THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; MUSOKE; MADRAMA; JJSC]

CIVIL APPEAL NO. 13 OF 2022

BETWEEN

PATRICK MUKASA :: APPELLANT

AND

ANDREW DOUGLAS KANYIKE

[suing through his lawful attorney Kenneth Henry Damba]::::::::: RESPONDENT

[An appeal from the decision of the Court of Appeal at Kampala before: (Hon. Justices: Bamugemereire; Musota and Mulyagonja, JJA) in Civil Appeal No.307 of 2018 dated 15th February 2022.]

Representation: *At the hearing of the appeal held on Wednesday 6th September 2023, the Appellant was represented by Counsel Peter Allan Musoke and Stella Busingye of M/S Stellah Busingye & Co. Advocates. However, following the Court's grant of extension of time for the Appellant to file written submissions, the Court received a notice from the Appellant, on 20th September 2023, indicating that he had given instructions to another law firm - M/S Musoke & Marzuq Advocates - to represent him.*

At the hearing, the Appellant was physically present in Court.

The Respondent was represented by Counsel Godfrey Niwagaba.

The Respondent's authorized attorney, Mr. Henry Kenneth Damba, was present in Court.

Case Summary:

Land law- *Proprietorship of land - Bonafide purchaser for value without notice.*

Land law-*applicability of the nemo dat quod non habet rule in land transactions. Rule not applicable under the Torrens System of Registration.*

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA, JSC.

Facts:

The facts accepted by the lower court are that in 1994, the Respondent (Andrew Douglas Kanyike) purchased land comprised in Kyadondo Block 216 Plot 455 at Buye (hereinafter referred to as the suit land) from Naume Nankya. According to the plaint and sale agreement marked exhibit R48, the Respondent purchased the suit land from Naume Nankya on 4th July 1994 and immediately took over possession of the land. The sale agreement was witnessed by Eric Mukasa, Elijah Serubiru and Harriet Buwalimba. According to the evidence, the Respondent purchased the suit land from Eric Mukasa and Serubiri who had been gifted the land by Naume Nankya and handed over blank signed transfer forms to the duo. The Respondent also stated that he had hitherto been in quiet possession of the said land for 12 years until the Appellant raised contentions that he was the lawful proprietor of the suit land.

On the other hand, the Appellant claimed having bought the same piece of land from Jane Nanfuka, a sister and an administrator to the estate of Naume Nankya. The Appellant particularly stated in his statement of defence and scheduling memorandum that having bought the suit land from Jane Nanfuka, he became the registered proprietor of the land on 2nd October 2009. It is on record that Jane Nanfuka obtained Letters of Administration to administer the estate of Naume Nankya on 17th September 2008.

In challenging the Respondent's purchase, the Appellant stated that Kanyike could not have bought the said land from Naume Nankya in

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1994 because she had passed away on 13th March 1981. However, the Record indicates that both the Court of Appeal and High Court made a finding of fact that just before the Letters of Administration were issued, a short death certificate was hurriedly procured by Jane Nanfuka which contained erroneous dates as to the death of the original proprietor- Naume Nankya.

Around 1998, Mr. Israel Bumpenja and Jane Nanfuka lodged a caveat on the suit land. They also lodged a complaint to the Commissioner for Land Registration (CLR) indicating that Naume Nankya had passed away on 14/3/1981 and therefore could not have transferred the suit land to the Respondent in 1994 as he claimed.

Upon investigation of the complaint, on 9/5/2007, the CLR issued a notice to the Respondent of the intention to cancel his name from the certificate of title of the suit land if he did not present his objection to the cancellation within 21 days as stipulated by law. Having received no objection within the said period of time, the CLR went ahead and removed the Respondent's name on the certificate of title and amended the land register to reflect Naume Nankya as the proprietor.

Subsequently, in 2009, the Respondent (Andrew Douglas Kanyike) applied to have the caveat lodged by Jane Nanfuka removed. He also attempted to lodge a caveat to stop the CLR from depriving him of his interest in the land.

In response to the Respondent's application for removal of the caveat, the CLR stated that Elijah Serubiri and Eric Mukasa who sold the suit land to the Respondent had been charged and convicted of theft of the certificate of title of the suit land and therefore she was going to cancel his entry. However, it is on record that on 27th August 2004, the conviction was set aside on by the High Court (before Yorokamu Bamwine, J) in *Criminal Appeal No.14 of 2004*.

Meanwhile, the Commissioner had issued a special certificate of title cancelling the Respondent's name on the title and instead registered Jane Nanfuka and thereafter the Appellant (Patrick Mukasa).

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Aggrieved with the Commissioner's decision, the Respondent lodged an application for Judicial Review in the High Court. In dismissing the application for Judicial Review with costs, the High Court *inter alia* held that the CLR's decision to amend the register was justified as there was no record in the land registry to indicate that Naume Nankya had transferred the suit land to the Respondent. That as such, the registration of the Appellant on the title of the suit land was lawful.

Dissatisfied with the Judicial Review decision, the Respondent sued the Appellant and the Attorney General (in his representative capacity) in the High Court Land Division *vide Civil suit N0.03 of 2010* before Justice Bashaija Andrew claiming the following reliefs:

i. A declaration that his entry as a registered proprietor of the suit land was irregularly, wrongfully and illegally cancelled.
ii. An order directing the CLR to restore his name on the suit land as registered proprietor and to cancel the Appellant from the register.
iii. An order declaring the Respondent (Douglas Kanyinke) as the lawful occupant of the suit land.
iv. A permanent injunction restraining the Appellants, their agents or employees from evicting the Respondent from the suit land.
v. General damages and costs of the suit.

