THE REPUBLIC OF UGANDA.

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER J. S.C. TSEKOOKO,JS **C,** *KAROKORA J. &* **C,**

KANYEIHAMBA, J.S. **C,** *AND MUKASA-KIKONYOGO, J.S. C,)*

CIVIL APPEAL NO: 3 OF 1999.

BETWEEN

HABRE INTERNATIONAL, TRADING CO. LTD.,::::::::::::::::::::::APPELLANT

AND

FRANCIS RUTAGARAMA BANTARIZA :::::::::::::::::::::::::::: **RESPONDENT**

(Appeal from the judgment and orders of the Court of Appeal at Kampala (S *T. Manyindo, D.C.J., M Kato, IA., and S.G. Engwau, J.A.,) dated* 24th *November, 1998 in Civil Appeal No. 10 of 1997)*

JUDGMENT OF KANVEIHAMBA, JSC,

This is an appeal against the judgment and orders of the Court of Appeal allowing an appeal against the judgment and orders of the High Court in Civil case No: 499 of 1992.

The facts of the case are briefly as follows:

On 14.3.1985, the appellant was registered as proprietor of leasehold Plot No. 3779 Block 244 Kyadondo, and proceeded to effect developments in the leased land. On 16.12.91, the Respondent was registered as proprietor of leasehold plot No. 4805, Block 244, Kyadondo with the intention also of effecting developments in the leased land. Both leases were granted by the Uganda Land Commission out of Public Land.

The evidence available suggests that in actual fact plot No. 4805 was part of Plot No. 3779 in

Block 244, Kyadondo. The latter plot measured 0.600 hectares whereas plot No. 4805 measured 0.309 hectares. On entering plot No. 4805 under his rights as a grantee of the lease, the respondent found that the appellant had effected some developments on the land and these developments included the laying of water pipes, electricity and the construction of a number of buildings. The respondent decided to take steps in his attempts to ouster the appellant from the disputed land and to stop it from effecting any further developments while forcing it to remove the structures already fixed in the land. In these endeavors, the respondent utilized the services of some officials of the Kampala City Council who investigated his complaints and eventually decided that the land legally belonged to the appellant and the structures which the respondent wished to have demolished were built with the planning permission of the City Council.

Dissatisfied with the findings and conclusions of the Kampala City Council officials, the respondent filed High Court suit No: 499 of 1992 against the appellant, seeking, *inter* alia, orders to force the appellant to remove the structures and grant general damages for trespass. Among the questions raised by the parties and answered by the learned trial judge were, which of the two tenants, the appellant or the respondent, owned the suit land and when and how did each acquire their respective leases and when did those leases, expire, if at all The trial judge dismissed the suit with costs. The respondent appealed to the Court of Appeal which reversed the decision of the High Court and allowed the appeal with costs - hence this appeal.

The Memorandum of Appeal contains nine grounds of appeal, framed as follows:

1- *The learned judges of the Court of Appeal erred in law and in fact when they failed to properly evaluate the evidence adduced and as a result reached a wrong decision.*

2- *The learned Judges of the Court of Appeal erred in law and in fact when in reaching their decision they erroneously found that the*

appellant's legal title to the suit land had been cancelled on the 1h December, 1988.

3- *The learned Judges of the Court of Appeal erred in law and in fact when they misconstrued and misapplied Section 76 of the Registration of Titles Act, Cap 205.*

4- *The learned Judges of the Court of Appeal erred in law and in fact when in determining whether the appellant was a trespasser they transcended into extraneous issues and matters that were neither pleaded nor issues before the trial court, viz*

(a) (sic) whether the appellant's title was invalid by reason of having been got fraudulently.

