IN THE COURT OF APPEAL

AT MENGO

(CORAM: WAMBUZI, P., LUBOGO, AG: J.A., ODOKI, J.A.)

CIVIL V APPEAL NO.9 OF 1985

BETWEEN

1. LIBYAN ARAB UGANDA BANK FOR
FOREIGN TRADE AND DEVELOPMENT…… APPELLANTS

2. HAJI MOHAMNADVMAGID BAGALALIWO

AND

ADAM VASSILIADIS……RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala (Opu, J.) dated 11th June, 1985 IN

Civil Suit No.847 of 1983)

JUDGMENT OF WAMBUZI, P.

According to the plaint filed in the High Court by the respondent as plaintiff against the, appellants, as defendants, the first appellant is the registered proprietor of plot 152 Rashid Khamis Rd. Kampala on which **of** residential flats. This property was sold and transferred to the first appellant by the second appellant in 1977. The respondent claimed that the first appellant through the second appellant **V** sold the property to him that the former refused to transfer the property to the respondent despite payment of the full purchase price. Alternatively, the respondent pleaded the original sale Of the property to the 1st appellant by the 2nd appellant was null and void and that the property lawfully belonged to the 2nd appellant. The respondent asked for an order of specific performance against both appellants in the alternative together with other reliefs. Opu, J.ordered specific performance against the 1st appellant and both appellants were ordered to pay arrears of rent and. general damages. It is against this judgment and decree that this appeal has now been brought.

In his address Mr. Kulumba-Kiingi, counsel for the appellants, said this appeal is unique in the history of our courts. The appellants were not attacking the decision of the lower court

solely on law and fact. They contend that owing to the learned trial judges chronic mental illness which had recurred before during and after the trial the learned judge was at all material times a person who was mentally unsound and therefore unfit to conduct the trial. The trial was therefore a nullity and the appellants would be seeking an order for a new trial. This is the first ground of appeal. Learned counsel represented the appellants in the lower court and sought to rely on his own affidavit in support of this ground of appeal. On the issue of the affidavit we invited Mr. Kuteesa, SC and counsel for the respondent, to address us. His firm represented the respondent in the lower court by another counsel.

Mr. Kuteesa opposed the inquiry y this court into the mental illness of the trial judge. Such an inquiry, learned counsel argued, was the province of another authority under the Constitution.

We ruled against receiving the affidavit which had been made part of the record of appeal. I now give my reasons. Rule 85 of the rules of this court prescribes the contents of a record of appeal. This does not include any affidavits by counsel as to what happened in the court below. In my view, the inclusion of counsel's affidavit in the record of appeal did not comply with this rule and was wrongly made part of the
record of appeal. It seems to me that one possible way of dealing with the matter could have been an application to adduce additional evidence under r.29 of the Rules of this court. We were not invited to consider this alternative. I can see however, that introduction of the affidavit in the manner proposed by counsel could, apart from failure to satisfy the provisions of rule 85, have led to problems if need arose to cross examine on the affidavit. Learned counsel would find himself in the awkward position of counsel cum witness. In my view, an appellant must support the grounds of his appeal, as far as facts go, from the record of appeal as provided in rule 85 which, means mainly the pleadings, the trial judge's notes of the hearing, the transcript of any shorthand notes taken at the trial, the affidavits read and all documents put in evidence at the hearing and the judgment. I see nothing wrong with the ground of appeal as framed but it must be argued on the basis of the record as provided in rule 85 of the Rules of this Court and not from any extraneous matters.

After our ruling learned counsel for the appellants abandoned his first ground of appeal ostensibly because he lacked medical evidence to support it but presumably because we had

rejected the affidavit. As pointed out by Mr. Kuteesa however, it is not the function of this court to inquire into the mental condition of a presiding judge. The function of this court is to decide whether, any decision has been made according to the law and to ensure that there has been no miscarriage of justice. Medical evidence might be helpful but I doubt it is indispensable in determining either that a decision, has been made according to the law or that there has been a miscarriage of justice. Be that as it may I now turn to consider the other grounds of appeal in the order in which they were argued by learned counsel.
Ground 3 reads as follows,

> "The learned trial judge erred in law and fact in failing to settle the main issues in the dispute before allowing counsel for respondent to call his first witness."

We were referred to 0.13 r.l (5) which provided in effect that, the court shall proceed to frame and record the issues on which the right decision of the case appears to depend.
No issues were framed by the court or by any of the parties. R.l (6) of the same order provides, however, that, nothing in the rule requires the court to frame issues where issues have been, joined upon the pleadings.
This appears to be the effect of the reply to the defence filed by the respondent which reads,

> "The plaintiff joins issue with the defendants on their statement of defence."

I accept Mr. Kuteesa's argument that this is an answer to this ground of appeal which must therefore fail. However, Mr. Kulumba- Kiingi argued that because of Failure to frame issues two important issues were not determined namely, (a) Who were the parties to the oral agreement of October 1980 and (b) whether the 1st appellant could under the agreement between the 1st and the 2nd appellants- (Exh.P.5) refuse to transfer the suit property.
Although these two points ere argued under ground 3 of the memorandum of appeal they are specifically raised under grounds 7 and 8 of the memorandum. These are,

> "7. The learned trial judge erred in law in holding that the first appellant was also a party to the oral contract of sale of the suit property made in October 1980; contrary to the 2nd appellant and the respondent's own admissions that the said contract of sale was between the 2nd appellant as vendor of the one part and the respondent as

purchaser of the other part.

8. The learned trial judge erred in failing to find as a fact that the respondent bought the suit property from the 2nd appellant subject to the terms and conditions contained in the agreement dated 6/l/79(Exh.p.5) made between the 1st and 2nd appellants.

Learned counsel argued that as to the first point that is who were the parties to the oral agreement of October 1980, the learned trial judge came to contradictory findings. He, said that the learned trial judge had found that the 2nd appellant in entering into the contract of sale was acting as agent of the 1st appellant but the learned trial judge went on to hold that nevertheless both appellants were parties to the contract. On this point the plaint runs as follows,

"4. At all the material times the 1st defendant was registered as the Proprietor of the said property.

5. On or about the 6th day, of January 1979 the 1st defendant authorised the 2nd defendant to sell the said property to any person and undertook to transfer the title thereto to such person upon the latter paying the purchase price and the 2nd defendant paying all his debts to the 1st defendant out of the purchase price.

6. On diverse dates subsequently the 1st defendant confirmed the said authority and undertakings.

7. In or about October 1980 the 1st defendant acting through the 2nd defendant as aforesaid agreed to sell and the plaintiff on strength of the said authority and undertaking agreed to purchase the said property for the sum of Shs.5,000,000/=.

8. Pursuant to the said agreement the plaintff paid to the defendants the full agreed purchase price in 2 instalments on 6th and 11th November1 1980 through mutual

advocates, and on or about the 25th day of November, 1980 the 1st defendant received and accepted payment of Shs, 2,000,000/= out of the said agreement, and the 2nd defendant also accepted part of the balance thereof.