In the alternative, the Respondent prayed for orders that:

i. A declaration be made cancelling out the order that his registration as the registered proprietor of the suit land was irregular and wrongful.
ii. Payment of Ushs. 140,000,000 being the market value of the suit land at the time of filing the suit.
iii. Interest at 24% per annum from the date of filing the suit till payment in full.
iv. General damages and costs of the suit.

In his defence, the Appellant (Patrick Mukasa) denied the Respondent's claims and allegations. He maintained that he had

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lawfully acquired the suit land from the Administrator of Naume Nankya's estate free from any encumbrances and was therefore a *bonafide* purchaser for value without notice. He also stated that the Respondent was always abroad and has never taken physical possession of the land.

The following three issues were framed for determination at trial:

(i) Whether the CLR cancelled Douglas Kanyike's entry on the register of the land comprised in Kyadondo Block 216 Plot 455 lawfully and or regularly.

(ii) Whether Patrick Mukasa obtained registration of the land in his names fraudulently.

(iii) What remedies are available to the parties.

On the first issue, the trial Judge (Bashaija J) held that: "*the CLR cancelled the Plaintiff's name (Douglas Kanyike) on the register premised on an erroneous notion that persons who had sold to the plaintiff had been convicted of theft of a land title and uttering false documents in respect of the suit land ... Besides this, the CLR did not notify the Plaintiff before cancelling his name on the register. This was a flagrant contravention of the law and procedure stipulated under Section 91(8) of the Land Act. By failing to comply with the stipulations of the law at the time of cancelling the Plaintiff's name on the register, the CLR acted illegally and irregularly and as such the decision must be set aside ex debito justitiae.*" Furthermore, the Judge held that, *the certificate of title of the plaintiff was held subject to the provisions of Section 59 of the Registration of Titles Act (RTA). Therefore, the intended cancellation could only be justified by an order of the High Court.*

Regarding, the second issue, the trial Judge held that Patrick Mukasa admitted to knowing of the Plaintiff's (Douglas Kanyike) interest in the suit land. He used that knowledge to collude with another person to buy the land with the attendant risks and cannot therefore be a *bonafide* purchaser.

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The trial Judge therefore granted the Respondent all the prayers and claims sought in his plaint and declared him the lawful occupant of the suit land.

Dissatisfied with the High Court decision, the Appellant appealed to the Court of Appeal but was unsuccessful. The Court of Appeal agreed with the High Court Judge that the Commissioner went beyond her statutory powers to cancel the Respondent's certificate of title in respect of the suit land.

The Court of Appeal found that the cancellation of the Respondent's certificate was premised on false allegations that Elijah Serubiri and Eric Mukasa had been found guilty and convicted of offences of forgery of a land title and uttering false documents. The Court of Appeal noted that the said criminal charges were dropped given that they were malicious and the persons who had accused Serubiri and Mukasa, particularly their aunt – Jane Nanfuka – a sister of the late Naume Nankya had ulterior motives of grabbing the suit land. The court also found that at the time when Naume Nankya passed on, she had signed transfer forms for Serubiri and Mukasa. That it was on the basis of the signed transfers that land was transferred from Naume Nankya to Douglas Kanyike (the Respondent).

Regarding whether or not the Appellant was a *bonafide* purchaser for value without notice, the Court of Appeal held that he was not. The court explained that the Appellant had notice of the encumbrance on the land before purchase. That the sale agreement clearly proved that the Appellant had notice of the interests of the Respondent in the suit land. Besides, the visible developments on the land ought to have sent warning bells to the Appellant but he seemed to have ignored the red flags. The court further held that, the *nemo dat quod non habet* **rule** which is to the effect that, no one can pass a better title than himself possesses, applied to the Appellant. The seller could not pass a better title to Patrick Mukasa than what she had. Consequently, the Court of Appeal dismissed the appeal with costs.

Still dissatisfied with the Court of Appeal decision, on 21st April 2022, the Appellant filed his Memorandum of Appeal in this Court

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containing 11 grounds. However, in the written submissions which were filed on 20 September 2023, the Appellant sought the leave of this Court to amend the grounds of appeal as follows:

1. **The learned Justices of the Court of Appeal erred in law when they upheld a judgment which condemned the Commissioner for Land Registration who was not a party to the suit and was, thereby unheard.**

2. **The learned Justices of the Court of Appeal erred in law when they applied legal principles regarding passing of property in sale of goods to transfer of title in land and, thereby, occasioned a miscarriage of justice.**

3. **The learned Justices of the Court of Appeal erred in law when they found that the Appellant was not a bonafide purchaser of the suit land.**

4. **The learned Justices of the Court of Appeal erred in law when they failed in their duty of re-evaluating the evidence that was before the trial Judge as a whole and, thereby, arrived at wrong conclusions.**

Prayers:

1. The Appeal be allowed;
2. The decree and judgment of the Court of Appeal and the trial court be quashed and set aside.

Submissions by Counsel

Court gave both Counsel directions and timelines within which to file written submissions as follows:

1. The Appellant was to file in Court and serve the Respond written submissions by 20th September 2023.
2. The Respondent was to file his written submissions in reply and serve the Appellant by 4th October 2023.

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3. The rejoinder was to be filed and served by 11th October 2023 and judgment was reserved on notice.

The Appellant duly complied with the filing schedules but by 4th October 2023, when the Respondent was expected to have filed his submissions, nothing was on record.

I went ahead to determine the outcome of the appeal based on the submissions filed by the Appellant and the documents on the Record of Appeal.

Appellant's submissions

Before arguing the grounds of appeal, the Appellant raised a preliminary objection to the effect that the Respondent's authorized attorney had no *locus standi* to lodge the plaint and to defend the consequent appeals for and on behalf of his principal because of a defective Power of Attorney.

