounds on which the application is made, the rest of the grounds listed in the motion are assertions that the Court made erroneous findings of fact or law allegedly because its attention was not drawn to one thing or another. We shall revert to and elaborate on this observation later in this ruling

Obviously, some of the grounds may well have passed as plausible grounds of appeal if the applicant had a right of appeal. However, as rightly conceded by learned counsel for the applicant, this Court being the final court of appeal in the legal system of this country, cannot be asked to sit on appeal against its decision. Again as rightly conceded by the same counsel in his written submission in response to the 1st respondent, the provision in Article 132(4) of the Constitution that permits the Court to depart from its previous decision does not permit it to overturn its decision in any proceedings, but only frees it from the bondage of the doctrine of *stare decisis* where it considers it right not to follow its previous decision. Subject to the inherent powers and the slip rule we have referred to, the Court's decision in every proceedings is final. This was explained by Sir Charles Newbold P., in ***Lakhamshi Brothers Ltd. vs. R. Raja and Sons*** (1966) E.A. 313; at p. 314 where he said –

> "***I would here refer to the words of this court given in the Raniga case (1965) EA at p.703 as follows:***
>
> ***'A court will, of course, only apply the slip rule where it is satisfied***

that

it is giving effect to the intention of the court at the time when judgment

was given or, in the case of a matter which was overlooked, where it is

satisfied, beyond doubt, as to the order which it would have made had

the matter been brought to its attention.'

These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.

But this application, and the two or three others to which I have referred, go far beyond that. It asks, as I have said, this court in the same proceedings to sit in judgment on its own previous judgment. There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation. This court is now the final court of appeal and when this court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said, to the limited application of the slip rule."

(Emphasis is added)

In ***Livingstone Sewanyana vs. Martin Aliker,*** Civil Application No.4 of 1991(SC), the court considered the nature of the Court's inherent power that

was preserved in r.1 (3) then and is now in r.2 (2). After noting and comparing the inherent power of the Court of Appeal in England and observing that the inherent power as articulated in 1966 case of ***Lakhamshi Brothers Ltd. vs. R. Raja and Sons*** (supra), was reflected in r. 35 of the Court of Appeal Rules of 1972, which the Supreme Court inherited, the court went on to clarify –

> ***"But rule 35 will not exhaust the inherent jurisdiction of the Supreme Court, otherwise Rule 1(3) would not have been necessary. The latter rule is there to provide for the many types of cases when the inherent jurisdiction will be necessary for the ends of justice"***

The applicant in ***NPART vs. General Parts (U) Ltd.*** Misc.Appl. No. 8 of 2000 (SC), sought *inter alia* a slip order reversing the Court's holding that a mortgage document produced in evidence was not properly executed because it was not sealed. The applicant wanted to show that the holding was erroneous because although the relevant common seal impression was not visible on the copy produced in evidence, it was visible on the original mortgage document, which it requested the Court to examine. Accepting the request would obviously amount to admitting additional evidence contrary to provisions of r.29 (1). The Court reviewed a line of decided cases concerning the slip rule and after holding that the case was not a proper one for the application of the slip rule, it observed –

> "***The jurisdiction of this Court to recall its judgment and correct or otherwise alter it, however, is not limited to the slip rule. It may also be exercised under its inherent power, which is set out in r.1 (3)…..***
>
> ……***we are inclined to agree that, where appropriate circumstances***

exist for the exercise of its inherent power, this Court would not be inhibited by r.29 (1) to receive additional evidence."

Both in ***Livingstone Sewanyana vs. Martin Aliker*** and in ***NPART vs. General Parts*** cases the court declined to invoke its inherent power because circumstances for its exercise did not exist. It is clear that, both under the inherent powers and under the slip rule, the Court's jurisdiction is circumscribed and must not be invoked to circumvent the principle of finality of the Court's decisions. We should therefore point out and stress that in this ruling we shall only consider two issues; namely whether the judgment in question is null and void and/or whether, as a result of any error arising from accidental slip or omission it is necessary to correct the judgment in order to give effect to the Court's intention.