5- *The learned Judges of Appeal erred in law and in fact when in determining the respondent's claim they failed to distinguish between legal and equitable title and give due consideration to the competing equities on the suit land*

6- *The learned trial judges (sic) erred in law and in fact when in upholding the respondent's claim against the appellant, they in effect decided that the appellant was a trespasser without any right, title or interest on the suit land.*

7- *The learned judges of the Court of Appeal erred in law and in fact in granting the respondent the orders and relief for inter alia, removal of the appellant's structures from the appellant's (now respondent's) land.*

8- *The learned Judges of the Court of Appeal erred in law and in fact in finding that the appellant obtained his title to the suit land fraudulently, when there was no such evidence adduced and proved against the appellant.*

9- *The learned Judges of the Court of Appeal erred in law and in fact when they upheld the respondents' argument and found that it was necessary for the appellant to obtain the consent of the Minister in respect of the suit land, which consent was not obtained by the appellant rendering the lease invalid*

The appellant prays that this court sets aside the judgment and orders of the Court of Appeal and confirms and restores the judgment/decree of the honorable trial judge and thus allow this appeal, with costs.

Mr. Mbabazi, Counsel for the appellant filed written submissions in favour of the appellant. He argued grounds 1, 2,3,7,8 and 9 jointly with the aim of showing that the Court of Appeal erred both in law and in fact in failing to revaluate the evidence properly. Counsel enumerated the findings of the Court of Appeal against which he
intended to argue that the court had erred. These he listed as under:

(a) *That the suit land once belonged to the National Water and Sewerage Corporation.*

(b) *That the respondent approached the National Water and Sewerage Corporation which had no interest in the land and no objection in its being allocated to the respondent.*

(c) *That the Minister of Water and Mineral Development vide exhibit P2 consented to the allocation of the land to the respondent.*

(d) *That the minute under which the land was leased to the appellant referred to a different piece of land and a different applicant known as Mukalazi Technical Services.*

(e) *That such irregularity renders the respondents' title void ab initio.*

(f) *That the evidence was led to prove (sic) that the minute under which the land was leased to the appellant referred to a different person.*

(g) *That the appellant's certificate of title (exhibit D 5,) had been cancelled on the 5th December, 1988 vide exhbit P 1.*

(h) *Thai when the respondent got his title on* ft *August, 1989, the appellant's lease was no longer in existence.*

(i) *That the legal effect of a cancellation of a certificate of title is to render it void under Section 76 of the Registration of Titles Act, Cap. 205.*

(j) *That Exhibit P.8 did not favour the appellant's case in relation to being an application for extension of the appellant's lease which had been cancelled*

Mr. Mbabazi contended that it was not shown how the National Water and Sewerage Corporation was the owner of the suit land. He further submitted, that even if it had been true that the

National Water and Sewerage Corporation owned the land, then he did not see how it was the Uganda Land Commission to which both the appellant and respondent applied to have the suit land allocated to them as tenants. Mr. Mbabazi further contended that since it is the Uganda Land Commission which allocated and granted the leases as the controlling authority of the Public Land and did so without any reference to the National Water and Sewerage Corporation, the Court of Appeal failed to properly reevaluate the evidence by holding that the appellant needed the permission of the National Water and Sewerage Corporation to obtain a lease in a public land from the Uganda Land Commission.

Mr.Mbabazi made submissions on the evidence given by Mr. Bakashabaruhanga (PW1), the then Permanent Secretary in the Ministry of Lands on which the Court of Appeal relied in reaching the finding that the appellants' lease had been cancelled. Counsel submitted that as Permanent Secretary to the Ministry, he had no direct dealings with the work of the Uganda Land Commission and his evidence upon which the Court of Appeal relied on was hearsay. He also contended that the allegations of fraud upon which the Court of Appeal based part of its reasoning had not been proved. It was Mr. Mbabazi's contention that the appellants' certificate of title could not be impeached by reason or on account of any informality or irregularity in the internal procedures of the Uganda Land Commission prior to the granting and registration of such a title. Counsel cited _ Francis Butagira v. Deborah Namukasa, SCCA No. 6 of 1989. Kampala Bottlers Ltd v. Damanico, (U) Ltd. SCCA No. 22 of 1992, Azizi Kasujja v. Neuni Tibakenya Nakakande. SCCA. No 63 of. 1995. J. .L. Okello - Okello v. Uganda National Examination Board, SCCA 12 of 1987 as well as S. 90 and 91 of the Evidence