The Appellant explained that the Respondent commenced H.C.C.S. No. 3 of 2010 through a defective Power of Attorney and yet **Section 146(1)** of the **Registration of Title Act (RTA)** provides that:

> **The proprietor of any land under the operation of this Act or of any lease or mortgage may appoint any person to act for him or her in transferring that land, lease or mortgage or otherwise dealing with it by signing a Power of Attorney in the form in the Sixteenth Schedule to this Act.**

Furthermore, that **Section 148** of the **RTA** provides:

> **No instrument or Power of Attorney shall be deemed to be duly executed unless**
>
> **either-**
>
> **(a) the signature of each party to it is in Latin character; or**
>
> **(b) a transliteration into Latin character of the signature of any party whose signature is not in Latin character and the name of any party who has affixed a mark instead of**

> **signing his or her name <u>are added to the instrument or Power of Attorney by or in the presence of the attesting witness at the time of execution</u>, and beneath the signature or mark <u>there is inserted a certificate in the form in the Eighteenth Schedule to this Act</u>.** (My emphasis)

To buttress the above argument, counsel relied on the authority of **Fredrick J.K Zaabwe vs. Orient Bank Ltd and 6 others**[1] where it was held *inter alia* that:

> **The requirement for the signature to an instrument under the Act to be in Latin character is a matter of substantive provision of the law, not a mere technicality.**

The Appellant also submitted that the defective signature on the Power of Attorney was aggravated by the fact that the donor could not be ascertained by name. That whereas the plaint was filed in the names of Douglas Andrew Kanyike through his attorney Robinah Kanyike, the Powers of Attorney which were attached and used to facilitate the filing of the plaint was donated by Douglas Andrew Kaye Kanyike. Thus, that the person mentioned as the plaintiff in the plaint and the purported donor of the Power of Attorney, are two different individuals.

Furthermore, the Appellant argued that the Powers of Attorney signed in favour of Kenneth Henry Damba were donated by Douglas Kanyike. The Appellant therefore submitted that Douglas Andrew Kanyike, Douglas Andrew Kaye Kanyike and Douglas Kanyike are, in law, three different and distinct persons.

In conclusion, the Appellant argued that while the non-adherence to the requirements of the law governing Powers of Attorney to support an act regarding land registered under the **RTA** was itself fatal, the inconsistencies in the names of the plaintiff at the trial aggravated the situation and cannot be redeemed. That by virtue of this preliminary point alone, the appeal ought to succeed.

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[1] SCCA No.4 of 2006.

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In respect of the grounds of appeal, the Appellant argued ground 1 separately, grounds 2 and 3 together; and ground 4 separately in that order.

Ground 1

The Appellant submitted that as an exception to the appearance in court by the Attorney General on behalf of the government of Uganda under **Article 119 (4) (c)** of the **Constitution**, Parliament was given powers to enact laws under **Article 119 (5)** of the **Constitution**. That pursuant to this Constitutional provision, **Section 182** of the **RTA** was enacted to the effect that a proprietor of land who is dissatisfied with the Commissioner's decision can summon the officer to appear in court to substantiate the grounds on which the impugned decision was based.

Therefore, the Appellant argued that since it was the Commissioner's decision which was being challenged by the Respondent, he ought to have summoned the Commissioner instead of the Attorney General. Therefore, owing to this failure and lapse, the appeal should succeed *ex debito justitiea* [as of right] and the decisions of the lower courts set aside.

Furthermore, that the right to a fair hearing is non-derogable by virtue of **Article 44** of the **Constitution**.

Grounds 2 and 3

Counsel submitted that the *nemo dat quod non habet* **rule** which applies to passing of property in sale of goods transactions does not apply to land transactions. That, in fact, **Section 2 (1)** of the **RTA** expressly excludes the application of any other laws or rules which are contrary to the provisions set forth in the Act. The Section provides that:

> **Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act.**

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Counsel contended that in resolving grounds 4, 5, 6 and 7 of the appeal that was before the Court of Appeal, the justices of appeal set out to answer the question, *whether the Appellant was a bonafide purchase for value of the suit land without notice of fraud* and in determining the issue, they applied the *nemo dat quod non habet* **rule**. That in doing so, the learned Justices of Appeal erred in law because **Section 2 (supra)** excludes the application of such rules.

In respect of being a *bonafide* purchaser for value without notice, the Appellant's counsel submitted that the Justices of the Court of Appeal omitted to weigh and to test the Appellant's claim to *bonafide* acquisition of the suit land in accordance with **Section 176** the **RTA** which provides that:

> **No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under this Act, except in any of the following cases-**
>
> **(a)-**
>
> **(b)-**
>
> **(c) the case of a person deprived of any land by fraud as against the person registered as proprietor of that land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud.**

That the above provision received judicial consideration of this Court in the case of **Kampala Bottlers Ltd vs. Damanico (U) Ltd**[2] where it was held:

"*... even where fraud is proved, it must be attributable directly or by necessary implication, to the transferee.*"

Counsel submitted that the processes that led to the Appellant's registration as proprietor of the suit land were regular and within the

[2] SCCA No. 22 of 1992 (Unreported).

scope of the law. That there was no fraud, directly or by necessary implication, in the process through which the Appellant acquired his registration as the proprietor of the suit land; but if there was, such acts cannot be attributed, in any way to the Appellant.