In the amended notice of motion, the prayer to set aside the judgment for invalidity is surprisingly made in the alternative, and yet if it succeeds the other prayer for corrections or alterations would not arise as there would be no judgment to alter or correct. In our view, it is the latter prayer that ought to be in the alternative. In that regard, we note that in the conclusion of the written submissions by the applicant's counsel, there appears to be a belated reversal in the sequence of the prayers. Be that as it may, we think it is appropriate for us to first consider if the prayer for setting aside the judgment is sustainable.

Submissions on setting aside judgment

Obviously, the prayer for setting aside the judgment is made under r. 2(2) of

the Rules of this Court. In order to succeed in this prayer, therefore, the applicant had to prove that the judgment is null and void. He sought to do so first by the affidavit evidence of Andrew Kibaya, the substance of which was that at the time the judgment was delivered, one of the Justices who constituted the Coram at the hearing of the appeal, had retired. As we noted earlier in this ruling, the separate judgments of each of the five Justices were delivered and dated on 10th July 2007. By that date, Justice Karokora had retired from service, so that his signed judgment was delivered by a sitting Justice.

The applicant contends that pursuant to Article 131(1) of the Constitution, the Supreme Court is duly constituted at any sitting if it consists of not less than five members of the Court and that the term "any sitting" includes a sitting to deliver judgment. In his written submissions, Mr.Bwanika, learned counsel for the applicant, argues that at the time of delivering judgment on 10th July 2007, the Court was not duly or competently constituted as Justice Karokora was no longer a Justice of the Supreme Court entitled to participate in any proceedings of that Court. He maintains that *ipso facto* Justice Karokora's judgment is invalid and that ***"it invalidates the decision of the whole Court as there can be no valid judgment of the Court where any of the constitutive judgments is invalid and ineffective."*** In support of his submission, learned counsel cites as persuasive authority the decision of the Supreme Court of India in ***Surendra Singh and Others vs. The State of Uttar Pradesh*** (1954) AIR 194 together with that in ***Mohamed Akil vs. Asadunnissa Bibee*** (9 WR 1FB) to which reference is made in the same decision with approval.

In support of the second ground for the prayer to set aside the judgment, namely that the judgment was obtained by fraud because it was based on the 1st respondent's false testimony, the applicant relies on parts of the affidavit evidence of Dick Omara. In paragraph 11 of his very long affidavit, Dick Omara avers –

> "***THAT I am informed by the Applicant's Advocates that the conduct of the 1st Respondent in issuing the power of attorney without limit, untruthful evidence given to Court particularly at pages 53 and 54 of the record (copies attached as Annexture "H") delaying to protect his property after being defrauded, and failing to inform the applicant of the fraud coupled with the fact that the 1st Respondent is an advocate ought to have been taken into account when this Honourable Court ordered aggravated damages"*** (Emphasis is added)

In what appears to be the illustration of the falsity of the so-called "untruthful evidence", Dick Omara avers in paragraph 5 (b), (c) and (d) that –

> ***"(b) The overdraft of the 2nd Respondent was not an "old" facility as evidenced by***
>
> i) ***the bank statements at page 272 and 273 of the record…***
>
> ii) ***page 187 of the record being Applicant's submissions to the High Court….***
>
> iii) ***page 200 of the record being a page of the judgment of the High Court…..***

iv) ***the overdraft approval at page 266 of the record….***

c) ***The intention of the 1st Respondent at the time he issued a power of attorney and surrendered his certificate of title to Block 9 Plot 534 <u>("the Suit Property")</u> to the 2nd Respondent was that the 2nd Respondent would use the said property to borrow UGX 1,000,000 for him but the limit on borrowing was not communicated to the applicant.***

d) ***The 1st Respondent was aware that funds were to be borrowed by the 2nd Respondent from the Applicant, and the 1st Respondent signed the declaration at page 258 of the record..."***

