**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA**

**CORAM: Tumwesigye, Arach-Amoko, JJSC; Odoki, Tsekooko and Kitumba; Ag. JJ.S.C)**

**CIVIL APPEAL NO. 02 OF 2014**

**Between**

**CRANE BANK LTD==========APPELLANT**

**And**

**NIPUN NAROTTAM BHATIA==========RESPONDENT**

(*Appeal and cross-appeal from the judgment of the Court of Appeal at Kampala (Bossa, Kakuru and Kiryabwire, JJA) dated 20th December, 2013 in Civil Appeal No. 75 of 2006*.)

**JUDGMENT OF ARACH-AMOKO, JSC**

This is an appeal by Crane Bank, the Appellant, against the decision of the Court of Appeal which reversed the decision of the High Court (Opio Aweri, J as he then was) dated 5th July, 2005, in favour of the Appellant and dismissed the suit on account of illegality. There is also a cross-appeal by Nipun Narottam Bhatia, the Respondent, against the said decision.

**Background:**

The facts giving rise to this appeal as found by the two lower courts are not in dispute. On the 12th April, 1996, the appellant and one Norattam Dharamsy Bhatia executed an agreement whereby Norattam Dharamsy Bhatia agreed to sell to the appellant property situated on plot 1 Martin Road, in Kampala (hereinafter referred to as "the suit property"), on the terms and conditions set out therein. Nattoram Dharamsy Bhatia had agreed to sell the suit property as the sole beneficial owner of the property by virtue of a trust executed in his favour by his parents, Dharamsy Morarji Bhatia and his wife Motibai, the registered proprietors.

The agreed purchase price was USD 75,000 payable in two equal installments as follows:

(i) 50% that is, (USD 37,500) upon execution of the agreement.

(ii) The balance of USD 37,500 was to be paid upon delivery of the original title deed with the appellant's name having been registered thereon and upon discharging all encumbrances thereon.

It was further agreed that the Appellant would take possession of the property on signing the agreement. Clause 2 provided that:

***"2) The Vendor undertakes to indemnify the Purchaser for any loss or damage suffered as a result of any defect***

***in the title to the property which may prevent the Purchaser from acquiring legal title to the same or from acquiring quiet possession of the same, and in such event a full refund shall be effected and the property shall revert fully to the Vendor."***

The Appellant paid the first installment of USD 37,500 and took possession of the property. However, Nattoram Dharamsy Bhatia failed to transfer the title to the Appellant. Subsequently, he invoked clause 2 of the agreement and offered to refund the Appellant's part payment and requested the Appellant to vacate the suit property. The Appellant declined the offer, arguing that the Respondent had not made a serious effort to transfer the title to the suit property as per the agreement.

As a result, on 27th April 2001, Nattoram Dharamsy Bhatia instituted a suit in the High Court praying for:-

***(i) An order for vacant possession of the land.***

***(ii) A declaration that the land has reverted to the plaintiff in accordance with the terms of the Contract.***

***(iii) Costs of the suit.***

In its written statement of defence, the Appellant contested the suit, and alleged that the Respondent had breached the contract by failing to make any serious effort to transfer the title to the suit property in its name, yet it had always been willing to complete

payment as agreed. It lodged a counter-claim against the Respondent, seeking for inter alia:-

***(a) A declaration that it was in lawful possession of the suit property.***

***(b) A declaration that it is entitled to remain in possession of the suit property as a bonafide purchaser for value.***

***(c) An order for specific performance of the contract.***

***(d) General damages for breach of contract.***

***(e)Interest on (d) above at court rate from date of judgment till payment in full.***

***IN THE ALTERNATIVE BUT WITHOUT PREJUDICE TO THE FOREGOING,***

***(f) Special damages of US $ 37,500 plus interest at 36% per annum with weekly rests from 17/4/1996 till payment in full.***

***(g) Costs***

***(e) Any further relief as the court may deem fit.***

During the course of litigation, Nattoram Dharamsy Bhatia passed away. His son Nipun Norattam Bhatia, the Respondent, obtained Letters of Administration to the estate and continued with the suit in a representative capacity.

At the hearing of the suit in the High Court, the issues agreed upon for determination by the trial judge were:

***(1) Whether the plaintiff was entitled to invoke clause 2 of the sale agreement.***

***(2) Whether the plaintiff was in breach of contract by failing to transfer title to the defendant.***

***(3) What remedies if any are available to the parties.***

The learned trial judge held that the Respondent could not invoke clause 2 of the Sale Agreement as there was no defect in his title to the suit property. He further held that the Respondent had breached the contract by failing to transfer the title as per agreement. As a result, he answered issue number 1 in the negative and issue number 2 in the affirmative. He dismissed the suit with costs to the Appellant and entered judgment for the Appellant on the counter claim with the following orders:

***(1) A declaration that the defendant is in lawful and rightful possession of the suit land.***

***(2) Order of specific performance against the plaintiff.***

***(3) General damages for inconvenience in the tune of US $ 20,000 (twenty thousand US $).***

***(4) In the alternative, special damages of $37,500 plus interest at 36% per annum with weekly rest from 17/4/1996 until payment in full.***

The Respondent was dissatisfied with the decision and appealed to the Court of Appeal against the judgment and the above orders. As pointed out earlier, the Court of Appeal, after hearing the same, dismissed the appeal and set aside the judgment and orders of the High Court on the ground that the sale agreement on which it was based was unenforceable on account of illegality and substituted it with an order dismissing the suit with no order as to costs. Both parties have appealed against the said decision.