Ground 4

For this ground, counsel submitted that the justices of the Court of Appeal failed in their duty to holistically re-evaluate the evidence that was before the trial Judge with a view of drawing their own inferences and, thereby, reached several erroneous conclusions which were, otherwise, material to the justice of the dispute. Some of the erroneous conclusions by the justices of the Court of Appeal were:

a. The justices of the Court of Appeal found that the CLR cancelled the Respondent's entry on the lands register because there was fraud by the Respondent, and that the CLR did not notify the Respondent of the intended cancellation of the Respondent's name from the register.

b. That the cancellation of the Respondent's name from the land register and the restoration of Naume Nankya was premised on allegations that Elijah Serubiri and Eric Mukasa had been found guilty and convicted in criminal case No. 523 of 2001.

Counsel submitted that the above conclusions were no different from those of the trial Judge. However, these conclusions neither have basis in the testimonies of the witnesses, nor in the evidence that is on the record. That at pages 218 -219 of the Record of Appeal, the record reflects that through their legal counsel and by letter dated 13th November, 1998, the beneficiaries to the estate of the late Naume Nankya wrote to the Respondent querying the process by which he had obtained registration as proprietor of the suit land of a deceased person; a copy of the said letter was furnished to the CLR. The record also shows at pages 220-221 that the CLR notified by registered post the Respondent of the intended cancellation of the entry of his name on the register of land and the reasons thereof; fraud was not mentioned as part of the reasons. The record also shows at page 222 that pursuant to the processes permitted by law

to the CLR, a rectification of the register was done by a memorandum of amendment whose reasons, too, are indicated therein; fraud was not one of them. The reasons borne in the said notice and memorandum of amendment abide by the powers vested in the CLR by virtue of Section 91 of the Land Act Cap. 227.

Counsel therefore contended that the findings of the Court of Appeal were not supported by evidence on the record. That there is no testimony from any of the Respondent's witnesses which suggested that Naume Nankya signed transfer forms in favour of Serubiri and Mukasa. Instead, what the record shows is an admission from PW1 stating that the transfer forms that facilitated the entry of the Respondent as proprietor of the suit land were signed by Serubiri and Mukasa. That Naume Nankya was not mentioned at all in that admission.

Court's consideration of the Appeal

I will first deal with the preliminary objection raised by the Appellant.

In **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd**[3], a preliminary objection is defined as one which consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. (My emphasis)

From the above definition, it is trite that a preliminary objection should relate to points of law only and must be raised at the earliest opportunity. I note that the Appellant contests the *locus standi* of the Respondent to lodge the suit in the Trial Court for the first time on a second appeal. This cannot be considered the earliest of opportunities to raise the objection. This is because the matter has already proceeded through the trial and the first appeal without making use of these forums to raise the preliminary objection. However, since the objection touches on issues of illegality of a legal

[3] [1969] EA 696.

instrument, this Court will go ahead and consider the preliminary objection raised.

The Appellant's preliminary objection is hinged on two limbs; first is that the Respondent's authorized attorneys had no *locus standi* to prosecute the matter on behalf of their principal/donor (the Respondent) because his signature which was appended on the Power of Attorney did not appear in Latin character. That as such, the Appellant was unable to detect who the donor of the Power of Attorney was or on whose behalf the attorneys were acting for.

I have had the opportunity to look at the instruments signed by the Respondent as donor. It is pertinent to point out the fact that two Powers of Attorney appear on the Record of Appeal. The first Power of Attorney was signed on 9 July 2009 in favour of Robinah Kanyike. The Donor [Respondent] signed it before a Notary Public without translating his signature in latin character.

The second Power of Attorney was signed in favour of Kenneth Henry Damba-who appeared physically in Court at the hearing of this appeal. This instrument was signed on 14 September 2016.

Unlike the first instrument, the second Power of Attorney bears the donor's signature as well as the name in latin character.

I therefore take it that the impugned instrument is the first Power of Attorney signed in favour of Robinah Kanyike.

I also note that 2 (two) plaints appear on the Record of Appeal. The first plaint was filed by Robinah Kanyike on 6th January 2010. However, on 27th February 2017, an amended plaint was filed by Kenneth Henry Damba. This was the second plaint. The trial in the High Court proceeded on the amended plaint and judgment was delivered premised on this document. Therefore, the Appellant's submission that the trial process was initiated using an impugned Power of Attorney has no merit. This is because the trial proceeded on the amended plaint which was filed by Kenneth Henry Damba; and as I have noted above, the Power of Attorney signed by the Respondent in favour of Kenneth Henry Damba was duly executed

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and bore the latin character as required by **Section 148 (b)** of the **RTA (supra).**

Therefore, the preliminary objection on this aspect fails.

I now move on to address the second limb of the Preliminary Objection which entails the different names used by the Respondent in signing off the instruments.

The Appellant submitted that the inconsistencies in the Respondent's name leads to the conclusion that Douglas Andrew Kaye Kanyike who signed the Power of Attorney in favour of Robinah Kanyike and the instrument subsequently signed in favour of Kenneth Henry Damba is a different person. Also, that the suit which commenced in the Trial Court in the name of Douglas Andrew Kanyike is a different person from the Respondent.

The issue to be determined is whether or not the use of different names brought about confusion in the Respondent's identity which affected his *locus standi* in lodging the suit.

What can be gathered from the different documents is that the Respondent was using his names interchangeably. At some point he would use all four of his names - Douglas Andrew Kaye Kanyike - and other times, he would use three of them i.e. Douglas Andrew Kanyike. At other times, he would use two names only- Andrew Kanyike.

An important question to be asked is - *was the recipient of the pleadings (plaint) unable to comprehend whether the documents referred to some other person other than the Respondent? Did this lead the Appellant to be confused as to the person lodging a claim against him?*

I answer the question in the negative. The Appellant at all material times was aware of the person who lodged a claim against him and actually made a reply to the claim. Whereas coherent use of names is desirable for ease of identification, from the present facts, it could be ascertained that the different names referred to no other person but the Respondent.