We are constrained to say that the need for this affidavit is not apparent, since Dick Omara avers on matters that are on the court record, much of which he gathered from counsel. In the written submissions, counsel for the applicant stresses that the 1st respondent lied when he testified that the mortgage was executed to secure an old loan and that although the High Court had disregarded the lie, this Court had believed it and proceeded on the premises that it was not a contentious issue. In the concluding part of the submission, counsel rounds up on this as a ground for setting aside the judgment, thus –

> "***We further submit that given <u>the 1st respondent's untruthfulness</u> pointed out above which was not brought to the Court's attention at the hearing of the appeal, and which amounts to obtaining judgment on the basis of fraud, the***

Court is moved to find that this is a proper case where <u>per force</u> the judgment obtained by the 1st Respondent should be recalled, to be corrected by setting it aside."

In summary, although the pleadings and submissions are replete with assertions of the 1st respondent's "untruthful evidence", what we are able to discern from the aforesaid affidavit evidence and counsel's written submissions, are only two alleged falsehoods. First, it is contended that the 1st respondent's testimony that that the mortgage of the suit property to the applicant was to secure an old debt was false. The second, which is more of a deduction than direct evidence, is in relation to the Court's holding that the power of attorney was not granted for the exclusive benefit of the 2nd respondent, which allegedly is belied by the Declaration wherein the 1st respondent confirmed that the 2nd respondent was the borrower. Counsel submits that *"to allow the 1st Respondent to assert … that he did not grant powers to the 2nd Respondent to borrow in the 2nd Respondent's name would be to allow the 1st Respondent and his client (the 2nd Respondent) to cheat the Applicant Bank."* Counsel relies on the decisions in ***<u>Livingstone Sewanyana vs. Martin Aliker</u>***, Civil Application No.4 of 1991 (S.C.), and ***<u>Hipfoong Hing vs.Heotia & Co.</u>*** (1918) AC 888, as authority for the proposition that this Court has inherent power to set aside a judgment obtained through fraud.

Mr. Zaabwe, the 1st respondent, represented himself and filed his written

submissions ahead of the applicant. His submission on the effect of the retirement of Justice Karokora is not quite on the point that the applicant canvasses. It is limited to the assertion that at the time of hearing the appeal on 6th December 2006, Justice Karokora was entitled to participate in the hearing pursuant to the provisions of Article 144 of the Constitution, which assertion appears not to be in contention. He does not directly advert to the effect of delivery of the judgment of Justice Karokora after expiry of the period permitted under Article 144 save to assert that ***"the applicant cannot now raise this complaint"*** when it did not raise it at the hearing of the appeal or at the delivery of the judgment,

Findings on Prayer for setting aside judgment

The proposition that this Court's judgment in a case heard and decided by a Coram of five Justices is invalid if at the time it is delivered one of the Justices has ceased to be a member of the Court, is novel. We have therefore, carefully considered the two Indian decisions relied on by the learned counsel for the applicant in support of the proposition. In the ***Surendra Case*** (supra) the Supreme Court of India held that an appeal decision of the High Court constituted by two judges was invalid because by the date of delivery of the judgment, one of the two judges had died notwithstanding that he had signed the judgment before he died. The court stressed that ***"a judgment within the meaning of the*** [applicable] ***sections*** [of the Indian law] ***is the final decision of the court intimated to the parties and to the world at large by formal pronouncement or delivery in open court."*** It observed that even if written and signed, the views of a judge remain a draft until formally

delivered as the judgment of the court, since until delivery he may change his mind. The court went on -

> ***"It follows that the Judge who "delivers" the judgment or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can if necessary, stop delivery and say that he has changed his mind………. If he hands in a draft and signs it and indicates that to be the final expository of his views, it can be assumed that those are still his views at the moment of delivery if he takes no steps to stop delivery.***
> ***But one cannot assume that he would not have changed his mind if he is no longer in a position to do so."***