**Grounds of appeal:**

The Memorandum of appeal comprised seven grounds. They were framed as follows:

***1. The learned Justices of Appeal misdirected themselves and erred in law when they selectively applied the provisions of the Financial Institutions Act (Cap 54) to hold that the Agreement of Sale was in contravention of the law, a nullity and unenforceable.***

***2. The learned Justices of Appeal misdirected themselves and erred in law when they failed to give the parties an opportunity to be heard on the question whether the***

***Agreement of Sale was in contravention of the law, a nullity and unenforceable.***

***3. The learned Justices of Appeal misconstrued the evidence and erred both in fact and in law when they found that the respondent attempted to convey a greater ownership interest than he had at the time.***

***4. The learned Justices of Appeal misdirected themselves and erred both in law and in fact when they found it to be unlikely that the title in the Agreement of Sale could be perfected under the Registration of Titles Act.***

***5. The learned Justices of Appeal erred both in fact and in law when they found that there was an encumbrance on the title to the suit property by reason of the property being in the possession of a third party.***

***6. The learned Justices of Appeal erred when they came to the conclusion that the learned trial judge erred in finding that the respondent could not invoke clause 2 of the Sale Agreement.***

***7. The learned Justices of Appeal erred when they;***

***a) Misapplied the law relating to unjust enrichment, and***

**b) *Interfered with the discretio*n exercised by the trial judge in awarding the interest he did.**

The Appellant prayed for orders that:

***a. The appeal be allowed.***

***b. The judgment of the Court of Appeal be set aside.***

***c. The judgment of the High Court be re-instated.***

***d. The respondent pays the appellant the costs in this Court and the Courts below.***

The Respondent filed a Notice of Cross-Appeal on 25th April 2014, on the grounds that:

**1.** ***The learned Justices of Appeal erred in law and in fact in finding the respondent to have committed an illegality under the Financial Institution Act and/or finding the respondent in pari delicto with the appellant in such alleged illegality.***

***2. The learned Justices of Appeal erred in law and in fact in finding the respondent in breach of contract because of failure to deliver title to the appellant in respect of the suit property.***

***3. The learned Justices of Appeal erred in law and in fact when they held that the appellant could not be a trespasser on the basis that a third party was in possession of the suit property.***

The Respondent prayed for the following reliefs:

***a) A declaration that the suit land reverted to the respondent in accordance with the terms of the contract.***

***b) The respondent is granted an order for vacant possession of the suit property.***

***c) The appellant be ordered to pay general damages for trespass to land.***

***d) The appellant be ordered to pay mesne profits at such rate and in such amount as the court deems fit from the day of filing the suit till payment in full.***

***e) The appellant be ordered to pay interest on (c) and (d) above at the rate of 25% per annum from date of judgment and date of filing the suit respectively till payment in full.***

***f) Costs in this Court and Courts below be granted to the respondent.***

**Representation: 5**

At the hearing, Mr.Didas Nkurunziza and Mr. Mohammad Mbabazi appeared for the Appellant while Mr. Hebert Byenkya and Ms. Pearl Nyakabwa represented the Respondent.

Mr. Nkurunziza relied on his written submissions and argued grounds 1 and 2 of the appeal together, then the rest of the grounds separately. Mr. Byenkya opted for oral submissions. He argued grounds 1 and 2 of the appeal together with ground 1 of the cross of appeal, then grounds 3, 4 and 6 of the appeal together with ground 2 of the cross-appeal and then ground 5 separately. He did not submit on ground 7.

***Consideration of the Grounds***

In ground 1 of appeal, the Appellant complained of an error of law in that the Learned Justices of Appeal selectively applied the provisions of the Financial Institutions Act to hold that the Agreement of Sale was in contravention of the law, a nullity and unenforceable.

In ground 2, the Appellant complained that there was an error of law in that the Learned Justices failed to give the parties an opportunity to be heard on the question as to whether the Agreement of Sale was in contravention of law, a nullity and unenforceable.

Submitting on the two grounds, Mr. Nkurunziza contended that although it is trite law that an illegality once brought to the

attention of Court, cannot be condoned, however, such illegality must be unequivocal, clear and sufficiently proved. Where further inquiry is required to see whether or not an illegality has in fact been committed, then a court of law is not entitled to make such finding or come to the conclusion that an illegality exists unless and until such further inquiry has been undertaken and the facts established. He cited the case of **Mohammed Mohammed Hamid v Roko Construction Civil Appeal No. 1 of 2013(SC)** in support of his submission**.**

He submitted that in the instant case, there was no pleading or issue of illegality in the High Court and Court of Appeal, nonetheless, the Learned Justices of Appeal identified and relied on S.18 (1) (c) of the Financial Institutions Act to reach their conclusion that the Appellant, had, in contracting to purchase the suit property, committed an illegality which could not be condoned, therefore, the contract had to be set aside as being unenforceable, null and void.