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The issue of legal effect of interchanging names by an individual was considered by the Court of Appeal[4] in the Election Petition Appeal decision of **Mutembuli Yusuf vs. Nagwomu Moses Musamba & Electoral Commission.**[5] In that case, the Appellant challenged the victory of the 1st Respondent as Member of Parliament for East Bunyole Constituency. The victory was challenged on the premise that the 1st Respondent was not qualified for nomination and election as he did not possess the required minimum "O" Level academic qualification to contest for the said position. The Appellant submitted that whereas the 1st Respondent was known as Nagwomu Moses Musamba, his "O" Level certificate bore the name "Musamba Moses". The Appellant argued the disparity in names referred to different individuals.

In dismissing the Appellant's argument, the Court of Appeal held that:

"interchanging of names, that is, writing of the same name in a different order cannot affect ones' qualifications. That in itself cannot be proof that, because the order of names on one certificate differ from another certificate therefore, that certificate is invalid or the holder must be a different person. That would be an absurdity that the law cannot permit." (My emphasis)

I am persuaded by the reasoning of the Court of Appeal Justices in the decision above. In the same spirit, I find that writing of the same name in a different order cannot in itself throw doubt as to the author of the documents presented before court and lead to the conclusion that the authors must be different persons.

The Respondent's use of his names interchangeably, was not a material error which would affect the validity of the suit lodged in the Trial Court.

Thus, the preliminary objection raised by the Appellant is overruled.

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[4] The Court of Appeal is the final court in parliamentary election dispute resolution in Uganda's jurisdiction.
[5] Election petition Appeal No. 43 of 2016.

Having found that the preliminary objection fails on all fronts, I now turn to address the merits of the case.

Before delving into the grounds, I will first address the Appellant's prayer for amendment of the grounds in the Memorandum of Appeal.

Rule 44 of the **Rules of** this Court permits a party to lodge an application for amendment of any document whether formally or informally.

What is pertinent in considering such an application is that the amendment should not seek to introduce new grounds of appeal. **Rule 98** of the **Rules of this Court** bars a party from arguing a ground of appeal not canvassed in the lower court.

I have looked at the amended Memorandum of Appeal and ascertained that it does not introduce new grounds. It is an improved document in terms of the drafting skills compared to the earlier filed Memorandum containing 11 grounds of appeal, which were overlapping each other and were repetitive.

Therefore, the Appellant's prayer for amendment of the Memorandum of the Appeal is hereby granted.

Ground 1

The essence of this ground is that the decision of the Court of Appeal ought to be set aside on the premise that judgment was made against the Commissioner's actions yet she was not a party to the case.

The Appellant's arguments under this ground are predicated in the legal principle - *audi alteram partem* - which means to hear the other side and emphasizes the importance of giving all parties involved in a dispute an opportunity to present their case and respond to the claims made against them before a decision is made. This principle is a fundamental aspect of procedural fairness and ensures a just and fair legal process. Going by that principle, was the Commissioner for Land Registration in the present case condemned unheard?

The Respondent sued two parties that is: the Appellant and Attorney General. The second paragraph of the Respondent's plaint clearly

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stated that the Attorney General was sued in his capacity as the Government Representative. **Article 250 (2)** of the **Constitution** provides that civil proceedings against Government shall be instituted against the Attorney General and all documents required to be served on the Government for the purpose of or in connection with those proceedings shall be served on the Attorney General.

The Commissioner's office is a public and government unit and therefore, the Attorney General was a proper party to the suit and represented the Commissioner.

It is on record at page 77 that the Attorney General filed its defence to the claims made by the Respondent. The judgments of both the Court of Appeal and the Trial Court were premised on an evaluation of the Respondent's evidence as well as that presented by the Attorney General and the Appellant. In the Written Statement of Defence, the Attorney General explained the chronology of events that led to the Commissioner's decision to cancel the Appellant's certificate of title.

The actions of the Attorney General showed that he recognizes that as the legal advisor to government, he has the authority to defend government entities. I therefore hold that the Court of Appeal did not condemn the Commissioner without being heard.

It can also be argued that even if suing the Attorney General as opposed to the Officer specifically mentioned in the relevant Act of Parliament was an irregularity, such deviation did not as already enunciated above, cause any miscarriage of justice.

Thus, Ground 1 fails.

Grounds 2 and 3

These grounds will be addressed together as they call for determination of two different but related legal concepts: the *nemo dat quod non habet* rule on the one hand and the concept of *bonafide* purchaser for value without notice on the other hand.

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The *nemo dat* rule is captured in **Section 22 (1)** of the **Sale of Goods Act** which provides as follows:

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

On the other hand, the principle of *bonafide* purchaser for value without notice is captured in **Section 176** of the **Registration of Titles Act.**

I must at the outset point out that both the *nemo dat rule* and the *bonafide* purchaser principle preserve proprietary rights on the one hand and on the other enable expediency in commercial transactions. Enabling expediency in commercial transactions is partly through protecting a person who acquires the goods in good faith and without notice of the rights of the original owner. In land transactions, such a person is a *bonafide* purchaser for value without notice. I will explain this in a little more detail later as I handle each principle.