9. Subsequently the 1st defendant demanded for a further sum of Shs.800,000/= out of the purchase price before it could execute transfer of the property in favour of the plaintiff, but when the said sum was tendered the first
defendant rejected it."

Paragraphs 2(a) and (b) of the joint written statement of defence read as follows,

"(a) The 1st defendant either by itself, its servants, its authorised agents or through the 2nd defendant never entered into any Contract of Sale of its property comprised in Leasehold Register Volume 349 Folio 21 Plot No.152 Nsalo/Khamis Rd. at Old Kampala in the City of Kampala to the plaintiff as alleged in paragraphs 4, 5,7,8,9 and 10 of the plaint.
Hence, the plaintiff cannot either in law or in equity be entitled to an order of specific performance of a non-existent contract or for damages as claimed in paragraphs 12 and 13 of the plaint.

(b) The 2nd defendant admits that in or about October 1980 the 2nd defendant acting for and on his own behalf agreed to sell the property described in paragraph No.2(a) herein above to the plaintiff and, as the Beneficial Owner of the property received from the plaintiff a sum of Shillings Four Million Two Hundred Thousand (Shs.4,200,000/=) being the sale price but denies that the said agreement of sale was entered into by the 2nd defendant as an agent of the 1st defendant, as alleged in paragraph Nos. 6,7,8,9 and 10 of the plaint."

It is quite clear from these pleadings that the 1st appe1lant denies entering into any agreement of sale with the respondent1 directly or through any agent. On the other hand the 2nd appellant

admits entering into the agreement of sale and receiving the purchase price of Shs.4,200,000/= which is different from the purchase price of 5 million shillings claimed in the plaint. In his evidence the respondent testified that he was dealing with Katagaranga of Zam Zam Agencies who showed him the property and told him the price and also that the owner was the 2nd appellant. He paid the purchase price of Shs.5, 000,000/= in two installments of, according to the judgment,. Shs.2, 000, 000/= on 6/11/80 and Shs.3, 000,000/= on 11/11/80. The recorded evidence gives the dates as 6/1/80 and 11/1l/80 and the amounts as Shs.2, 000,000/= and Shs.2, 000,000/=.
Be that as it may the respondent testified further,

> "Before I paid the money I was told the houses belonged to the 2nd defendant Bagalaaliwo. He owes money to Libyan Bank and the title of the property was with the Libyan Bank. The Bank wrote to the 2nddefendaiit to sell the flats in order to recover the bank's money. At this stage Mr. Ndozireho was acting both for me and the defendant. Extracts of a letter shown to the plaintiff by Mr. Ndozireho is Exh. P.1. In total I paid Shs..5,000,000/= to the defendants. Mr. Ndozireho prepared the transfer form, Exh. P2. Mr. Ndozireho forwarded the remaining amount of Shs.800, 000/= to the defendants."

First of all, the respondent claims' to have paid the full purchase price of Shs.5,000,000/= to the appellants apparently through mutual advocates. He did not explain what the Shs.800,000/= was for. Secondly, the transfer form, Exh.P.2, -shows that the consideration was Shs.2, 800,000/= and there was no explanation as to why a different figure from the purchase price of 5million shillings was quoted in the transfer form. Thirdly, it appears that the respondent learnt that, the 2nd appellant owed money to the first appellant who therefore authorised the sale of the property, from extracts (Exh. P.1) shown to him by Mr. Ndozireho. Exhibit P.1 reads as follows,

> "(a) Extract from letter dated 17.3.80 from Managing Director of Libyan Arab Uganda Bank to Messrs. Kirenga. & Gaffa Advocates.

RE: FLATS AT PLOT NO.152 RASHID KHAMIS RD. KAMPALA

……
……

"I have gone through your letter and I have noted the contents. It is apparent that the then Management of the bank cancelled the
deal and the vendor was given the right to sell to anyone as he wished provided he settled all his liabilities with the bank. It is my view that the bank cannot at the moment commit Shs.4m/= to purchase the property.

"The purpose of this letter is to confirm to you that the bank is no longer interested in purchasing the said property. The vendor is free to sell the said property as he wishes provided he covers his liabilities with the bank before the transfer in his names can be effected. The amount owing to date is Shs.2,014,367/95."

On this point the learned trial judge held,

> "There is evidence that in October 1980, the let defendant acting through the 2nd defendant offered to sell the suit property to the plaintiff. I find that a valid contract was entered into between the plaintiff, the 1st defendant and the 2nd defendant. I further find, that the 1st and 2nd defendants are in breach of the contract."

The learned trial judge did not identify the evidence on which he relied. On the pleadings the contract is admitted by the 2nd appellant but is denied by the 1st appellant. The evidence of the respondent in which he names Zam Zam as the agent, is not only vague as to who he contracted with but is also contrary to his own pleadings in so far as agency, was concerned and also as to ownership of the property. Exh. P.1 is said 'to an extract of a letter which was not produced'.' This extract was shown to the respondent by Ndozireho but the latter did not testify to say what the extract was part of. Even if the extract were correctly introduced in evidence I. understand from the extract that the management of the bank cancelled the deal and the vendor was given 'the right to sell to anyone else. Assuming that the vendor here is

the 2nd appellant all that the 1st appellant is saying, is that it is pulling out of the deal that it no longer wishes to purchase the property and the vendor can sell elsewhere. This is far from the 1st appellant giving authority to the 2nd appellant to sell the 1st appellant's property. Ground 7 of the appeal must therefore succeed.

Having found for the appellants on ground 7 ground 8 must fail. If the 1st appellant was not a party to the agreement of sale and gave no authority to the 2nd appellant to sell, then it follows that the respondent who is a stranger to Exh. 5 which is an agreement between the two appellants cannot be bound by it. For the same reason grounds 9 and 10 of appeal must also fail. The two grounds are to the effect that the learned trial judge erred in law and in fact in failing to find as a fact that the 2nd appellant failed to settle all liabilities due and owing to the 1st appellant and that the 1st appellant had a right not to transfer the suit property to the 2nd appellant in accordance with the terms of the agreement (Exh, P.5).
Ground 4 of appeal was,

> "The learned trial judge erred in law, in admitting in evidence verbal and written communications made between an advocate and clients which communications were in law inadmissible on grounds of privilege without the consent of the appellants either jointly or severally and despite strong
> objects from counsel for the appellants."

In his argument of this ground Mr. Kiingi said that Kirenga & Gaffa had for years been the external advocates of the 1st appellant on a retainer basis, that Ndozireho is a senior partner in that firm of advocates which had been instructed by the 1st appellant to handle matters relating to the suit property, that Exh. P.1 is an extract of a letter written by the Managing Director of the 1st appellant addressed to their advocates, that Exh. P.2 was an uncompleted document prepared by Kirenga & Gaffa Advocates and sent to their client, the 1st appellant. Learned counsel submitted that in these circumstances the documents were privileged and were inadmissible in evidence without express consent of the 1st appellant and referred to section 124 of the Evidence Act in support of his argument.