Act, (Cap). 13, ss 38, 42, 48, 49, 69, 70 and 89 of the Registration of Titles Act, (Cap.205) to support his submissions this far. With regard to the cancellation of the appellants' title, counsel for the appellant contended that what the evidence showed was a mere intention to cancel and no steps were taken to comply with the provisions of the Registration of Titles Act, Cap. (205), Counsel quoted extensively the relevant provisions of the Act to show what should have been done but was not done in order to effect a cancellation of a registered interest in land. Counsel for the appellant made further submissions on the matter of the expiry of the appellant's lease. It was counsel's contention that the Court of Appeal failed to properly reevaluate the evidence

relating to the expiry of the lease. If it had, it would have discovered that the appellant had not only submitted an application for extension but in expectation of that application succeeding, the planning authority had given the appellant the go ahead with further developments to be effected on the Suit property. Counsel argued that pending extension of the lease, the appellant had an equitable interest which was protected by the provisions of the rules of the Public Land Rules, Statutory Instrument 201 - and in particular Rule 10. The recognition of the appellants' rights in the suit land was strengthened further by the acceptance in the land registry of its caveat (Exhibit 6) which was registered after the respondent had began to challenge the appellant's entitlement. It was counsel's submission that on these grounds there is no way the appellant could have been held, as the Court of Appeal did, that he was a trespasser. For these reasons, counsel for the appellant asked this court to allow the appeal.

For the respondent, Dr. Byamugisha made oral submissions dealing with the issues as serially argued by the appellant's counsel.
Dr. Byamugisha acknowledged that the facts as set out in the written submissions by the appellant's counsel were more or less accurate except for one or two slips on pages 1.3 and 1.4 of those written submissions. Counsel for the respondent observed that whereas it is true that the appellant had been the registered owner of the lease in the suit land, a letter requiring him to produce his certificate for cancellation had been written in 1988 before the respondent applied for his own part of the land. The letter clearly stated that the lease would not only be cancelled but the fact of cancellation would be advertised in the Uganda Gazette. A witness, Mr. Bakashabaruhanga, (PW1), gave evidence of cancellation.

Dr. Byamugisha further contended that by the time the parties went to court the appellant's certificate had been cancelled and the question of fraud did not arise. Counsel further observed that even if the appellant had legitimately obtained the certificate of title, time for it which was stipulated as five years had expired and the lease had not been renewed and one of the reasons it could not be renewed was because it had been cancelled. Dr. Byamugisha referred us to the issues which had been framed in the High Court which revolved around which of the parties owned the suit land, whether the suit land claimed is the same as that referred to in the defense

replies to the plaint and the nature of the relief prayed for by the parties. Dr. Byamugisha submitted that the answers to the above questions are to be found in the judgment of the learned trial judge pp 1 - 5, where the judge deals with the manner in which the respondent came to apply for the lease, the evidence of Mr. Bakashabaruhanga (PWI) that the lease certificate title was tainted with fraud, the discredit of the report (exhibit 7) submitted by John Musingo (DW2) in favour of the appellant and the cancellation of the appellants' certificate of title. Counsel for the respondent argued that the main issue in this case is whether or not the appellant's certificate of title had been cancelled. He referred to the letter written by one Deo K. Kajugire, then Ag. Chief Planner (Exhibit 8) and another written by one B.H. Byamugisha for Secretary of the Uganda Land Commission both of which supported the submission of the appellant in the High Court and which partly influenced the trial judge to find for the appellant. Dr. Byamugisha contended that the contents of these two letters were based on false premises, for by the time they were written, appellant's certificate of title had already been cancelled.

It was also counsel's submission that neither of the writers of the two letters was a land expert capable of professionally guiding a court in matters of land. The person who wrote on behalf of the acting Chief Planner was a mere administrative officer while the second writer was only a security guard. It was therefore wrong for the learned trial judge to rely on their evidence. Counsel for the respondent observed that in fact Mr. D. H. Byamugisha (DW2) conceded that he did not interview anyone representing the appellant as he was only interested in and concerned with the structures on the land and not the title to it.