He asserted that this was an error because the prohibition in section 18 of the Financial Institutions Act is so equivocal and is subject to exceptions that the learned Justices could not have properly come to the conclusion that an illegality had been committed without receiving evidence and hearing the parties on the matter. He elaborated his point further by giving the following reasons:

Firstly, he submitted that sub-section (2) of that section provides a rider that, a financial institution may, notwithstanding sub-section (1) and while engaging in an undertaking mentioned in sub-section (2), with permission from the Central Bank, purchase or acquire property without committing an illegality. He stressed that the Learned Justices could not reach a conclusion that an illegality had been committed without first having evidence that the Central Bank had or had not permitted the appellant to acquire the suit property.

Secondly, he contended that Section 18(1)(c) of the Financial Institutions Act itself contains exceptions including for instance, where the purchase was reasonably necessary for the purpose of conducting its business, housing staff, or securing a

debt. Therefore, in order for the prohibition to apply, there must be evidence before Court to prove that the purchase was not covered by these exceptions. There was no such evidence before the Court of Appeal.

Thirdly, he argued that in any event, but without prejudice to the foregoing, the evidence showed that the appellant was purchasing the property on behalf of one Lt. Col Nyanzi, its client and a disclosed principal and not in its own right. On the contrary, he contended, such purchase is actually protected and contemplated by section 18(1) (c) of the Financial Institutions Act for ***"securing a debt on any immovable property…"*** There was thus nothing wrong with the appellant purchasing the property

for his client/customer in its name until the customer pays off the debt incurred in purchasing the property on its behalf.

Lastly, on ground 2 of appeal, he contended that the learned Justices failed, contrary to Rule 102 (c) of the Court of Appeal Rules, to give an opportunity to the parties to address them on the matter before coming to the conclusion that an illegality had been committed. In so doing, the learned Justices made assumptions of fact not supported by evidence. They thus erred in law and deprived the Appellant of the fundamental right to a fair hearing guaranteed under Article 28(1) of the Constitution. In support of his submissions on this ground, counsel once again cited the case of **Hamid v. Roko (supra)** and the decision of Katureebe, JSC (as he then was) in **Bakaluba Mukasa v Betty Nambooze Bakireke, Election Petition Appeal No.04 of 2009.** He prayed that grounds 1 and 2 of the appeal be upheld.

In his reply, Mr. Byenkya did not challenge the position of the law stated by Mr. Nkurunziza regarding illegalities and the right to a fair hearing as well as the authorities cited. He only added the case of **Active Automobile Spares Ltd vs Crane Bank and Rajesh Parkesh SCCS 442 of 2003** on the same point. His contention was, however, that the learned Justices could not be faulted for their decision since there was ample evidence from both parties to support the finding by the learned Justices that the property was being bought for a client other than for the normal business of the bank**.** Grounds 1 and 2 of the appeal should therefore be disallowed.

He then submitted on ground 1 of the cross-appeal where the Respondent complained against the finding by the learned Justices that he was in *pari delicto* with the Appellant in the alleged illegality. According to him *pari delicto* only applies where the offence is for both parties to the contract. In the instant case the

provisions of section 18 of the Financial Institutions Act create the offence in respect of financial institutions only. The learned Justices, therefore, erred in their finding that the parties were in *pari delicto*. He relied on the cases of **Ahmad Ibrahim Bolim v Car and General (U) Ltd. SCCA No. 12 of 2002** and **Mistry Amar v Serwano Wofunira Kulubya 1963 EA 408.**

Secondly, and relying on the above authority, he submitted that where one does not base his or her right of possession on the impugned agreement, one would not be in *pari delicto*. He submitted that in the case cited above, the respondent's right of possession was in no way based on the purported agreement. What happened was that the respondent was not coming to court to enforce the contract since he had actually terminated it. He was rescinding it and saying that the contract could not be performed and wanted the situation to revert to what it was before the contract. That the respondent in that case also had possession by virtue of having an interest in the land. The right was based on the certificate of title. The innocent person in terms of illegality was the respondent who was the previous owner of the land because the impugned contract was what had given the appellant the right to possess the land.

He submitted that when you apply this criterion to the instant case, you will find that the Respondent was also saying that the contract will not be performed and the Respondent was also not relying on the contract to get possession of the land. He had a registered interest as the beneficial owner thereof on which he was relying to repossess the land, not the sale agreement.

His other argument is that the same authority also talks of policy considerations in deciding whether or not to enforce an illegality against a person accused of participating in illegality. That you look at whether policy considerations require that the person should be punished too. That going by these criteria, the respondent could not be in *pari delicto* because the framers of the Financial Institutions Act decided that one side commits the offence and the other side does not. So, there is no policy reason to find the parties in *pari delicto*.

In the premises, Mr. Byenkya prayed that this Court finds that the respondent was not in *pari delicto* and ground 1 of the cross appeal succeeds.