The bonafide purchaser for value without notice

I will first address the concept of *bonafide* purchaser for value without notice because in my view, this is what forms the crux of the appeal before Court. The question to be addressed is: *whether the Court of Appeal erred in reaching the finding that the Appellant was not a bonafide purchaser for value without Notice.*

In coming to the finding that the Appellant was not a *bonafide* purchaser, the Court of Appeal was guided by the sale agreement

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between the Appellant and Jane Nanfuka which in part (paragraph 7) stated as follows:

"*The vendor hereby warrants that she is the bonafide owner of the land and the buyer shall enjoy quiet possession of the same free from any encumbrances or disturbance from any person claiming under the vendor's title apart from Douglas Kanyike Andrew who still claims to have interest in the land." (My emphasis)*

It is clear from the excerpt above that the Appellant had notice of the Respondent's interest on the suit land before purchase.

Further still, it is on record that when the Trial Court asked the Appellant: "*in other words, you bought subject to the interest of the person who had a wrangle on the land*", the Appellant answered: "*Yes*". It is on this basis that the Court of Appeal concluded that the defendant (appellant in this Court) admitted to knowing of the Respondent's interest in the suit land.

It is on the basis of all the above evidence, that the Court of Appeal came to the conclusion that, the Appellant was steeped deep in the shady dealings surrounding the suit land and was therefore not a *bonafide* purchaser for value without notice.

Furthermore, Justice Bamugemereire with whom the rest of the Coram members agreed found that:

"*The evidence of Nanfuka* [Administrator] *did not portray her as a truthful person. This is because having buried her sister Naomi Nankya, and with knowledge that there was no death certificate, Nanfuka stealthily processed Letters of Administration. It was a finding of the trial court and it is indeed my finding that just before the letters were issued a short death certificate was hurriedly procured. The death certificate had erroneous dates. It is a fact that Nanfuka used the Letters of Administration and the short death certificate purportedly to bring criminal charges against her nephews.*

Indeed, if the Commissioner Land Registration had paid careful attention to the unique facts and evidence in this case, she would have given the Respondent a fair hearing. The decision to cancel the title was hasty and not based on facts."

I find that after the trial court's evaluation of the evidence adduced and the first appellate court's re-evaluation of the evidence, both courts came to the finding of fact that the Appellant was not a *bonafide* purchaser for value without notice.

It is trite law that an appellate Court will not interfere with the concurrent findings of two lower courts unless it is satisfied that the two courts applied wrong principles of law in coming to that finding or that the finding is not supported by evidence. [See: **R. vs. Hassan bin Said**[6]].

I am satisfied that the findings of the courts below were supported by evidence.

The *Nemo dat quod non habet* rule

I must now deal with the Appellant's argument that in coming to the finding that he was not a *bonafide* purchaser, the Court of Appeal incorrectly applied *nemo dat quod non habet*, a rule which should be limited to sale of goods transactions and not be extended to land transfers.

Nemo dat quod non habet is a legal rule whose effect is that the transferor of goods cannot pass a better title than they possess. The lack of ownership/right to goods by the seller denies the purchaser any ownership title. In the decision of **Bishopsgate Motor Finance Corpn Ltd v Transport Brakes Ltd**[7] Lord Denning explained that the said rule was *for the protection of property: no one can give a better title than he himself possesses.*

However, although the *nemo dat* rule in its essential form may be clear, it is not always fair, as it is an innocent party buyer who will

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[6] (1942) 9 E.A.C.A. 62.

[7] [1949] 1 KB 322, at page 336

suffer, and nor is it necessarily in keeping with the needs of modern commerce and trade.

Because of the apparent harshness of the rule, several exceptions to it were developed at common law. All of the exceptions will apply only in favour of a person who acquires the goods in good faith and without notice of the rights of the original owner. In such circumstances, a seller would have represented to a purchaser that they are the owner of an item or goods, and the purchaser would have made all relevant investigations and had no cause to believe the seller is not the owner.

Similarly, to qualify as a *bonafide* purchaser for value without notice in land transactions, a person must have, in good faith, paid valuable consideration for the property without prior notice of any adverse claim. In this regard, one who has exercised due diligence, as well as reasonable caution, before entering into a transaction would be a bona fide purchaser. To qualify as a bona fide purchaser one would not have had actual or constructive notice as to defects in the seller's right to transfer title to the property.

In the present case, the Court of Appeal appears to suggest that to arrive at the finding that the Appellant was not a *bonafide* purchaser for value without notice, the *nemo dat* rule had to be brought into play as seen in the court's holding below:

"... The nemo dat quod non habet rule which is to the effect that, no one can pass a better title than he himself possesses, applied to the Appellant. His seller could not pass a better title to him than what he had. He was therefore not a bonafide purchaser for value without notice ..."

Uganda applies the Torren's system of land registration whose principles are stipulated in the Registration of Titles Act[8] and apply to registered land. Section 2(1) of the RTA provides:

> **Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply**

[8] Cap. 230 Laws of Uganda.

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or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act.

To answer the question whether the *nemo dat* rule is applicable in land transactions, court must be guided by the historic development of the Torren's system of land registration.

The *nemo dat* principle was a constituent part of a very problematic system of land recordation and verification - which embedded a mischief that was historically visited on the land market, a problem which the Torren's system came to solve. In Australia where the Torren's system originates, the situation before its introduction was characterized by a number of perils including: no guarantee of accuracy of records (not up to-date), frequent searches of huge volumes of records to verify title/ownership, fast accumulating documents and need to search all, more than one indexes/catalogues to search, etc.[9] According to Massie: "Under this system it is absolutely impossible for the most careful examiner of titles to have any certainty that the result of his labors will show the true state of title."[10]

In the pre-Torren's system, having title deeds at hand meant that the holder was the owner with interest and therefore had power to transfer or create other interests in that land.[11] In essence, a written deed was proof of ownership, yet, later under the Torrens system , "...title to land passes to the purchaser, not because of the deed, as heretofore, but because of registration."[12] The fact that deeds were proof of ownership did not bar one from engaging in the long searches to verify ownership, since such a holder could not always transfer better title than what they had (*nemo dat* applied). Indeed, earlier literature on the subject has summed up the problem with the system and its likely impact on land markets. To Massie:

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[9] See Massie," The Torrens System of Land Registration and Transfer" (1900) Vo.6 No.4 *Virginia Law Review* ,at page 214.