Dr. Byamugisha contended that the trial judge was in error when he held in his judgment that the letter (exhibit. 8) written by Mr. Deo K. Kajugira favored the appellant. Counsel further contended that to hold from the evidence as the trial judge did, that the title was impeachable had to be based on the fact that the certificate of title was still in existence which was no longer the case after cancellation.

It was the contention of counsel for the respondent that the evidence of Mr. Bakashabaruhanga (PWI) was crucial in determining the nature and ownership of the suit land. Mr. Bakashabaruhanga testified about the rampant corruption and forgeries in the Land Registry and the internal workings of the Uganda Land Commission to the effect that nothing or little from

these sources by way of testimony should have been relied upon. Counsel submitted that the defence witnesses who had testified or whose documents had been tendered in evidence were all motivated by pecuniary interests and therefore should not have been believed as their evidence was unreliable. In consequence, Dr. Byamugisha submitted that the trial judge had been wrong to rely on their evidence whereas the Court of Appeal was right to believe and rely on the evidence of the respondents' witnesses.

Before considering and determining the issues raised by this appeal, one matter needs to be clarified first. The material facts of this case and the manner in which they are presented both by counsel and dealt with in the courts below differ substantially and are liable to lead to confusion and misunderstanding. I shall attempt to set them out in the manner I understand them and make my findings.

The plaint set out the case for the appellant in paragraphs 2 to 5 thus,

2. The defendant is a company owned by non-Ugandans with offices and carrying on business in Kampala....

3. The plaintiff is the registered proprietor of Plot No: 4805, Kyadondo Block 244, Kampala which is approximately 0.309 hectares in area. A photocopy of the certificate of title issued on the 31st December 1991 is annexed hereto and marked "A".

4. he defendant, in or about early 1990, after the plaintiff had been given a lease offer to the above mentioned land, continued to trespass upon part of the same by building thereon two illegal structures and, at first even hindered the plaintiff and his surveyors from surveying part of the said land so that the plaintiff could get a certificate of title thereto to enable him to commence developments thereon,

5. While the plaintiff had all his land surveyed and got a certificate of title, defendant has nevertheless continued its trespass on part of the plaintiffs land by keeping the illegal structures thereon thus hindering plaintiff from planning for development of all the land by unlawful means and even interfered with the City Council of Kampala law officers who had been directed to pull down illegal structures upon plaintiffs land after defendant had

itself failed to pull down the structures after being ordered to do so. A photocopy of a letter by City Council of Kampala dated the July, 1992 to its Senior City Law Officer, Makindye Division, is annexed hereto and marked "B",

Among the remedies sought from the High Court were an order for the removal of the illegal structures from plaintiffs land either by appellant itself or failing that, by respondent at appellant's cost and, general damages for trespass.
However, examination of all the facts which come to light in the pleadings of both parties and during the trial of the suit show, quite clearly, that there was a number of material facts which were either omitted or misrepresented in the plaint For instance, the plaint suggests that when the plaintiff first applied for and obtained the lease in plot 4805, Kyadondo Block 244, the land was a separate parcel of land and undeveloped. Nevertheless, as the appellant showed later and the learned trial judge found from the hard facts and evidence of the case, Plot 4805 Kyadondo Block 244, was only part of a larger Plot No. 3779 Kyadondo Block 244 which was already occupied by M/s Habre International Ltd, the appellant, as a leasehold tenant which had rightly and obtained that lease from the Uganda Land Commission in March, 1985, that is, than five years before the respondent had enquired about and discovered the existence of the land.. It is also apparent from the evidence that the appellant had already effected some developments on the whole land before the respondent acquired part of it. Counsel for the respondent conceded that in fact his clients piece of land was originally part of the appellant's larger lease and the learned trial judge so found when in his judgment he held that Habre International Trading Co. Ltd. had plans of development approved by the Kampala City Council and also had title to the suit property.

The evidence shows clearly that Habre International was owned partly by a Nigerian and a number of Ugandans and not wholly by non-Ugandans as claimed in the plaint. Nevertheless, on the basis of the facts disclosed in the pleadings, respondent could have pursued his remedies on the strength of his certificate of title and the fact of expiry of the certificate of title of the appellant, but it is misleading to cite illegal structures or indeed trespass against a person who

had acted legally even if the lease may have expired in due course.