I have carefully considered the submissions on the above grounds. In ground 1 of appeal, the question whether the court can condone an illegality once brought to its attention is settled. A court cannot condone an illegality. The case of **Makula International Ltd v His Eminence Cardinal Nsubuga and Anor, [1982] HCB 15,**

which remains the locus classicus on the question of illegality, holding No. 16 was to the effect that:

***"… A court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleading, including any admissions made thereon".***

However, as Mr. Nkurunziza rightly stated, such illegality must be obvious or clear from the evidence before court. Where it is not clear or obvious, then the court must carry out further inquiry to establish the illegality by giving the parties an opportunity to explain their positions.

According to decided cases, an appellate court must even be more cautious in concluding that an illegality has been committed where it was not canvassed in the lower court or before it.

In the case of an appellate court, I find holding No. 6 of the case of **Makula International** very instructive. There the court held:

***"6.The appellate court should only decide in favour of the appellant on a ground raised for the first time if its satisfied beyond doubt, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an explanation had been afforded to them in the witness box."*** (the underlining is for emphasis).

Earlier on, in the case of ***H. Singh vs. Dhiman (1951) EACA 75*** the East African Court of Appeal in the words of Justice Sir Newnham Worley, VP had stated in the lead judgment at page 77 that:

***"… although it is the right and duty of court to consider illegality at any stage yet, when it has not been pleaded and not raised in the Court below or, at best, only raised at a late stage, an appellate Court must be cautious and must consider whether the alleged illegality is sufficiently proved and must be satisfied that if there are matters of suspicion in the plaintiff's case, an opportunity was given for explanation and defense****."( the underlining is added).*

In that case, the question of illegality had been raised for the first time on appeal. The court declined to reach any conclusion on the matter without giving an opportunity to the parties for an explanation and defence.

In the instant case, the record shows that the issue of illegality was neither pleaded nor raised before the High Court from where the case had originated or before the Court of Appeal during the hearing of the appeal. Kakuru JA, who wrote the lead judgment with which the other learned Justices agreed, found it out at the stage of drafting the judgment. The issue therefore is, whether the alleged illegality was sufficiently proved and no satisfactory explanation could have been offered by the parties regarding the transaction in question even if they had been given a hearing.

The determination of this issue calls for the interpretation of the relevant part of section 18 of the Financial Institutions Act which reads:

***"18. Trade, investments and immovable property.***

***(1) A financial institution shall not –***

***(a)…***

***(b)…***

***(c) purchase or acquire any immovable property or any right in it except as may be reasonably necessary for the purpose of conducting its business or of housing or providing amenities for its staff, but this paragraph shall not prevent a financial institution –***

***(i) from letting part of any building which is used for the purpose of conducting its business; or***

***(ii) from securing a debt on any immovable property and in the event of default in payment of such debt, from holding such immovable property for realisation at the earliest moment suitable to that financial institution."***

Sub-section (2) provides as follows:

***"Notwithstanding subsection (1), the central bank may permit a financial institution to engage in a commercial, agricultural, and industrial or other undertaking upon such conditions as it may deem fit, provided that the undertaking is not likely to impair the viability and efficiency of the financial institution."***

Section 18 of the Financial Institutions Act is clear in my view. Although the section prohibits a financial institution such as the appellant from purchasing or acquiring

any immovable property or any right in it, the section 18(1)(c) provides exceptions as well, where it is reasonably necessary for the purpose of conducting its business, or housing or providing amenities for staff, or for letting part thereof for purpose of conducting business or securing a debt. In order to determine the question of illegality under this section, therefore, the court had to answer a number of questions including whether the purchase was reasonably necessary for the purpose of conducting business or for housing staff; or for letting part of it for conducting business or for securing a debt on it. These questions were not raised by the court before reaching its conclusion.

Similarly, sub-section (2) provides that a financial institution may engage in a number of undertakings with permission from the central bank. It is thus apparent that it was possible for the Appellant to purchase the suit property after obtaining permission from the Central bank without contravening section 18 of the Financial Institutions Act. There was need, for that reason, for the learned Justices to inquire whether the appellant had obtained the requisite permission from the Central bank to purchase the suit property prior to the transaction.

Lastly, if the appellant bank was purchasing the property for a third party as the evidence shows, then the question of illegality would not even arise, since the bank would not be purchasing in its own right.

From the foregoing, I find that the evidence relied on by the Learned Justices of Appeal was insufficient to conclusively prove illegality in the absence of an explanation from the appellant as to whether the transaction did not fall within the rest of the exceptions or the proviso under section 18 of the Financial Institutions Act.

In the premises, I accept the submissions by Mr. Nkurunziza and accordingly uphold ground 1 of the appeal.

This brings me to the complaint in ground 2 of the appeal. Here, the issue is, whether the Learned Justices actually failed to give the Appellant a hearing before determining the question of illegality as alleged, and if so, whether they contravened Rule 102 of the Court of Appeal Rules and Article 28 of the Constitution.