In the course of its judgment, the court referred to the decision in ***Mohamed Akil's Case*** (supra) in which a full bench of nine judges of the Calcutta High Court considered whether the judgments of three out of seven judges who constituted the Coram that heard a case, were valid. The issue arose because the three judges had written and signed separate judgments, which they handed to the Registrar of the Court for subsequent delivery, but before the judgments could be delivered, two of the three judges retired and the third died. While the Supreme Court pointed out that it did not agree with all that was said in that case it cited, with approval several passages from the judgments in the case including those from Jackson J. and Peacock C.J. The passage cited from the judgment of Peacock CJ., reads –

> ***"The mere arguments and expressions of opinions of individual judges, who compose a court, are not judgments. A judgment in the eye of the law is the final decision of the***

> ***whole court. It is not because there are nine judges that there are nine judgments. When each of the several judges of whom a simple court is composed separately expresses his opinion when they are all assembled, there is still but one judgment, which is the foundation for one decree."***

The words quoted from Jackson J., are more demonstrative. He said –

> ***"I have however always understood that it was necessary in strict practice that judgments should be delivered and pronounced in open court. Clearly, we are met today 'for the first and only time' to give 'judgment' in these appeals; and it appears to me, beyond question, that Judges who have died or have retired from the Court cannot join in the judgment, which is to be delivered today and express their dissent from it"***

We recognize the reasoning of the learned justices in the two cases, which obviously they founded on the Indian law. However, having regard to the provisions of our law, we are not persuaded to conclude as they did, that death or retirement of a judge necessarily invalidates an undelivered judgment that the judge signed before the death or retirement.

Under Article 131 of the Constitution of Uganda, the Supreme Court is duly constituted at any sitting in criminal or civil appeals, other than appeals from the Constitutional Court, if it consists of an uneven number not being less than five members of the court. The practice and procedure of the Supreme Court is governed by the Judicature (Supreme Court) Rules (S.I. 13-11). The provisions relating to judgments are set out in Rule 32, which reads -

“32. Judgment.

1) ***Judgment or an order may be given at the close of hearing of an appeal or an application or reserved for delivery on some future day which may be appointed at the hearing or subsequently notified to the parties.***
2) ***In a criminal application, other than application heard by a single judge, and in criminal appeals, one order or judgment shall be given as the order or judgment of the court, but a judge who dissents shall not be required to sign the judgment; except that the presiding judge may in any particular case, direct that separate orders or judgments be given.***
3) ***In a civil application, other than an application heard by a single judge, and in a civil appeal, including a constitutional appeal, a separate order or judgment shall be given by the members of the court, unless the decision being unanimous, the presiding judge otherwise directs.***
4) ***An order of the court on an application shall, where the application was heard in chambers be delivered in chambers, or if heard in court, be delivered in court, and a judgment on an appeal shall be delivered in court, except that the presiding judge may, in any particular case, direct that the decision of the court only shall be so delivered and not the reasons for the decision, and in any such case, the judgment or order shall be deposited in the registry, and copies shall be available to the parties when the decision is delivered.***

5) ***Notwithstanding sub rule (1) of this rule, the court may at the close of the hearing of an application or appeal give its decision but reserve its reasons; and in any such case the reasons may be delivered in court or deposited in the registry.***

6) ***Where the reasons are deposited in the registry, copies of the reasons shall be made available to the parties and they shall be so informed.***

7) ***Where one judgment is given at the close of the hearing as the judgment of the court, it shall be delivered by the presiding judge or by any other member of the court as the presiding judge may direct.***

8) ***Where judgment, or the reasons for a decision, have been reserved, the judgment of the court, or a judgment of any judge, or the reasons, as the case may be, being in writing and signed, may be delivered by any judge, whether or not he or she sat at the hearing, or by the registrar.***

9) ***A judgment shall be dated as of the day when it is delivered, or where a direction has been given under sub rule (4) of this rule, as of the day when the decision was delivered."***

Although the rule does not directly refer to the issue raised by the applicant, in our considered view sub-rule (8), which envisions delivery of a reserved judgment by a judge who did not sit at the hearing or the registrar, covers not only the scenario where the judge who sat is temporarily absent but also the two scenarios where the judge is no longer available by reason of death or

retirement. The only conditionality for the application of the sub-rule is that the judgment in question is written and signed by the judge who took part in the hearing and deciding of the case. The reason that prevents the judge who wrote and signed the judgment to deliver it in person is not a factor for sub-rule (8) to apply. For purposes of the sub-rule, it is immaterial that the judge is prevented by death or retirement provided that at the time of writing and signing the judgment the judge was a member of the Court.