In my opinion, the trial court correctly understood the chronological sequence of events and issues involved in the suit but when it came to the Court of Appeal, a number of material facts were either overlooked or ignored.
In my view, the way in which the Memorandum of Appeal was framed for the Court of Appeal, compelled that court to properly reevaluate the evidence that was presented in the High Court and upon which the learned trial judge based his findings and orders.
There were two grounds of appeal framed for the Court of Appeal to determine, as follows;

1- **In holding that the plaintiff had failed to prove his claim on a balance of probabilities, the learned trial judge erred in law and in fact in his evaluation of the evidence.**

2- **On the basis of the evidence, the learned trial judge erred in law and in fact in not holding that:**
a) the plaintiff owns the suits land and
b) the suit land claimed is part of that referred to in the defence"

In the Court of Appeal, Dr. Byamugisha represented the respondent while Prof. Kakooza represented the appellant. In my opinion, the analysis of what both counsel submitted and the leading judgment of Kato, J.A., show that the Court of Appeal not only, failed to properly reevaluate the evidence presented in the case, but part of its judgment offended against rule 101 of the Rules of the Court of Appeal, 1996, that a Court of Appeal shall not allow an appeal or cross appeal on any ground not set forth or implicit in the Memorandum of Appeal or notice of cross appeal, without affording the respondent, or any person who, in relation to that ground, should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground. However, as I will Endeavour to show, there is something much more inexplicable in the judgment of the Court of Appeal in that part of it is founded on a ground

not advanced even by the successful party, namely, fraud. In the case of Shell (U) Ltd. V. Agip (U) SC/SA No. 49 of 1995 (unreported), the learned Wambuzi C.J., referring to an additional ground which was not argued in the court below said,

> *"In my view, all the three grounds, 1,2, and 4 really are the same grounds expressed differently and should have been grounds, in a cross-appeal which would have enabled this court to reevaluate the evidence and come to its own conclusion. In my view a decision can be upheld on different grounds only f there is a finding made or evidence accepted by the trial court of fact, which can supporting the decision but which was not relied upon by the lower court."*

In my opinion, failure by a first appellate court to evaluate the material evidence as presented in the trial court in a civil matter constitutes an error in law, and this court will intervene to correct that error by doing what the first appellate court should have done.

In my view, where the first appellate court comes to a decision different from that of the trial court, it is even more imperative that evidence of rehearing and revaluating the material facts in the case must be apparent on the record of proceedings of that appellate court. It is clear in this appeal that such evidence is conspicuously missing. Consequently, this is a clear exception of a civil case in which this court must itself reevaluate the material facts to ensure that justice was not denied in the courts below.

In his submission to the Court of Appeal on behalf of the appellant, Prof. Kakooza stated that the appellant applied to the Uganda Land Commission for the lease in 1984 and it was granted to him in 1985. It was registered. It was that very Land Commission which had the authority to grant leases. The land given to the appellant was 0.600 hectares. It was registered in the names of appellant on 14.3.1985 as Plot 3779 Block 244. That was the position in 1990 when the respondent got the grant of a lease in the same land. The appellant's lease expired in February 1990. It could not obtain an extension as the respondent had acquired part of that land and a

dispute had arisen. So appellant simply put a caveat on the whole of the land in May, 1990.

Further on, the learned Counsel continues to state that in October an extension of the lease was recommended by the Ag. Chief Planner to the Secretary of the Uganda Land

> *forgeries... I did not report the matter for investigation because there were many forgeries at that time."*

Mr. Bakashabaruhanga also revealed in his testimony that an innocent applicant cannot just go into the Ministry or be privy to what happens inside. Yet the respondent knew what was happening inside the Registry even though it was closed. Instead of dealing with the officials of the Uganda Land Commission, the respondent's main contacts for the acquisition of his desired lease were Ministers, Permanent Secretaries and Commissioners of Water and Sewerage Corporation. This is an example of blatant power peddling.