In the first place the 1st appellant and Ndozireho did not give evidence in the lower court. There is no evidence whatsoever on record of' the facts relied on by learned counsel to set up privilege. There is no indication that there was any objection raised to the admissibility of these documents.

Section 124 of the Evidence Act provides,

> " No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and, for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or, condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his Client in the course and for the purpose of such employment **.....**"

There is a proviso to the section which is not applicable. As already remarked, however, there is no evidence that the privilege was claimed or that the required Consent was not given particularly as there is some indication that Mr. Ndozireho was acting for both parties. Besides the evidence was not given by an advocate and I am not sure that the section is strictly applicable here. This ground of, appeal must therefore fail. Ground of appeal 5 states,

> "The learned trial judge erred in law and fact in admitting in evidence verbal (hearsay) and written statements (including an extract of letter dated l7/3/80(Exh.P.l) written by the 1st appellant to its advocates) and a blank Transfer Form (Exb.P.2) alleged to have been made/prepared by Mr. Ndozireho, advocate without the maker being called to give oral evidence and without recording the groups for dispensing with his appearance in court as a witness."

For reasons already given, this judgment this ground of appeal must succeed. Exh.P.l and P.3 apparently were produced by the respondent who testified that the extracts constituting these exhibits were, shown to, him by Mr.Ndozireho who, as already stated, did not testify. There is no evidence that there is a letter dated 17/7/80 from the Managing Director of the 1st appellant

to M/S Kirenga & Gaffa Advocates or indeed that the extract, Exh.P.1, is from that letter., Similarly, there is no evidence that there is a letter dated 13/8/60 from the Ag. General Manager of the 1st appellant to the General Manager of the Co-operative Bank or that the extract, Exh.P.3, was from that letter. I cannot say these extracts were wrongly admitted in evidence but they are valueless pieces of hearsay evidence. In connection with these exhibits, however, the- learned trial judge remarked in his judgment,

> "According t an extract of a letter dated 17/3/80 to M/S Kirenga & Gaffa Advocates, the Managing Director of the 1st defendant had unilaterally cancelled the contract between the plaintiff on one hand and the 1st and 2nd defendant on the other. A strange way of carrying on business indeed."

With respect to the learned trial judge, even if this was an extract of the letter referred to, what the letter is saying is totally different it is saying that the 1st appellant cancelled the contract of. sale between it and the 2nd appellant whereby the property was transferred to the 1st appellant by the 2nd appellant in 1977 which was referred to by the respondent's own pleadings. The 1st appellant was saying that the 2nd appellant could sell the property to any other person. The respondent was not a party to that agreement of 1977 and he did not come on the scene until October 1980 long after the alleged letter had been written.

Grounds 6, 11 and 12 were abandoned.

Learned counsel then dealt with the 2nd ground of appeal which was,

> "That the learned judge's mental condition, misconduct and/or bias prevented the appellants from having a fair trial."

Learned counsel did not argue the part of this ground relating to the learned trial judge's mental condition. As regards misconduct and bias however, learned counsel argued that

because of the learned trial judge's intervention counsel had to withdraw and the ease proceeded ex-parte which was unfair to the appellants. In this connection the record shows that hearing of this case began on 21/3/85, that preliminary submissions were made a ruling given and the respondent gave evidence-in-chief. The record then reads as follows,

> "By Mr. Kulumba-Kiingi:
> I live in my own house. It could be a lease. I do not know anything about mailo land. I do not know whether there was consent from the Minister.
> Court,
> At this stage Kulumba-Kiingi advocate for the defendants became provocative and rude. I suffer no rudeness in my court lightly. I gave him a dressing down. I prifue he decided to withdraw from the case.
> Mr. Kulumba-Kiingi,
> I am withdrawing.
> Mr. Mulenga,
> The situation has changed. It could cause me problems on appeal. As the representative of the bank and 2nd defendant is in court in person, I apply for an adjournment to allow them to engage another advocate.
> Court,
> Application for adjournment granted. Hearing of the case is adjourned to 14/5/85"

Although the 1st passage is attributed to Mr. Kulumba-Kiingi he informed us from the bar and indeed I would so construe that what was recorded there are answers by the respondent in cross-examination by Mr. Kulumba-Kiingi. The learned trial judge recorded that he gave counsel a "dressing down" but did not record what counsel had done or said which was provocative or rude. That notwithstanding I see nothing wrong with a presiding judge taking steps to curb rudeness or lack of courtesy on the part of counsel.

The hearing was resumed on 15/5/85 and the record read as follows, '

> "Mr. Mulenga for the plaintiff. Advocates for the defendants absent. The 2nd defendant absent. Mr. Rugasira representing 1st defendant.

Mr. Mulenga,

Not only was this date fixed by consent, I wish to state that both representatives of the 1st defendant and the 2nd was present in person within the court premises before we entered court. They- have now gone away. They were with Mr. Kulumba-Kiingi. The defendants told me that they had not engaged any other advocate. This was the reason for adjournment last time. I apply to proceed ex-parte.

Court,

On the last hearing date; the counsel for the defendants withdrew from the case. The defendants were given an opportunity to engage another advocate commendably for him, at the instance of counsel for the plaintiff. The representative of the 1st defendant and the 2nd defendant was present when this generous gesture was made. Today counsel for the defendant and defendants are conspirous by their absence. No reason has been given for their absence. Justice delayed is justice denied. The application to proceed ex-parte is granted.

As the record shows there were no advocates for the appellants. The 2nd appellant was also absent. But the record shows Rugasira as representing the 1st appellant, in what capacity is not stated. What is clear is that Rugasira did not take part in the proceedings at all. Why the learned trial judge decided to proceed ex-parte at least in respect of the 1st appellant who was represented in court is not clear. We were not addressed by both counsel on this point. However, the case proceeded ex-parte and judgment was reserved to 3/6/85. The court was convened the next day 4/6/85 and the record reads as follows,

"Mr. Mulenga for the plaintiff. Plaintiff present. Mr. Kulumba-Kiingi - absent without apology. Mr. Ndozireho - absent without apology.

Court,

I could not deliver judgment on the date promised because I was still in Kabale. However, as a result of allegations I heard on my return as to how I handled the case, I called the above counsel to attend me in Chambers to discuss certain matters which I

considered highly unethical before I start to write my judgment, Mr. Kulumba-Kiingi wrote me a letter in which he repeated the same allegation to which his fellow advocate witness had given vehement credence. Mr. Ndozireho who accused me of partiality ignored the letter altogether. The attitude of these two gentlemen, who are advocates of this court, is high discourteous. As it is, I cannot proceed to do what I wanted.