Rule 102 (c) reads:

***"102 (c) the court shall not allow an appeal or cross- appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross appeal, without affording the respondent or any person who in relation to that ground***

***should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground"*** *(*the underlining is provided for emphasis.)

The ground of illegality was not set forth nor was it implicit in the memorandum of appeal, yet the Learned Justices of Appeal based their decision to dismiss the appeal on it. In the case of ***Hamid v Roko Construction (supra)*** this Court stated as follows:

"***We have perused the eight grounds of appeal which were lodged in the Court of Appeal on behalf of the present respondent. None of those eight grounds of appeal in the memorandum complained about illegalities upon which the learned Justices decided the appeal. In our considered view, and with respect, the decision of the Court of Appeal contravened Rule 102 (c) of the Rules of the Court of Appeal."***

The Court held that the requirement in Rule 102 is mandatory. That the sub rule is a reproduction of Rule 101 (c) of the former Court of Appeal Rules, 1972 which was operating when the former Uganda Court of Appeal decided the **Makula** case. That the Court must have borne this in mind when it allowed parties to address it before it made its decision on the basis of an illegality brought to the attention of the Court

In that case this Court also observed as follows:

***"We may again point out that in the Makula case advocates for the respondent had been awarded by the registrar of the court costs of the litigation at 10% of the damages awarded by the trial court. This was contrary to the relevant taxation of costs rules. The former Uganda Court of Appeal which found the substantive appeal incompetent heard the parties on the aspect of violation of Taxation of Costs Rules before it reduced the costs in favour of one side.***

The Court found that the Court of Appeal had not followed the permissible procedure in deciding the appeal and, therefore, allowed the appeal, set aside the orders of the Court of Appeal and returned the matter for re-hearing before a different panel.

Article 28(1) of the Constitution provides that:

***" (1)In the determination of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."***

In the case of **Nambooze *Bakireke (supra)*** Katureebe JSC, (as he then was), held that the right to a fair hearing is one of the fundamental rights guaranteed by the Constitution. He further held that this right is so fundamental that it is given in Article 44 of the Constitution as one of those rights that are non-derogable. That because of its very importance, allegations of denial of the right to fair hearing or trial should not be made lightly or in passing as they impact on the very core of our trial system.

In **Hamid *v Roko Construction (supra)*** this Court stated in respect to Article 28 as follows:

***" There is no doubt that all the authorities cited by counsel for the appellant emphasise the need to hear both sides on a crucial point in a case before deciding the case one way or the other. And this is properly emphasized by clause (i) of Article 28 of our Constitution which provides for fair hearing."***

In this case, as earlier on stated, the issue of illegality was neither pleaded nor canvassed before both courts; it was discovered at the late stage of drafting the judgment. Being an appellate court, the Learned Justices of Appeal had to be very cautious and had to consider whether the illegality was sufficiently proved. It was in my view, obligatory upon the Learned Justices of Appeal, upon detecting an illegality during the course of drafting their judgment on the basis of the available evidence, to summon both parties to address them on the issue before taking a decision. This would have satisfied the requirement of Rule 102 (c) of the Court of Appeal Rules as well as Article 28(1) of the Constitution. As stated in **Hamid *v Roko Construction (supra)***,:

***"The Court of Appeal is the second highest court in Uganda. As prescribed under Article 28(1) of the Constitution, litigants expect the Court of Appeal to handle litigation with fairness and openness…"***

In light of the above finding, and with respect to the Learned Justices of Appeal, I find that they did not consider all the exceptions under section 18 Financial Institutions Act nor did they give the parties an opportunity to be heard before determining the issue of illegality. The consequence of failure to observe the rules of natural justice renders the decision void. (See:**Ridge v Baldwin [1953] All ER 66.**)

Accordingly, ground 2 of the appeal is also upheld.

Ground 1 of the cross- appeal is also taken care of in light of the above finding. It is allowed

In ground 3 of the appeal, the Appellant criticized the finding by the learned Justices of Appeal that the respondent attempted to convey a greater ownership interest than he had at the time.

The thrust of the submissions by Mr. Nkurunziza on this ground is that the respondent did not attempt to convey a greater ownership interest in land than he had at the time of executing the Sale Agreement at all. The respondent contracted as an equitable owner not as a registered proprietor. In law, there is nothing to prevent an equitable owner from selling his interests either actual or in expectancy, in property. The Learned Justices, therefore, erred both in law and in fact when they found that the respondent attempted to convey a greater ownership interest than he had at the time. He cited the case of **Manzoor v Baram** 5 **[2003] 2 EA 580 per Oder JSC (RIP) and Alibhai & Others v Karia & Anor [1995-98]2 EA 9 (SCU)** in support of his submissions on this point**.**

Mr. Byenkya also faulted the Learned Justices of Appeal for their findings in this ground.

The learned Justices found at page 8 to 9 of the judgment that:

***"The agreement that the parties signed creates rights and obligations in two distinct stages. First, an agreement to sell creates the corresponding obligation to convey title and render payment. This stage culminates in the closing where title is actually transferred. A suit may be brought for a breach of contract, and the remedies for contractual breach apply.***

***The second is after the title is transferred, the buyer may acquire different rights based on the title deed. In this stage, the buyer may be entitled to protections from liability as a bona-fide purchaser for value without notice.***

***Here the seller may also be obligated to indemnify the buyer from various third party claims or later discovered defects.***

***In this case the two stages are continuously confused and conflated. The "agreement of sale " purports to immediately transfer "all the property herein described to hold absolutely without encumbrances"…Thus, not only is the distinction between a contract to sell property and the actual transfer of title***

***completely ignored, but the appellant also attempts to convey a greater ownership interest than he had at the time.***

***Thus, the contract may be either treated as void and unenforceable in its entirety, or it may be treated as a mere contract for sale of land and not as an actual conveyance of property. Assuming the latter approach, there are several issues the case presents."***

The Learned Justices of Appeal proceeded on the basis that it was an agreement for the sale of land and not as an actual conveyance of property.