Nevertheless, the Court of Appeal completely overlooked or ignored these material facts and instead adopted the submissions of Dr. Byamugisha almost in toto. A comparison of his submission as recorded by Manyindo D.C.J. on grounds 1 and 2 are reproduced by Kato, J.A., who gave the leading judgment of the Court of Appeal, without any reference to the submissions and explanations by Prof Kakooza, learned counsel for the appellant. The learned justice did not consider the contradictions in the evidence tendered on behalf of the respondent.

Thus, the judgment of Kato, J.A., commences:

> *"This is an appeal against the judgment of the High Court dated 3/1 1/9 5. The appellant, Francis Rutagarama Bantazira was the plaintiff in the court below while the respondent, Habre International Trading Co. Ltd was the defendant The summary of acts of this appeal is as follows: There is apiece of land known as Kyadondo Block 244 Plot*

4805 situated at Muyenga in Kampala District, measuring 0.309 hectares. The land was at one time vested in the National Water and Sewerage Corporation but when the appellant approached the Corporation he was told the Corporation had no interest in it The appellant then applied for it and made the necessary payments stipulated in the offer on 9/8/89. The appellant was however informed

Commission and Exhibit 8 showed that the appellant's title was not questioned by the Chief Planner. That exhibit showed that there was a lease existing in favour of the appellant before the respondent acquired his part of the same land. The Kampala City Council's law enforcement officer who was sent to demolish the appellants' structures on the suit land found that the structures had been approved by the relevant authorities of the City Council.

On the other hand, the evidence by the respondent, Mr. Bantariza shows that he did not go through the proper channels. In his testimony, respondent (PW2) stated:

"To acquire this land, it was in 1989 when I was approached by a land agent that he had land to sell. So he took me to the area and I asked him whether he had a land title. Then I got a copy of the land title of the plot. It was in names of Habre International. At that time it was when the land office had closed because they wanted to check forgeries. I approached one of/he officials in the land office. I gave him a photocopy of the land title in the names of Habre International to check whether the title is genuine. After sometime the result were that a copy of the land title was forged Then I went and approached the minister concerned I asked the Managing Director (of the National Water and Sewerage corporation,) to write me a note…"

In cross-examination, the respondent revealed that he went to see the Minister of Lands, Hon. Mulondo, who only needed a clarification since the land title to the respondent had already been issued. The then Permanent Secretary to the Ministry of Lands, Mr. Bakashabaruhanga (PWI) was the first and principal witness for the respondent. In cross-examination, Mr.

Bakashabaruhanga conceded:

> *"I know the plaintiff He is my acquaintance.... At the time Habre's title had been cancelled.... The Deputy Minister and Onyango was (sic.) sacked because of* ***that the land was too big to be leased to one person alone. It had to be divided into 3*** *portions* ***out of which the appellant could*** *get* ***apart. In the end the plot was divided into two plots out of which the appellant got one which is the subject of this*** *case.* ***The appellant was eventually issued with a certificate of*** *title* ***on 31/112/91 for a period of 5 years starting from 1/8/89. Later on the appellant discovered that the respondent was trespassing on part of his land. He filed this suit requesting the court to order the respondent to remove his illegal structures from the appellant's land and to pay damages for trespass."***

In my opinion, the summary completely ignores the material facts narrated on behalf of and which could have been favorable to the appellant who was then respondent before the Court of Appeal.

In his submissions on ground 1 and 2 of appeal, Dr. Byamugisha stated

> *"In fact our case was not that* ***he was*** *guilty* ***of fraud*** *but that his title had expired and that the initial allocation of the land to him was illegal and fraudulent. So the judge proceeded on different premises altogether. At the time of trial the respondent* ***did*** *not have a title* ***to*** *impeach."*

In spite of this submission which is clearly not based on fraud, Kato J.A., in his leading judgment of Kato, J.A., stated,

*"With **due respect I do** not agree with Prof Kakooza's contention that this was a mere internal administrative irregularity. In my view the irregularity was the crux of the matter as it rendered the respondent's title void ab **initio"***

With respect, it is my opinion that Kato, J.A.,'s conclusion, was totally irrelevant and uncalled for. Respondent who was then appellant, through his counsel, and in his pleadings did not rely on fraud. Counsel for the appellant who was then the respondent also denied that there was ever any evidence of fraud against it, yet, the learned justices of the Court of Appeal misdirected themselves on the evidence of Permanent Secretary Bakashabaruhanga (PW1) by holding that fraud and irregularities in the granting of the lease were the crux of the matter. Such a finding offends against Rule 101 of the Rules of the Court of Appeal (supra).