However, it should be understood by those concerned, that this court will never be intimidated by allegations of partiality improperly made by an advocate. Regardless, I will give judgment on 11/6/85."

Mr. Kulumba-Kiingi had, with leave of the court, withdrawn from the case. Nevertheless, he was apparently summoned in Chambers together with a would be witness in the case, Mr. Ndozireho, to discuss "highly unethical" matters before the learned trial judge started writing his judgment. These "highly unethical" matters are not stated save that there is some indication that they could be allegations of partiality. The learned trial judge did not say what he had intended to do if the people he had summoned in his Chambers had turned up.

The last bit of the record I wish to refer to is at the end of the judgment where the learned trial judge picks up the story again and states,

"Before I leave this suit, I am constrained to make certain remarks. When I returned from Kabale and before I could write judgment in this case, I heard what I can only describe as bizarre happenings. When I was hearing the case, oblivious to me, events were taking place outside the court room which were totally unethical. An advocate of this court, who was witness in the case conceived that I was biased against, the defendants. He set out to remedy the situation which to him was a travesty of justice. He went to a well known judge, friend of his, and raised his complaint. That judge friend put the advocate to those who he thought could provide a remedy. I am astounded that this judge and his friend never realised that there was no remedy outside the court.

The advocate was aspered to where it was believed vestress could be obtained. I am surprised that it did not occur to the judge, advocate and others that they could not

discuss a case which was being heard by another judge. I understand that a number of meetings were held about this case. I do not know what useful purpose these meetings would achieve or did achieve. I thought it is elementary that once a judge is seized with a case, the conduct of that case is
solely in his hands until judgment. I understand it is the right of an advocate to withdraw from a case as if he had good reason, although this is usually not the best course. Usually, a prudent advocate would proceed to the end. In case he thought the judge was biased, he would make that a ground of appeal. The spectable of a badly behaved advocate withdrawing from a case and a witness advocate running helper scalter in search of non-existence assistance to me is at most undignified and down right stupid. What happened in this case was completely unethical and must never be repeated in my court. I am making available to the Chief Justice a copy of this judgment with a request that, the conduct of Mr. Ndozireho and Kulumba-Kiingi be brought to the attention of the Uganda Law Society. I do not want my court to be disgraced. It is a mistake for any advocate to think that this court will be intimidated by allegations of bias."

I think this passage speaks for, itself and. I will make no comment except that this matter of Mr. Kulumba-Kiingi seems to have persisted in one form or another even when he had withdrawn from the case. I do not think I can do any better than refer to some general principles laid down in these matters by the predecessor of this court in A.P.C. Lobo and Another v. Saleh Salim Dhiyebi & Others (1961) E.A. 223.
In the judgment prepared by Sir Keneth O'Connor, P. the court said at page 229,

"An advocate who appears for a client in a contested case is retained to advance, or defend his client's case and not his own. This he must do strictly upon instructions and with a scrupulous regard to professional ethics. Remembering that he is an officer of the court and owes a duty to the court as
well as to his client ...
A court, if it considers, that an advocate, in his conduct of the client's case, has been guilty of misconduct should find facts only in so far as is necessary to dispose of the case before it. Remembering that it is the client's case and not that of the advocate

> which it has heard and is called upon to decide, it should deal in the judgment with the advocate's conduct only in so far as that is necessary to the case before it, and, if the court is of opinion that a prima facie case of professional misconduct is disclosed, should refer the matter to the appropriate professional body for the report and if necessary for adjudication by another court. That other court will be concerned with the question of the advocate's conduct and not with adjudication of the client's cause; and the advocate will then have an opportunity of explaining, if he wishes to do so, matters which appear to be prejudicial to hit. In the above remarks it has been assumed that the conduct of the advocate has not amounted to a contempt committed ex facie the court to which different considerations apply and which might have to be dealt with in a more summary manner."

Considering the record as a whole in this case there is some doubt in my mind that the trial of, this case in the court below was conducted in an atmosphere conducive to a fair trial and to that extend this ground of appeal must succeed. In the circumstances I think that this court having exercised its jurisdiction to review the evidence ought not to allow the conclusion reached by the learned trial judge to stand. Further although an appeal from the High Court is by way of a re-trial the trial in the High Court in this case was virtually ex-parte and as already discussed in this judgment there is hardly any evidence upon which this court can reach a decision. In these circumstances in the only course which can meet the justice of this case I would allow the appeal set aside the judgment and orders of the court below and would order are-trial de novo before a different judge. I would also order coats in this court and in the court below to be costs in the cause.

Before I take leave of this case, however, I wish to make a few observations. We ruled against use of Mr. Kulumba-Kiingi's affidavit in this court for reasons we have now given. That ruling notwithstanding I have read the affidavit and although
it is not the duty of this court to pronounce on the soundness or unsoundness of the mind of any judicial officer, it is the duty of this court to make sure that justice has been done or is done in every case that is brought before it. The significance of our decision is not only in the case before us but also serves to mould future conduct of parties concerned in similar circumstances. The matter of a possible failure of justice is, therefore, a matter of utmost

importance. If what is stated in Mr. Kulumba-Kiingi's affidavit is true, and here all I can say is that the allegations are made on oath by an officer of this court, I am astounded that the Executive at the relevant time should have permitted a situation like that to persist as suggested. This in my view is trifling with the administration of justice to say the very least. I am a little puzzled though that the decision in the lower court in this case has not only been supported by Mr. Kuteesa S.C but Mr. Kuteesa has invited us to comment on the conduct of his learned friend Mr. Kiingi in raising what Mr. Kuteesa described as wild allegations about a member of the bench. I agree with Mr. Kuteesa that the dignity of the bench must be maintained but I think this will be maintained better by establishing the truth. I would accordingly direct that a copy of the record of appeal in this case as well as a copy of this judgment be furnished to the Attorney General and I would draw his attention to the provisions of article 85(3) of the Constitution.

As both learned Justices of Appeal agree it is ordered as proposed in this judgment and as Odoki, J.A. agrees with the proposed directive it is so directed.

S. W. W. WAMBUZI,
PRESIDENT.
12/6/86

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JUDGMENT OF LUBOGO, AG. J.

I have some comments to make in regards to the observations made by the learned president in the last paragraph of his judgment. I would like t refer specifically to the recommendation where it is stated that a copy of the record in this case as well as a copy of the judgment be furnished to the Attorney General and would draw his attention to the provisions of article 85 (3) of the Constitution.

I have endeavoured to look for precedents on this issue but I have totally failed. The only guide on this issue is contained in our Constitution. The learned President referred to article 85(3) of the Constitution. It is true that that article provides for the removal of a judge for inability to perform the functions of his office, but does not provide the machinery for such removal. The Constitutional machinery is found in article 85(5) which reads;

> "If the cabinet represents to the President that the question of removing a judge under this article ought to be investigated, then
>
> (a) the President shall appoint a tribunal which shall consist of a chairman and not less than two members.....