They found that:

(i) The title could not be perfected under section166 of 20 the Registration of Titles Act as there was no trust deed since it was said to be lost;

(ii) Section 134 of the Registration of Titles Act does not apply because the appellant as an administrator of his late father's estate could not be registered as a proprietor of the suit property when his late father was only a beneficiary of the same under a trust that had been created by the registered proprietors that had gone missing;

(iii) There was also the question of possession. The evidence clearly showed that the suit property was neither in the possession of the appellant as vendor and ultimately, the bank as the purchaser, but rather, the property had been for a long time and continues to be in the possession of a third party, namely, the family of the late Lt. Col. Nyanzi.

In my opinion, the evidence clearly showed that the Respondent's father's interest was that of a beneficiary under a trust created by the registered proprietors who were by then deceased. The agreement of sale clearly stipulated that the Respondent's father was selling in his capacity as the lawful beneficial owner, not the owner and the title to the suit property was to be transferred at a later date. The complaint is, therefore, a genuine one.

Ground 3 of the appeal succeeds for that reason.

The criticism in Ground 4 is that the Learned Justices of Appeal misdirected themselves and erred both in law and in fact when they found it to be unlikely that the title in the Agreement of Sale could be perfected under the Registration of Titles Act.

Mr. Nkurunziza submitted that the trustees, Dharamsi Morarji Bhatia and his wife were registered as proprietors of the property on the 5th November 1935. On the same date using a later instrument, they registered the trust in favour of their son Narottam Dharamsy Bhatia. He contended that, there would have been nothing legally wrong with the respondent taking proceedings against the Executor of their estates to have the suit property transferred into his names, if such Executor was reluctant to transfer.

He submitted further, that the Commissioner for Land Registration had also advised the respondent in his letter of 4th June, 1996, to try either a direct transfer or an application under section 143 now 134 of the Registration of Titles Act. Counsel further argued that, in the alternative, the Respondent could have sued to establish his legal right under the suit property and upon recovery thereof, he could have invoked section 177 of the Registration of Titles Act, to have the title perfected into his names and thereafter conveyed the same to the appellant as per the contract. That in light of the above evidence and the provisions of the Registration of Titles Act, the learned Justices of Appeal misdirected themselves and erred both in law and fact when they found it to be unlikely that the title in the Sale Agreement could be perfected under the Registration of Titles Act.

Mr. Byenkya on his part supported the finding of the learned Justices, on the ground that it was based on the evidence on record. Therefore, the finding cannot be faulted.

After reviewing the evidence, this is what the Learned Justices of Appeal found:

***"Looking at the evidence as a whole it appears unlikely that the title in this agreement could be perfected under section 166 of the RTA as there is no trust deed as it is said to be lost and section 134 of the RTA does not apply because the appellant as Administrator of his late father's estate could not be registered as proprietor of the suit property when his late father was only a beneficiary of the same under a trust that had been created by the registered proprietors that had gone missing."***

I respectfully agree with the findings by the Learned Justices of Appeal. As Mr. Byenkya rightly argued, the evidence supported that finding. It showed that both parties had made numerous attempts to secure the transfer of the title. Both parties had used their respective lawyers. The Appellant had hired a Mr. Lwanyanga who had tried to get the transfer by applying for a limited grant of administration. It was also evident that the title was not vested in the Respondent. The Respondent had hoped to secure the title and then transfer it to the appellant.

Section 166 the of the Registration of Titles Act reads:

***"166(1) Whenever any person interested in land under the operation of this Act or any estate or interest in land appears at the High Court to be a trustee of that land, estate or interest within the intent and meaning of any law for the time being in force relating to trusts and trustees, and any vesting order is made in the premises by the High Court, the registrar, on being served with the order or an office copy of the order, shall enter in the Book and on the duplicate certificate of the title instrument, if any, the date of the order, the time of its production to him or her, and the name and addition of the person in whom the order purports to vest the land, estate or interest; and upon the date of that registration as defined in section46(3), that person shall become the transferee and be deemed to be the proprietor of the land, estate or interest."***

It is clear from this section that in order to obtain a vesting order, the Respondent who was claiming under a trust, had to produce before court the trust deed before court could issue to him a vesting order. Without the vesting order, the Registrar could not enter his name on the Register Book for purposes of effecting transfer of the suit property. The trust deed could not be traced, so the title could not be perfected under section 166 of the Registration of Titles Act.

This finding is supported by the evidence on record that both parties had made numerous efforts using their respective lawyers to transfer the title to the appellant, but they had failed.