It is trite that a judgment takes effect from the day it is pronounced, hence the requirement in sub-rule (9) that it be dated as of the day it is delivered and not necessarily the day it is signed, though more often than not the two are done at the same time. On the other hand, the requirement for the judgment to be in writing and signed is to ensure its authenticity and validation as the judgment of the judge/judges making it. In the case of reserved judgments, the writing and signing are invariably done before the time the judgment is delivered, and its authenticity and validity are thus preserved up to its delivery. Where at any time before its delivery, the judgment is altered because there is change of mind, the altered judgment has to be similarly authenticated and validated. In either case, the judgment is delivered as the valid judgment of the judge who prepared and signed it. We are not persuaded that the situation where the judge, having signed a reserved judgment, does not alter the judgment, calls for speculation whether it is by choice or because the judge ceased to be a member of the Court. We say this because in our view, much as the date of delivery is the day it takes effect, it is not the day the decision is made. We think that neither the interest of justice nor public policy would demand that a decision of five judges be invalidated because one of the judges who participated in the decision retired

or died before the decision was pronounced.

The second ground on which the applicant prays for the judgment to be set aside is that it was obtained by fraud through the alleged falsehoods in the evidence of the 1st respondent. As we said earlier in this ruling, there are two alleged falsehoods about which the applicant complains. The first is the assertion by the 1st respondent that the mortgage was for securing an old loan; and the second is the implicit contention by the 1st respondent that the 2nd respondent was not authorized under the power of attorney to borrow in its own name.

Like this Court's predecessor said in ***Livingstone Sewanyana vs. Martin Aliker*** (supra), ***"we*** [too] ***would not hesitate*** [by order] ***to set aside*** [our] ***judgment based on fraud under our inherent powers"***. However, we hasten to add that before exercising that power to make such order, we would have to be satisfied on three conditions; namely that the fraud is proved strictly, that the judgment is based on that fraud and that the order is necessary either for achieving the ends of justice or to prevent abuse of court process. Can it be said that the three conditions are fulfilled in the instant case? In our considered view the answer is in the negative.

In the first place, we are unable to say with certainty that the alleged falsehoods constitute fraud on the part of the 1st respondent. While we agree that the 1st respondent's testimony that the mortgage was to secure an old loan turned into a new loan is belied or at the very least is not supported by

the bank statement produced in evidence, the purpose of that testimony cannot be verified from the record. The fact that the 1st respondent was not cross-examined on it does not help to show that it is false let alone that it was given with a fraudulent intent.

More importantly, it must be stressed that the Court's judgment was not based on the alleged falsehoods or any of them. The joint liability of the applicant and the 2nd respondent, as held by this Court, was neither based on the finding that the mortgage was for securing "an old loan" nor on the fact that in the mortgage the 2nd respondent was referred to as "the borrower". This Court disagreed with the concurrent finding of the two courts below that the 1st respondent had not been defrauded. It held that there was fraud committed against the 1st respondent. In a nutshell, it found the fraudulent transaction to be obtaining of the power of attorney, under the 2nd respondent's false undertaking that it would use the power to borrow money for the 1st respondent, and subsequently mortgaging the suit property to secure a loan for its own exclusive business contrary to and *ultra vires* the clear terms of the power of attorney. The Court found that the 2nd respondent perpetrated the fraud. It also found that the applicant had constructive notice of the fraud, ignored it and instead participated in effecting it by accepting and executing the mortgage, which it eventually enforced through the sale and transfer of the suit property. The invalidity of the mortgage was not only on account of that fraud, but also on account of noncompliance with sections 115, 147 and 148 of the RTA. The Court

concluded that both the 2nd respondent and the applicant were jointly liable for causing loss to the 1st respondent through that transaction. This Court would not have come to a different conclusion even if it had found that the 1st respondent's allegation of an "old loan" to be false. In conclusion we find that the applicant has not proved either that the alleged falsehoods were fraudulent or that the judgment of this Court was based on them.