(b) that tribunal shall inquire into the matter and report on the facts thereof to the president and recommend to the president whether the judge ought to be removed under this article."

The above constitutional provisions do not empower this court to initiate proceedings for the removal of a judge.

The initiation of proceedings of the removal of a judge is, therefore, the duty of the Cabinet, and this court cannot arrogate to itself that duty. However, the Constitution is silent as to how the cabinet can be seized of the matter in order to represent it to the President. Is it through the Chief Justice as head of the judiciary who would advise the Minister of Justice/Attorney General, or is it the Uganda Law Society that would lay a complaint in appropriate quarters? Be that as it may, one thing is certain, in my view, that the Court of Appeal is not empowered to initiate such proceedings. The best way the court do is to note with concern the matter hat has come to its knowledge and probably inform the Chief Justice in a separate communication other than in the judgments of the Court. It would be to the Chief Justice to take action or ignore it.

I am strengthened in my view by the fact that counsel for the appellant withdrew the first ground in which the expression "chronic mental disease" appeared. In the second ground he withdrew the expressions "judge's mental condition" and proceeded with expressions "misconduct" and "bias". Again this court made a ruling against receiving the affidavit, sworn by counsel, as part of the record. The fact that those expressions were with drawn and the affidavit disregarded as part of the record, the court had nothing before it in regard to the unsound mind of the judge in question, and therefore, the court should not take legal congnisance of the matter.

However, having said that, it must be emphasized that this court is mainly concerned with redressing the manifold manifestations of miscarriage of justice wherever they may appear in their multifarious forms. It is manifest from the record that there was a lot to be desired in the conduct of the case. There were so many gaps that should have been bridged in order to make a complete whole. The hearing was partly ex parte. The appellant did not have the

opportunity of adducing evidence to rebut allegations. Clearly there was a miscarriage of justice. For that reason, I do agree with the judgment prepared by the learned president. The appeal would therefore be allowed, set aside the judgment and orders of the court below and a re-trial de novo to take place before a different judge. I also agree to the orders made as to costs.

Sgd:

David L.K.Lubogo,
AG. JUSLICE OF APPEAL.

IN THE COURT OF APPEAL
AT MENGO
(CORAM: WAMBUZI, P., LUBOGO, AG: J.A., ODOKI, J.A.)
CIVIL V APPEAL NO.9 OF 1985
BETWEEN

1. LIBYAN ARAB UGANDA BANK FOR
FOREIGN TRADE AND DEVELOPMENT…… APPELLANTS

2. HAJI MOHAMNADVMAGID BAGALALIWO

AND

ADAM VASSILIADIS……RESPONDENT

(Appeal from the judgment of the High Court of Uganda at Kampala (Opu, J.) dated 11th June, 1985 IN

Civil Suit No.847 of 1983)

JUDGMENT OF ODOKI J.A.

I had the benefit of reading in draft the judgment prepared by the leaned President and I fully agree with him, that this appeal must be allowed.

The facts of the case have been set out in detail in the judgment of the learned president and I do not propose to repeat them again. This appeal raises a question of great public importance. It concerns a matter which strikes at the very foundation upon which our system of administration of justice is based. It is a question which relates to the fundamental right of every person in this country to a fair trial in our courts as guaranteed by the Constitution, Article 15(9) of the Constitution provides,

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent, and impartial and where
> proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time".

This provision lays down two requirements for a fair trial: firstly, that the court must be independent and impartial and secondly, that the court must give the case a fair hearing. It seems to me that this provision embodies the two cardinal principles of natural justice, namely that no man shall be a judge in his own cause (the rule against bias) and that no man shall be condemned unheard (the right to be heard).

In the first two grounds of appeal, the appellants complained in effect that they never had a fair hearing due to the trial judge's mental illness, misconduct and bias. They asked for a

fresh trial before another judge. The first two grounds of appeal were:

> "1. That in law and fact the whole trial of the said civil suit and the decision arising therefrom were a complete nullity. The appellants will contend that, owing to the trial judge's chronic mental illness which had recurred before, during and after the, trial, the learned Judge was at all material time a person who was mentally unsound and therefore unfit to conduct the said trial. The grounds for the contention are contained in counsel's affidavit annexed hereto and marked Annexture "A".
>
> 2. That the learned Judge's mental condition, misconduct and/or bias prevented the appellants from having a fair trial."

In support of these grounds of appeal, Mr. Kulumba-Kiingi, learned counsel for the appellants, sought to rely on his own affidavit" "Annexture A" which had been filed as part of the record of appeal. The that affidavit, Mr. Kulumba-Kiingi sought to disclose what had transpired during and after the hearing of the case, which matters were not contained in the judge's notes of the proceedings. We ruled against the admission of this affidavit and I agree with the reasons given by the learned President for so ruling. Indeed the inclusion of the affidavit in the record of appeal offended against rule 8 of rules of this court.

The proper-course for counsel to take would have been to make an application for leave to adduce additional evidence under Rule 29 of the Rules of this court which provides,

> "29(1) On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power
>
> (a) to reappraise the evidence and to draw inferences of fact:

(b) in its discretion for sufficient reason to take additional evidence or direct that additional evidence be taken by the tria1 court or by a commissioner.

(2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent."

Since the appellants did not make any application for leave to adduce additional evidence it is not necessary to consider whether their application would have been allowed. But in England the Court of Appeal has power to allow a party on application to rely on counsel's notes of the proceedings where the judge's note or transcript of evidence are inadequate or incomplete. See Ex parte Firth (1882) 19 Ch. D.419, Parkinson v. Parkinson (1947)63 T.L.R. 439, Thomson v. Andrews(l968) 1 WLR 778.

In Parkinson v. Parkinson (Supra) We husband petitioned for divorce,, and the trial judge dismissed the petition. The judge made no note of the evidence nor was one available from the shorthand writer. During the hearing of the appeal the husband made an application under O.58 r.11 of the Rules of the Supreme Court to read an affidavit as to the evidence sworn by a solicitor. Scott L.J. allowing the application said,-

"The court has on several occasions previously admitted a note made by a solicitor's Clerk coupled with a statement by counsel that the note had been taken in court., In the present case there is no such statement by counsel, but, as the solicitor has put his note as the evidence in the form of an affidavit, the court has thought it right to admit it."