Further, Section 134(1) of the Registration of Titles Act provides that:

***(1) Upon the receipt of an office copy of the probate of any will or any letters of administration or of any order by which it appears that any person has been appointed the executor or administrator of any deceased person, the registrar shall on an application of the executor or administrator to be registered as proprietor in respect of any land, lease or mortgage therein described, enter in the Register Book and on the duplicate instrument, if any, when produced for any purpose, a memorandum notifying the appointment of the executor or administrator and the day of death of the proprietor when the day can be ascertained, and upon that entry being made that executor or administrator shall become the transferee and be deemed to be the proprietor of such land, lease or mortgage, or of such part of it as then remains unadministerd, and shall hold it subject to the equities upon which the deceased held it, but for the purpose of any***

***dealings therewith the executor or administrator shall be deemed to be the absolute proprietor thereof."***

The section allows registration of persons who have been appointed executor or administrators of the estate of a deceased person. Since the Respondent's father was merely a beneficiary of the suit property under a trust deed which could not even be found, the Respondent who was the administrator of his father's estate could not be registered as the proprietor of the suit property under this section of the Registration of Titles Act. Consequently, the Respondent could not transfer to the appellant what he did not possess in the first place.

As Mr. Byenkya rightly submitted, and there is ample evidence that there was a bona fide effort to transfer the suit property, however, there was a missing link in that the title was not vested in the Respondent from the outset. Therefore, the title could not be perfected in the circumstances.

This ground therefore fails.

The gist of the complaint in ground 5 of the appeal is that the Learned Justices of Appeal were wrong to find that there was an encumbrance on the title of the suit property for the reason that the property was in the possession of a third party.

Mr. Nkurunziza submitted that there was no evidence whatsoever that possession of the suit property by the Drago family was in any way adverse to the interests of the Appellant. He contended that on the contrary, the evidence shows that the possession of the suit property by the said family was with the consent and permission of the appellant as part of the banker/customer transaction between them. He submitted further that the evidence showed that the fact of possession by a third party had no bearing on the contractual duty of the Respondent to procure transfer of the suit property into the names of the appellant. He asserted that physical possession of property in itself is not an encumbrance on the title unless a caveat is lodged and registered thereon. He cited the case of **J.W.R.Kazzora v M.L.S.Rukuba, Civil Appeal No. 13 of 1992 per Oder JSC,** for the proposition that there is no *lispendens* rule in

Uganda. A purchaser either protects himself by a caveat or an injunction.

He prayed that this ground of appeal be allowed.

Mr.Byenkya was in agreement with the appellant on the issue of encumbrance.

With respect to the Learned Justices of Appeal, I also agree with counsel. Physical possession of property does not, in itself amount to an encumbrance in the absence of a caveat, according to the case of ***Kazoora v Rukuba(supra).***

Osborne's Concise Dictionary 8th edition at page 129, also defines the word encumbrance as:

***"A charge or liability e.g a mortgage."***

There was no mortgage or charge registered on the certificate of title in issue. For that reason, the mere presence of Lt. Drago on the suit property did not amount to an encumbrance in the legal sense that could have prevented the Respondent from perfecting the title. In my view; it was merely an obstacle in the way of possession once the title had been perfected in the Appellant's name. I think the Learned Justices of Appeal had this in mind when they observed that:

***"The agreement was therefore concluded above this reality on the ground possibly as a way to regain possession of the suit property from the third party who nobody was willing to tackle head on."***

This ground succeeds.

In Ground 6 the criticism is that the Learned Justices of Appeal erred when they came to the conclusion that the learned trial judge erred in finding that the Respondent could not invoke clause 2 of the Sale Agreement.

Mr. Nkurunziza submitted that, as per his submissions on ground 4, this ground should be upheld too because there was no defect in title to the suit property on the part of the Respondent. There was only a reluctance to complete the transaction on his part, once he realized that the value of the suit property had vastly improved, so, he sought to evade his obligations. Mr. Nkurunziza insisted that there were several legal avenues for the respondent to have the property transferred as per contract but he declined to utilize them. That the learned trial judge saw through this and, rightly, found that the respondent was not entitled to invoke clause 2 of the Agreement. The Learned Justices, therefore, erred in concluding that the trial judge had erred in holding that the Respondent could not invoke clause 2 of the Sale Agreement.

Mr. Byenkya repeated his submission that the evidence showed that both parties had made numerous attempts using their lawyers to secure the transfer of the title. That it was evident that the title was not vested in the respondent from the word go. So, the Learned Justices of Appeal were factually right. He contended that there was a

bona fide intention to transfer title but there was a missing link and Clause 2 provided an exit route for the parties. Therefore, having found that there was a defect in the title as the Learned Justices of Appeal did, they should have respected the wishes of the contracting parties and allowed them to exercise the agreed solution, which was to terminate the contract and refund the money. The findings of the court were therefore, in his view, inconsistent with the terms of the contract and the law.

This appeal revolves around this issue. The Learned Justices of Appeal stated in their judgment that:

***"Clause 2.2 provided a remedy in case of a specific contractual breach. This interpretation is supported by the language specifying those defects "which may prevent the purchaser from acquiring legal title…" if the defect was such as to "prevent" the purchaser from acquiring title, then it would seem by implication that the transfer of title would not take place".***

In my opinion, this is the correct interpretation of clause 2 when the contract is read as a whole. As Mr. Byenkya submitted, this is not a typical clause. The Vendor was obligated under clauses 1 and 2(b) above to sell to the purchaser the suit property; and to deliver to the purchaser the original (duplicate) title deed after registering it in the purchaser's name. Clause 2 provided an exit route which in effect amounted to a termination clause in the event that it was impossible to perfect the title to the suit property.