[10] Massie, ibid, at 218

[11] Nakayi, "Certificate of Title: A Discussion of Contemporary Challenges to the Protection of Land Interests in Uganda", *Journal of African Law* (2023), Vol. 67 Iss. 1 23-43 at 27-28; Goldner, "The Torrens system of title registration: A New Proposal for Effective Implementation" (1981) 29/661 *UCLA Law Review 661.*

[12] Townsend Charles C. "Registration of Title to Land", *The American Law Register and Review*, Oct. 1896 Vol.44. No. 10, 605-618 at 611.

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> These are some of the difficulties that beset our profession in the examination of titles and lie in the pathway of all who deal in real estate. And no matter how often a title may have been examined, it must always be thoroughly re-examined before any sale can be made or any money borrowed upon it – all of which means delay and expense.[13]

To offset the burden that potential purchasers had to verify title under the above system, the Torrens system of land registration was introduced. Under it, titles are registered and issued as "absolute and indefeasible", via a central system run by the government, which also guarantees security of title.[14] In Uganda, this system and principles are embedded under the RTA. Title is indefeasible with exceptions set out in the Act, such as fraud.

Prior to the Torren's system, deed holders or interest holder got more protection from the property law regime than purchasers. That is the rationale for Torren's approach of simplifying the system to promote protection of purchases and land markets.[15]

I conclude that scholarly literature and **Section 2 of the RTA** have ousted the applicability of *nemo dat* to land regulated under the Torrens system. Hughson *et al* clearly put it in these terms:

> Any system of property law requires rules for the resolution of competing claims between innocent parties. There are two main ways of resolving such conflicts. One approach is to protect the holder of an interest by preventing a transferor from passing a title which he or she lacks. This is reflected in the common law *nemo dat quod non habet principle*. The alternative approach, typified by **systems of registration of title**, is to protect innocent purchasers of interests, regardless of whether or not the transferor has a good title. Such systems facilitate dealings with property by making it unnecessary for a purchaser to undertake an investigation of title which goes beyond inspection of the titles register. This was Robert Torren's goal. Torrens

[13] Messie, supra, at 219.
[14] Nakayi, supra, 29-32.
[15] Hughson Mary -Anne *et al.* "Reflection on the Mirror of title: Resolving the conflict between purchasers and prior interest holders", 21 Melb. U. L. Rev. 460, 460-496 (1997).

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sought to introduce a 'cheap, simple, expeditious and accurate system of transfer of land' which would restore 'to its intrinsic value a large amount of property depreciated or unmarketable through defective evidence or technical imperfection in title."[16] (*Emphasis added*)

It is no doubt that jurisprudence from courts in Uganda has interpreted and modified some of the Torren's principles. But it remains an overriding principle that in the Torrens system, a *bonafide* purchaser for value without notice is an established defense against challenge of one's title, who may have acquired it from another with defective title, as long as the conditions (purchaser for value, good faith, without notice) are proved[17]. This is a clear indication that under the Torrens system, *nemo dat quod non habet* does not apply since there are saved circumstances under which a good title can be held while arising from a defective title. The principle of *nemo dat quod non habet* does not apply to transactions in land registered under the RTA.

In fact, the *bonafide* purchaser for value without notice principle negates the *nemo dat* rule in as much as it is to the effect that as long as the purchaser gave value, in good faith and without notice of the defect in title, they can acquire title from a person whose title is defective. Whereas *nemo dat* is to the effect that you cannot give a good title if you do not have it, *bonafide* purchaser for value protects the purchaser from imperfections in title that they did not know about.

Section 2(1) RTA and existing literature on the historical evolution and contemporary application of the Torren's principles show that the *nemo dat quod non habet* principle does not apply to registered land – in Uganda this is land under the operation of the RTA.[18]

It follows that the Appellant's argument that the *nemo dat quod non habet* rule which applies to passing of property in sale of goods transactions does not apply to land transactions is correct.

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[16] Mary -Anne Hughson *et al,* Ibid at 461.
[17] See Sejjaka Nalima v. Rebecca Musoke, Supreme Court Civil Appeal No. 12 of 1985.
[18] Nakayi, supra, at 27-28.

Nevertheless, I still find that based on the evidence available on the record, the Appellant did not qualify as a *bonafide* purchaser for value without notice. In this, I am in agreement with the concurrent finding of both the Trial Court and the Court of Appeal that the Appellant was **not a bonafide purchaser.**

I therefore hold that whereas ground 2 succeeds; Ground 3 fails.

Ground 4

Although the Appellant's counsel went ahead and presented written submissions on this ground, it is my considered view that the ground as it appears in the Memorandum of Appeal is vague. A vague ground of appeal refers to a ground which lacks specificity and fails to clearly identify the legal errors the Appellant is challenging. It is imprecise and does not give a clear basis for challenging a decision of court.

Ground 4 of the Appellant's Memorandum of Appeal states as follows:

The learned Justices of the Court of Appeal erred in law when they failed in their duty of re-evaluating the evidence that was before the trial Judge as a whole and, thereby, arrived at wrong conclusions.

The ground fouls **Rule 82 (1)** of the **Rules of this Court** which provides that:

> **A Memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.** (My emphasis)

As can be seen, ground 4 did not specify the points or conclusions alleged to have been wrongly decided by the Court of Appeal.