In Thomson v. Andrews (Supra) proceedings were taken before an official referee for damages for breach of contract. In accordance with the normal practice no official shorthand note of the proceedings was taken, but the defendant's solicitor took a very full note of the evidence or purposes of appeal the defendant's solicitors obtained the official referee's own note of evidence but considering it to be inadequate, they obtained his agreement to the substitution of their own note for use on appeal. The plaintiff's legal advisers when

approached objected to the proposed substitution. At the hearing of the appeal counsel for the defendant applied under RSC O.59 r.12 (l) (b) for substitution of the solicitors note for that official referee. The court of Appeal refused the application on the ground that there had been no agreement by the other side to the substitution. Salmon L.J, said,

> "The normal practice is that save in the most exceptional circumstanced, this court will look only at something other than the shorthand note or the judge's note if it is an agreed note of evidence. Whether it be taken by a solicitor or counsel seems to me immaterial."

Although the authorities I have cited are English decisions where the procedure for recording evidence may be different from Uganda, I respectfully agree with principles enunciated therein. In the absence of local decisions on the matter, I believe that they offer some guidance on the procedure-counsel may take where he intends or wishes to supplement the official record of proceedings as taken down by the trial judge with his own note of evidence or by affidavit of his own observations of the judge's conduct or incidents which happened during the hearing either in court or outside it.

Having ruled that the affidavit was inadmissible, Mr. Kulumba-Kiingi abandoned the first ground of appeal, and the entire issue of the mental condition, of the learned trial judge in. the second ground of appeal. But before counsel did so, Mr.Kutesa learned counsel for the respondent argued that this court cannot inquire into the mental soundness of the trial judge. I do not for my part agree entirely with this broad statement. I agree that the issue of a judge's inability to perform the duties of his office either due to infirmity of body or mind or from any other cause, or for misbehavior can only be inquired into by a tribunal appointed under Article85 (5) of the Constitution, after the cabinet has represented to the President that the question of his removal should be investigated. But where it is alleged on appeal that the infirmity of the judge or misconduct has denied the parties a fair trial, this court must have the jurisdiction to determine the matter if it is appropriately raised. To hold otherwise would be to abdicate our primary duty to ensure that justice is done between the parties by remedying any miscarriage of justice.

The substantial question for consideration is whether the trial judge's misconduct and/or bias prevented the appellants from having a fair trial. I shall deal with the ground of bias first. Mr. Kulumba-Kiingi submitted that the trial judge was biased against the appellants. Counsel invited this court to infer from the record of proceedings that there was bias. He also contended that after he had withdrawn from the case, the appellants did not return to court to take part in further proceedings because they suspected that the judge was biased. Mr.Kutesa for the respondent submitted that the appellants could not raise objection based on bias since they accepted the judge's jurisdiction, and secondly that the allegations of bias were mere conjecture since they were not based on any evidence.
The learned trial judge 0mented on the allegation of bias at the end of his judgment in these words:

> "Before I leave this suit, I am constrained to make certain remarks. When I returned from Kabale and before I could write judgment in this case, I heard what can only describe as bizarre happenings. When I was hearing the case, oblivious to me, events were taking place outside the court room which were totally unethical. An advocate of this court, who was a witness in the case, conceived that I was biased against the defendants. He set out to remedy
> the situation which to him was a travesty of justice. He went to a well known Judge friend of his and raised his complaint. That Judge friend put the advocate to those who he thought could provide a remedy. I am astounded that this judge and his friend never realised that, there was no remedy outside the court. The advocate was aspered to where it was believed vestress could be obtained. I am surprised that it did not occur to the judge, Advocate and others that they, could not discuss a case which was being heard by another judge. I understand that a number of meetings were held about this case. I do not know what useful purpose these meetings would achieve or did achieve. I thought
> it elementary that once a judge is seized with a case the conduct of that case is sorely in his hands until judgment. I understand it is, the right of an advocate to withdraw from a case as if he has good reason although this is usually not the best course. Usually a prudent advocate would proceed to the end. In case he thought the judge was biased, he would make that a ground of appeal. The spectacle of a badly behaved advocate withdrawing from a case and a witness advocate running helper scalter in

search of non-existent assistance to me is at most undignified and down right stupid. What happened in this case was completely unethical and must never be repeated in my court. I am making available to the Chief Justice a copy of this judgment with a request that the conduct of Mr. Ndozireho and Kulumba-Kiingi be brought to the attention of the Uganda Law Society. I do not want my court to be disgraced. It is a mistake for any advocate to think that this court will be intimidated by allegations of bias."

It is abundantly clear from the above remarks that the, allegation f bias was somehow brought to the attention of the trial judge. It is not clear however, how it was brought to his cognisance. The learned judge only states that it was conceived by Mr.Ndozireho during the hearing of the case, as a result of which various meetings were held over the matter. There is nothing in the record of proceedings other than the judgment to indicate that this allegation of bias was raised in court. Therefore we do
not know the nature of bias that was suspected against the trial judge.

Bias may be established against a person sitting in a judicial capacity on one of the two grounds. The first is direct pecuniary interest in the subject matter. The second is bias in favour of one side against the other: See Metropolitan Properties Co. F.G.C. Ltd. v. Lannon (l969) 1 QB 577. Bias therefore means a real likelihood of an operative prejudice whether conscious or unconscious. See R.V. Justices of Queens Court (1908) 2 IR 282. In considering the possibility of bias it is not the mind of the judge which is considered but the impression given to reasonable persons. See Tumaini v. Republic (1972) E.A. 441. In Metropolitan Properties Co. F.G.C. Ltd.v. Lannon (Supra) Lord Denning said, at p.599,

"In considering whether there was a real likelihood of bias; the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be who sits in a judicial capacity. It does not
look to see if there was a real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the impression which would he given to other people. Even if he was impartial as could be, nevertheless if right minded persons would think that in the circumstance there was a real likelihood of bias on his

part, then he should not sit. And if he does
sit, his decision cannot stand. See Reg.v. Huggins (1895) 1 QB 563. Nevertheless there must appear to be a real likelihood of bias. Surmise
or conjecture is not enough: See Reg. v. Cambone Justices, Ex parte Pearce (1955)]. QB 41, 48-51, (1954) 2 All E.R. 850 and Reg. v. Nailsworth Licensing Justices ex parte Bird (1953) 2. WLR 1046, (1953) 2 All E.R. 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would or did favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: The Judge was biased"

Indeed it is a well settled principle that justice must not only be done but must be seen to be done. As Lord Hewart C.J. said in an oft quoted passage, in R. V. Sussex Justices Ex parte Mcarthy (1924) l KB 256 at p. 259.