As Mr. Byenkya pointed out throughout the trial of the case before the courts, and as the evidence bears out, it is evident that the agreement was concluded with a very high possibility that it would go into default. The vendor was only a beneficial owner under a trust deed. The appellant did not see or verify the existence of the trust deed before signing the agreement. There was a third party in possession of the property. There were issues between the Respondent and his aunt, Mrs. Karia, who was the Executrix of the Respondent's late parent's estate. His application for a vesting order was dismissed by the High Court. (Lugayizi J).

The Respondent was under the obligation to register the title in the appellant's name. He failed to do so and that failure amounted to a breach of contract. Clause 2 of the sale agreement therefore, provided for a remedy in case of breach of contract. The Clause was drafted very widely to include "***defects which may prevent the purchaser from acquiring legal title"***

Clause 2 also prescribed a remedy, that, ***"****…a full refund shall be effected and the property shall revert fully to the vendor."*

This ground fails for that reason.

In Ground 7 the Appellant contended that the Learned Justices of Appeal erred when they;

a) Mis-applied the law relating to unjust enrichment; and

b) Interfered with the discretion exercised by the trial judge in awarding the interest he did.

Regarding ground 7(a) of appeal, Counsel submitted that neither the suit nor the counter claim was for money had and received consequently; the issue of unjust enrichment did not arise at all in the matter. The law relating to unjust enrichment was inapplicable.

Regarding ground 7(b), Mr. Nkurunziza faulted the Learned Justices of Appeal for interfering with the discretion of the trial judge on interest without identifying any wrong principle of law that the learned trial judge had purportedly acted upon or showing that it was erroneous. He cited the decisions of this Court in **American Tobacco Ltd v Sedrach Mwijakubi; Coussens v Attorney General [1991] 1 EA 40 at p.54; Shenoi v Maximov and Sietco v Noble Builders Ltd.**

Mr. Byenkya did not make a specific reply to this ground.

I agree with Mr. Nkurunziza that this was not a case for unjust enrichment. The claim was for recovery of the suit property. The cases relied on by the Learned Justices of Appeal in coming to the conclusion of unjust enrichment, are with all due respect, therefore inapplicable to the instant case.

In my opinion, the Learned Justices, having rightly found that there was indeed a defect in title which had prevented the respondent from transferring the title to the appellant, should have respected the wishes of the contracting parties and allowed them to exercise the agreed solution under clause 2 of their agreement, which was simply, to allow the respondent to refund the deposit in full so that the beneficial interest in the suit property could revert to the estate of the Respondent's late parents.

Ground 7(a) therefore succeeds.

Regarding the second limb of ground 7, it is trite law that an Appellate court will not interfere with an award of interest by a trial court unless the trial judge has taken or

failed to take into account a factor or factors he or she ought to have taken into account or where the award is so high or so low that it amounts to an erroneous estimate. Upon perusal of the record, I am in total agreement with the Learned Justices of Appeal; interest on US dollars at a rate of 36% p.a compounded weekly from April 17th 1996 till payment in full, awarded by the trial judge was too high and unconscionable. Indeed, the learned trial judge did not even give any reason for this very high award.

Secondly, interest was not included in the terms of the Sale Agreement. In the premises, I cannot fault the decision by the Justices of Appeal and I think it is only fair that this interest should be reduced to 6% p.a from the date of judgment till payment in full. This is because according to the evidence on record, the Respondent was ready to refund his money before resorting to court but it was the Appellant who had refused the refund.

Mr. Byenkya also argued that the Respondent should be awarded mesne profits arising from the continued occupation of the suit property even after his client had terminated the contract. Mr. Nkurunziza did not respond to this submission although the Court had the power to grant him leave to address it under Rule 64(3) of the Supreme Court Rules.

In my view, mesne profits are not in the category of general damages. They are in essence, loss of earnings and therefore fall squarely in the category of special damages. That being the case, the law requires that special damages must be pleaded with specificity and must be proved (See: **Kyambadde v Mpigi District Administration [1983] HCB 44**.

I have perused the amended plaint filed on the 1st September, 2004, and considered the issue and found that it was not pleaded at all. The issue only surfaced during the hearing and in Mr. Byenkya's submissions. Even then, no effort was made to prove it apart from the general statement by the Respondent regarding the usage of the said property by tenants purportedly belonging to the Appellant. In the circumstances, the prayer for mesne profits is accordingly disallowed.

In conclusion, and for the reasons I have given above, both the appeal and cross-appeal succeed partly and I make the following orders:

***1) The judgment of the Court of Appeal is hereby set aside.***

***2) The judgment of the High Court is reinstated and varied to the extent that the Respondent shall refund USD 37,500 to the Appellant with interest at 6 % p.a from the date of this judgment till payment in full.***

***3) Plot No. 1 Martin Road shall revert to the Respondent as beneficial owner upon full refund of the money in (2).***

***4) Each party shall bear his/its costs in this court and in the courts below.***

Dated at Kampala this *20th* day of *August* 2015.

**M.S ARACH-AMOKO,**

**SUPREME COURT JUSTICE**