To Condone a vague ground of appeal leads to opening a flood gate of arguments by the Appellant and raising of new issues, without leave of the Court being sought first. This would contravene **Rule 98 (a)** of the **Rules of this Court** which provides *inter alia* that: "*At the hearing of an appeal, no party shall, without the leave of the court,*

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argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal ..."

Ground 4 is therefore struck out for being vague.

Conclusion and orders

Having dismissed the preliminary objections presented by the Appellant and having also come to the finding that the Appellant was not a *bonafide* purchaser for value without notice, the appeal substantially fails. And the decision of the Court of Appeal to dismiss the appeal is upheld.

For clarity, the Court of Appeal held as follows: *"All the grounds of appeal having failed, the appeal is dismissed. Costs are awarded to the Respondent* [Douglas Kanyike] *in this court and in the court below."*

Costs

Costs in the courts below are awarded to the Respondent.

Although it is trite law that costs follow the event and costs in this appeal would have been awarded to the Respondent, given the fact that the Respondent did not comply with the filing schedules as directed by this Court, the award of costs is declined.

Decision of Court

Since all the members of the Court agree with this lead judgment and the orders therein, this appeal is dismissed with no order as to costs.

Dated at Kampala this 19th day of January 2024.

Tibatemwa.

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PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

Delivered by the Registrar on the 19/1/24

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; MUSOKE; MADRAMA; JJSC)

CIVIL APPEAL NO. 13 OF 2022

PATRICK MUKASA .....APPELLANT

VERSUS

ANDREW DOUGLAS KANYIKE

(Suing through his Attorney Kenneth Henry Damba).....RESPONDENT

[Appeal arising from the decision of the Court of Appeal at Kampala before Hon. Justices Bamugemereire, Musota and Mulyagonja, JJA, in Civil Appeal No. 307 of 2018, dated 15th February, 2022]

JUDGMENT OF TUHAISE, JSC.

I have had the benefit of reading in draft the Judgment prepared by my learned sister Prof. Lillian Tibatemwa-Ekirikubinza, JSC.

I agree with her decision and conclusions that this appeal be dismissed with no order as to costs.

Dated at Kampala, this ....19th.... day of....January.....2024.

Percy Night Tuhaise

Justice of the Supreme Court

Delivered by the Registrar on the 19/1/24

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: TIBATEMWA-EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOKE, MADRAMA, JJ.SC

CIVIL APPEAL NO: 13 OF 2022

BETWEEN

PATRICK MUKASA :: APPELLANT

AND

ANDREW DOUGLAS KANYIKE
(THROUGH HIS ATTORNEY
KENNETH HENRY DAMBA) :: RESPONDENT

[Appeal from the decision of the Court of Appeal (Bamugemereire, Musota and Mulyagonja, JJA) in Civil Appeal No. 307 of 2018 dated 15th February, 2022]

JUDGMENT OF CHIBITA, JSC

I have had the advantage of reading in draft the judgment prepared by my learned sister, Prof. Tibatemwa-Ekirikubinza, JSC, and I agree with her conclusion, reasons and the orders she has proposed.

Dated at Kampala this ....19th....day of ....January....2024

Hon. Mike J. Chibita
JUSTICE OF THE SUPREME COURT

Delivered by the Registrar on the 19/1/24

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 13 OF 2022

PATRICK MUKASA::APPELLANT

VERSUS

ANDREW DOUGLAS KANYIKE
(THROUGH HIS ATTORNEY
KENNETH HENRY DAMBA)::::::::::::::::::::::::::::RESPONDENT

(Appeal from the decision of the Court of Appeal (Bamugemereire, Musota and Mulyagonja, JJA) in Civil Appeal No. 307 of 2018 dated 15th February, 2022)

CORAM: HON. LADY JUSTICE PROF. LILLIAN TIBATEMWA – EKIRIKUBINZA, JSC
HON. LADY JUSTICE PERCY TUHAISE, JSC
HON. MR. JUSTICE MIKE CHIBITA, JSC
HON. LADY JUSTICE ELIZABETH MUSOKE, JSC
HON. LADY JUSTICE CHRISTOPHER MADRAMA IZAMA, JSC

JUDGMENT OF ELIZABETH MUSOKE, JSC

I have had the advantage of reading the judgment of my learned sister Prof. Tibatemwa-Ekirikubinza, JSC. For the reasons she has given therein I agree with her conclusion that this appeal be dismissed with no order as to costs.

Dated at Kampala this ..... 19th ..... day of ..... January ..... 2024.

.....

Elizabeth Musoke

Justice of the Supreme Court

Delivered by the Registrar on the 19/1/24

RJ

THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TIBATEMWA – EKIRIKUBINZA, TUHAISE, CHIBITA, MUSOKE, & MADRAMA, JJSC)

CIVIL APPEAL NO. 13 OF 2022

BETWEEN

PATRICK MUKASA} .....APPELLANT

AND

ANDREW DOUGLAS KANYIKE
[suing through his lawful attorney Kenneth Henry Damba} ... RESPONDENT

[An appeal from the decision of the Court of Appeal at Kampala before: (Hon. Justices: Bamugemereire; Musota and Mulyagonja, JJA) in Civil Appeal No.307 of 2018 dated 15th February 2022.]

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JSC

I have read in draft the judgment of my learned sister Prof Lillian Tibatemwa – Ekirikubinza, JSC.

I agree with the facts and legal principles she has set out. I also concur with the judgment and orders she has proposed and I have nothing useful to add.

Dated at Kampala the 19th day of January 2024

Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the Registrar on the 19th/1/24