"a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"

As regards the evidence of bias, the authorities are clear that there must be reasonable evidence to satisfy the court that there was a real likelihood of bias. Objection cannot be taken at everything that might raise a suspicion in somebody's mind or anything which could, make fools suspect. There must be something in the nature of real bias, for instance evidence of proprietary interest in the subject matter before the court or a likelihood of bias based on close association with one of the parties as was the case in Tumaini v. Republic (Supra). In R.V. Justices of Queen's court (Supra) cited in R.V. Combone Justices ex parte Pearce (Supra) Slade J, said,

> "There must in my opinion be reasonable evidence to satisfy us that there was real likelihood of bias. I do not think that mere vague suspicions of whimsical, capricious and unreasonable people should be made standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds was reasonably generated but certainly merely flimsy, elusive morbid suspicions should not be permitted to form a ground of decision"

In the present case, there is no reasonable evidence to satisfy me that there was a real likelihood of bias on the part of the learned trial judge. There was no evidence or even suspicion that he had a direct pecuniary interest in the subject matter of the suit. There was n evidence that he was likely to favour the respondent against the appellants. And even if the trial judge may have been thought to have formed some opinion beforehand on the case, it is not enough to establish bias. (Per, Lord Goddard C.J. in R.Y. Nailsworth Licensing Justices ex parte Bird (1953) 2.A1l E.R. 652 at p. 654. I therefore agree with the submission of Mr. Kutesa that the allegation of bias was mere conjecture and was not based on any evidence or reasonable suspicion.

The record was silent as to whether counsel for the appellant objected to the judge hearing the case on the ground of bias. In my opinion counsel should have raised this objection at the trial and even if it were overruled, he should as the trial judge remarked in his judgment, have continued with the hearing and made it a ground of appeal. I agree with what Lord Loreburn L.C. said in Lord Mayor & Co. of Leeds v. Ryder and others (l907) A.C. 420 at p. 424,

> "Justices are not able satisfactorily to discharge their duty if the propriety of their sitting and adjudication is admitted when the case is before them and then is combated in courts of law afterwards. It is a reprehensible practice".

However in the instant case it can be said that appellants admitted the trial judge to adjudicate on their case because they seem to have refused to take part in further proceedings of the case before him. But the point that the appellants should have raised objection to the trial judge

against his sitting still holds.

The appellants also argued before this court, that they decided to abandon the hearing because they suspected that the trial judge had prejudged the case against them beforehand, and that it was futile to continue with the case before him. In this connection, I wish to recall the words of Holroyd Pearce L.J. in Brassington v. Brassington (1961) All E.R. 988 at p. 990,

> "Before considering the effect of the remarks of which complaint is made, we must observe that only very a strong case indeed could justify a refusal by a party to continue to take part in the trial. If a party though aggrieved, continues to present his evidence and arguments he can always reserve his complaint and appeal against unfair decision when it has been given. And any remarks which show that the tribunal prejudged the case against him before he had called his evidence will always in this court add very great weight to the substance of the appeal and may in themselves constitute a sufficient ground of appeal. The aggrieved party will then at least have shown that he has a genuine
> case on which he either ought to have or could have succeeded."

Holroyd Pearce L.J. continued o say that a. heavy burden of proof lies on a party refusing to continue with the trial to satisfy the Court of Appeal that he was justified in his apprehension that it would be futile for him to continue and that had he done so he would not have had a fair hearing. This is what he said,

> "Whatever be the truth of the matter where parties refuse to call their evidence or to take part in any further part in the trial a very onus lies on them, to satisfy the Court of Appeal that the apprehension that for them, it would have been futile to continue and that had they done so, they would not have had a fair, proper and satisfactory hearing, was truly justified. (See per Lord Evershed M.R. in Badcock v. Middlesex County Council, March 15, 1960. .The Times March, 16 (1960)."

The reason why this heavy onus is imposed in the party who declines to proceed with his case on grounds of prejudgment is that if it were open for such a party to break off a losing battle when the court appears to be very much against him and then ask this court for a re-hearing, it would create an opportunity for many appeals to this court by under serving litigants.
In the instant case I am unable to find anything said or done by the learned trial judge which reasonably led the appellants to the conclusion that the learned trial judge has made up his mind against their case and that it would, therefore, he futile for them to continue with the hearing of the suit.

The other leg on which the second ground of appeal is based is the misconduct of the trial judge. Mr. Kulumba-Kiingi submitted that the trial judge's misconduct consisted in the judge's unnecessary interruption of counsel for the appellant during his cross-examination of the respondent, and in striking too soon. He submitted on the authority of Jones v. National Coal Board (1957)2 QB 55, that excessive intervention by court during counsel's cross-examination can amount to an unfair trial to warrant an order for a new trial.
Counsel contended further that the trial judge struck too soon when he stopped counsel during cross-examination of the respondent and thus prevented the appellants from putting forward their case. As a result of that intervention no sufficient primary facts were elicited in the trial as the appellants were proven bed from calling their evidence. In support of his submission that the trial judge struck too soon,
Mr. Kulumba-Kiingi cited the cases of Fletcher v. London & North Western Railway Co. (1892) 1 QB 122 and Allen v. Francis (1914) 3 KB 1065.

Mr. Kutesa, for the respondent, submitted that the trial judge did not intervene n the proceedings at all until counsel for respondent became rude. He pointed out that it was then that the judge intervened to give Counsel a dressing down. It was Mr. Kutesa's submission that it is not misconduct for a trial judge to comment on the discourtesy of an advocate.
Secondly, Mr. Kutesa submitted that the trial judge did not strike too soon. He distinguished the case cited by Mr. Kulumba Kiingi on the ground that in those cases the parties were not allowed to state their cases. Mr. Kutesa pointed out that in the present case there were many adjournments on record, and when the hearing started, counsel for the, appellants decided to withdraw from the case during cross-examination of the respondent, at his own instance, not

that of the court. Even after counsel had withdrawn, an adjournment or two weeks was granted to enable appellants to engage another advocate. wherefore, Mr. Kutesa submitted, the record shows that the trial judge bent backwards to accommodate the appellants in order for them to have a fair trial.

It is I think well established law that excessive intervention in the proceedings by a trial judge may amount to misconduct justifying the grant of a new trial. See Jones v. National Coal Board (1957) 2 QB 55. In Patel v. Joshi (1952) 19 E.A.C.A. 42 the Court of Appeal for Eastern Africa held that a judge should not descend into the arena where his vision may be clouded by the dust of the conflict, but an appellate court will refuse a retrial unless it is convinced that the vision of the judge had become so clouded.

In Jones v. National Coal Board (supra) the trial judge intervened during the evidence for the plaintiff in order to understand the technicalities of expert evidence. During the evidence of the defendants the judge intervened frequently both during examination-in-chief and during cross-examination, at times conducting the examination of a witness himself, at times interrupting cross-examination to protect a witness against questions which he considered misleading. The nature and extent of his interventions were such as to break the sequence of question and answer. The complaint on appeal was

> "that the nature and extent of the Judge's interruptions during the hearing of the evidence called on behalf of the defendants made it virtually impossible for the plaintiff to put the plaintiff's case properly or adequately or to cross-examine the witness called on behalf of the defendants adequately or effectively."