Accordingly we reject the applicant's prayer for setting aside the Court's judgment as invalid on the ground that it was not delivered by a duly constituted court or on the ground that it was obtained by fraud.

Submissions on correction of the judgment

Earlier in this ruling we indicated that the applicant's other prayer is for orders to alter the judgment so as to exonerate the applicant from liability, and to substitute an award of "general damages" for the one of "aggravated damages". It is in respect of this prayer, which is principally brought under the slip rule, that the application, both in pleading and submissions by counsel, overshoots the parameters of the slip rule in as much as the Court is invited to reverse its duly considered decisions.

As we observed earlier, the amended notice of motion lists 15 grounds on which the application is made. However, it appears to us that the said grounds, other than ground 14 that is already disposed of, cannot sustain the prayer for a slip order. A quick glimpse through the grounds pleaded in the motion, illustrates this point.

In ground 1, the applicant asserts that the ***"Court made an accidental slip … that the facts of the case were not contentious"*** but does not indicate any error resulting from the alleged slip. Ground 2 lists thirteen alleged erroneous findings of fact that the Court made ***"through accidental slips or omissions"*** without alluding to, let alone identifying any of the alleged slips or omissions. On the other hand, ground 13, without any pretence that there was any slip or omission, just lists seven findings of law which, according to the applicant, are erroneous and ***"ought to be corrected".*** In ground 3 it is asserted that contentious facts were not drawn to the attention of the Court. Grounds 4 and 5 assert that the Court would have made different findings, in respect of facts ***"if certain*** [undisclosed] ***matters had been drawn to*** [its] ***direct attention during hearing";*** and in respect of law ***"if counsel for the Applicant had addressed the Court regarding the said findings"***. Grounds 6 and 7 are arguments that in view of the fact that the 1st respondent is an advocate of not proven good standing as a practicing lawyer, of his conduct and of the nature of his evidence, and having regard to the *Contra Proferentem* doctrine, the Court was misled and slipped in its decision to allow the appeal and was misled to overlook the fact that the 1st respondent's premises could not be approved as law chambers and to award aggravated damages. Ground 8 complains that the Court ***"based certain of its findings on principles of equity"*** on which neither counsel addressed it. Grounds 9 and 12 amount to arguments that if the untruthfulness or dishonesty of the 1st respondent was not overlooked, all orders ought to have been issued against the 2nd respondent alone and the court would not have "***slipped"*** to order cancellation of registration of the mortgage and

transfer of the suit property contrary to natural justice. Ground 10, which is duplicated as ground 15, asserts that granting the orders sought would serve the interest of justice and prevent abuse of process. Ground 11 simply states that the 1st respondent was the dishonest party but he misled the Court to find that it was the applicant who had acted dishonestly.

The written submissions by counsel for the applicant do not cover all the fifteen grounds but in addition to ground 14 they only address grounds 1, 2, 7 and 13. In the circumstances we need only briefly consider the grounds counsel addresses. Before doing so, however, we are constrained to observe, with due respect, that even in regard to those grounds addressed, the submissions appear to be no more than a desperate attempt to re-argue the applicant's defence hoping to put it in better light than was done in earlier proceedings.