The Court of Appeal held that although the judge may have been actuated by the best motives, his interventions taken together were excessive and ill timed with the result that no sufficient primary facts had been elicited to enable an appellate court to determine the issues of liability and therefore there must be a new trial. In so holding Lord Donning said, at page 63, -

> “Nevertheless we are quite clear that the interventions taken together were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties not to conduct an investigation or examination on behalf of society at large, as happens, we believe in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question
> “How is that?” His object, above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honorable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that truth is best discovered by powerful “statements on both sides of the question.” See Ex parte Lloyed (1822 Mont 70, 72n. And Lord Green M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Green, should himself conduct the examination of witness, he so to speak descends into the arena and is liable to have his vision clouded by the dust of conflict: See Yuill v. Yuill (1945) page 15, 61;T.L.R. 176 (1945) All. E.R.183”.

The facts of the above case are slightly distinguishable from those in the present case in that in this case the learned judge did not descend into the arena by taking part in the cross-examination of the witness. But, like in the Jones case the trial judge in the instant case interrupted, counsel during cross-examination although it seems there was only one interruption which led counsel to withdraw from the conduct of the case. In both cases the complaint is that the intervention of the trial judge prevented the appellants from putting forward their case and therefore they, did not have a fair hearing.

After the respondent had been examined in chief, the record of proceedings shows the intervention as follows:

> “By Mr. Kulumba-Kiingi:
> I live in my own house. I could be a lease. I do not know anything about mailo land. I do not know whether there was consent from the Minister.
> Court: At this stage Kulumba-Kiingi advocate for the defendants became provocative and rude. I suffer no rudeness in my court slightly. I gave him a dressing down. I

> prifue (sic) he decided to withdraw from the case. . **V**
> Mr. Kulumba-Kiingi - I am withdrawing."

"It is clear that the intervention took place during cross-examination by Mr. Kulumba-Kiingi. The learned trial judge intervene to give counsel what he called "dressing down" for being provocative and rude. But there is no record o the remark made by counsel which the learned judge considered provocative or rude. To whom was counsel rude to the court or the witness? Therefore, we do not know the nature and extent of the provocation or rudeness suffered by the learned judge; One thing which is clear is that as a result of the dressing down, counsel for the appellants withdrew from the case.

It was also argued that this intervention by the trial judge amounted to striking too soon. In Fletcher v. London & North Western Railway & Co. (1892) 1 QB122 the trial judge, after hearing the opening statement of counsel for the plaintiff, non suited the plaintiff without the consent of his counsel and inspite of his insisting that he ought to be allowed to call his witness. Lord Esther M.R. said,

> "I am of the opinion that the learned judge struck too soon. I will state in its broadest favour. In my opinion a judge has no right without the consent of the plaintiff's counsel to Suit the plaintiff upon his counsel's statement of facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions."

In Allen v. Francis (1914) 3KB 1065 the county judge asked counsel who had been retained by Allen and the Prudential Society whether he was instructed by the society and for whom he appeared. Counsel in his discretion did not answer and the judge thereupon dismissed the application with costs. No evidence was before the judge but Allen was ready to be called. Lord Cozens Hardy M.R. said at page 1067,'

> "In my opinion the judge struck too soon. He ought to have heard Allen and perhaps other witnesses and finally ascertained the facts. If he had then come to the conclusion that it was not really Allen's application and that Allen's name was merely being used by the Prudential the order dismissing the application would have

been proper."

The facts in cases of Fletcher and Allen are also distinguishable from the present case in that' in those cases the plaintiff's claim was dismissed without his being given an opportunity to prove his case. But the two cases' reflect the same fundamental error of denying a party a fair opportunity of presenting his case, and thus being condemned without being heard.

It was contended on behalf of the respondent that the trial judge did not strike too soon because he granted a two weeks adjournment to enable the appellants to engage another advocate. It is true that the adjournment was granted but when the court reconvened after the adjournment Mr. Rugasira is recorded as having appeared for the first appellant and yet counsel for the respondent applied to proceed ex parte on the ground that the appellants were absent and he application was granted. It is therefore not clear in my mind whether the opportunity which was given to the appellants to engage another advocate to represent them was, not thrown overboard by denying Mr. Rugasira a hearing. It is doubtful whether in these circumstances the 1st appellant can be said to have had a fair trial.

It seems to me that the blow the learned trial judge struck by his intervention had profound effect on the course of proceedings in this case. Counsel for the appellants, did not only withdraw from the cases but the case proceeded ex parte after the adjournment. The learned judge observes in his judgment that meetings consisting of another judge, counsel and others were held over the case. The judge himself also made several abortive attempts to hold a meeting with both counsel and an advocate who was a witness in the case. It is not clear to us why, he sought to meet Mr. Kulumba-Kiingi who had withdrawn from the conduct of the case and Mr.
Ndozireho who was merely a prospective witness. This was before he delivered his judgment. Vie do not know what the learned judge intended to do. It may be that he intended to discuss allegations that had been made against him or to give the appellants an opportunity of being heard.

In these circumstances, I am not satisfied that the hearing of this case was conducted in ‘a satisfactory manner and that the appellants had a fair trial. I am unable to say that the learned trial judge did not strike too soon or that his intervention though may have been actuated by the best of motives, did not prevent the appellants from putting forward their case. Since the case proceeded ex parte, I am unable to say that the decision reached was the inevitable decision because we have not all the material facts for the purpose. As Lord Denning said in Jones v. National Coal Board (supra) at page 61,

> “We much regret that it has fallen to our lot to consider such a complaint against one of Her Majesty’s judges: ‘but consider it we must because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. Once we have the primary facts fairly found we are in as good a. position as the judge to draw inferences or conclusion from those facts but we cannot embark on this task unless the foundation of primary facts is secure.”

I respectfully agree with those sentiments and principles which apply with equal force to this case.

I agree that this is a proper case in which to order a new trial before another judge since the trial was not conducted satisfactorily. It is trite law that in general a retrial will be ordered only where the original trial was illegal or defective. It will also be ordered where the interest of justice require it but will not be ordered where it is likely to cause any injustice to any party. Fatehali Manji v. Republic (1966) E.A. 343. As the trial was unsatisfactory the appellants never had a fair hearing and therefore the interests of justice require that there should be a retrial. I agree entirely with the dictum of Wills J. in R. v. Huggins (1895) 1 QB 563 when, he said,

> “It is impossible to overrate the importance of keeping the administration of justice by magistrates clear from all suspicions of unfairness.”

Accordingly, I agree with the orders and directive proposed by the learned President.

DATED at MENGO this 12th day of June 1986.

Signed: S.W.W. WAMBUZI
PRESIDENT

Signed: D.L.K. LUBOGO
AG. JUSTICE OF APPEAL

Signed: J.B.ODOKI
JUSTICE OF APPEAL

Mr. Kiingi-of M/s Kuluba-Kiingi and Company Advocates for the applicant.
Mr. Nkurunziza of M/s Mulenga and Company Advocates.

I certify that this is a true copy of the original.

M.K. KALANDA
REGISTRAR COURT OF APPEAL