In the submissions on ground 1, counsel for the applicant questions the statement in the lead judgment of Katureebe JSC to the effect that ***"the facts of the case are not in contention"*** and contends that it was an accidental slip because the submissions of the 1st respondent's counsel in the Court of Appeal reflect disputed facts relating to four issues, namely –

- *the reason behind the grant of power of attorney*
- *whether the title was security for existing or fresh facility*
- *whether power of attorney was procured by fraud*
- *validity of the mortgage*

Counsel then reproduces a passage in the said judgment purportedly to show what he then exaggeratedly refers to as ***"the slips, errors and omissions"***

affected and ***"contaminated"*** the Court's judgment. This at best is a farfetched and unsustainable argument. A summary of the non-contentious facts to which the learned Justice of Supreme Court referred, appears immediately after the questioned statement at pages 2 and 3 of the judgment. Those facts, which do not include any of the said four issues, are indeed not disputed. The questioned statement was not a slip nor was it made in error. What is more, the statement did not result into any erroneous findings in the reproduced passage or anywhere else in the judgment.

The submissions on ground 2 are in several segments. The first relates to the allegation by the 1st respondent that the mortgage secured an old loan which we have already discussed. The second and predominant segment relates to what the applicant's counsel refers to as *"Visitation of fraud on the Applicant"*. The thrust of the submission is to argue that it was erroneous to find the applicant liable for the fraud when allegedly there was no evidence to show that the applicant had knowledge of the dealings between the 1st and 2nd respondents, or that it was aware that the power of attorney was obtained by fraud. Counsel makes no attempt to link the alleged erroneous finding to any accidental slip or omission except by the vague assertion that the Court was misled. Clearly, this is requesting the Court to sit on appeal over its decision that the applicant had constructive notice of the fraud by reason of its knowledge that the loan was not for the benefit of the donor of the power of attorney. That decision did not result from any accidental slip or omission but from inference on evidence on record. We don't find it necessary to comment on the submissions on the other two segments concerning the applicant's arrogance and the participation of the applicant's

officials in the transaction, which submissions are virtually incomprehensible.

Although in ground 13 the amended notice of motion lists seven alleged erroneous findings of law, in the written submissions, counsel for the applicant addresses only two, i.e. on fiduciary relationship and equitable mortgage. In our view, however, the submissions in both cases are misconceived. The basis for finding that a fiduciary relationship existed between the applicant and the 1st respondent were set out at p.18 of the lead judgment and need not be re-written in this ruling. On the second finding, the applicant relying on observations made in the decision of this Court in ***General Parts (U) Ltd. vs. NPART,*** Civil Appeal No.5 of 1999 implicitly contends that the court ought to have held that in absence of a legal mortgage, the applicant was entitled to an equitable mortgage. However, the submission ignores the finding that the mortgage was vitiated by the fraud in as much as the purpose of the mortgage, to the knowledge of the applicant, was *ultra vires* the terms of the powers of attorney, which finding distinguishes the case from the ***General Parts Case*** (supra).

Lastly, the brief submission on ground 7 is that the record does not show proof that the 1st respondent had a law chamber approved by the Law Council in or at the suit property, and that therefore he should not be awarded aggravated damages. Again this illustrates how the application is an attempt to improve on the presentation of the applicant's case rather than to seek perfection of the Court's judgment. The record shows that at the trial the 1st respondent testified that he had law chambers in the suit property.

This evidence was not contradicted or even challenged in cross-examination. In any case it was not the only reason why the Court awarded aggravated damages.

In conclusion, we reiterate that the prayer for correcting or altering the judgment is not sustainable because its purport and thrust is to ask this Court to reverse its findings not so much because the findings resulted from accidental slip or omissions but because in the view of the applicant the findings are erroneous. More importantly, we are satisfied that the judgment fully reflects the intention of the Court.

In the result we dismiss the application with costs to the 1st respondent.

DATED at Mengo this 22nd day of January 2008

B.J. Odoki
Chief Justice

J.W.N. Tsekooko
Justice of Supreme Court

J.N. Mulenga
Justice of Supreme Court

G.W. Kanyeihamba
Justice of Supreme Court

B. M. Katureebe

Justice of Supreme Court