I now turn to the issue of whether the certificate of title of the appellant in so far as it related to the suit land was ever cancelled as to justify the respondent's claim that by the time he obtained his own certificate of title that of the appellant was no longer in existence. The law governing documents which record interests and titles in land and which was in force at the time of this suit is The Registration of Titles Act, Cap.(205) and, in so far as is relevant, it provided:

s. 38 (1) "The Registrar shall keep a book, to be called the 'Register Book' and there in shall register certificates of title, and shall enter in such manner as to preserve their properties the particulars of all dealings and matters affecting the land by this Act required to be registered or entered.

s.39 (1)…

(2) …

(3) Wherever it shall appear expedient to the Registrar, he may cancel a certificate of title registered in the Register Book and may register a

certificate of title in any of the forms prescribed under this Act in lieu thereof:

Provided that the Registrar shall not issue any such new certificate until the duplicate of the certificate cancelled under the provisions of this sub-section is in his hands.

s. 42 (1)

(2) Every instrument purporting to effect land or any interest in land, the title to which has been registered under the provisions of this Act, shall be deemed to be registered when a memorial thereof as described in section 48 of this Act has been entered in the Register Book upon the folium constituted by the certificate of title.

s. 48. Every memorial entered in the Register Book shall state the nature of the instrument to which ii relates, the time of the production of such instrument for registration, the name of the party to whom the same is ***given*** *and shall refer by number* ***or*** *symbol to such instrument, and shall be signed by the Registrar.*

s. 69. In case it appears to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error or any certificate of title or instrument, entry or endorsement has been fraudulently or wrongfully obtained or that any certificate of title or instrument is fraudulently or wrongfully retained, he may by writing require the person to whom it has been issued or by whom it has been so obtained or is retained to deliver up the same for the purpose of being cancelled or corrected or given to the proper party, as the case requires, and, in case such person refuses or neglects to comply with such requisition, the Registrar may apply to the High court to issue summons for such person to appear before such court and show cause why such certificate of title or instrument should not be delivered up for the purpose aforesaid, and f such person when served with such summons refuses or neglects to attend before

such court at the time therein appointed, it shall be lawful for the court to issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.

S.89 In canceling any certificate of title, instrument or any memorial or entry in the Registrar Book, the Registrar shall endorse thereon memorandum stating the circumstances in which the cancellation is made."

In light of these provisions on cancellation of certificates of title, the evidence of Mr. Bakashabaruhanga (PW1), the submissions of counsel for the respondent and the findings of Kato J.A., cannot with respect, cannot be supported.

On this very point the learned Kato, J.A., with respect, fails to appreciate the submissions of counsel for the appellant and ignores the law applicable. Thus, the learned Justice of Appeal asserts in his judgment:

> *"The respondent's lease would have ordinarily expired 1/2/90 according to Ex. Dl. The appellant got his lease on 1/8/89 as per ex. P3. It follows that had the respondent's certificate not been cancelled, the appellant would not have got a valid certificate. What happened however was that the respondent's certificate was cancelled on .5/12/89 according to the evidence of Paul Bakashabaruhanga (PWI) and Ex. P1."*

However, neither the evidence of PWI nor Exhibit P1 nor, indeed, the Justices of the Court of Appeal's observation, make any reference to compliance with the provisions of the Registration of Land Titles Act. I therefore agree with the submissions of counsel for the appellant and the findings of the trial judge that there was no proof whatsoever to show that the appellant's certificate of title was cancelled in accordance with the provisions of the Registered Land Title Act, (Cap. 205). Moreover, as the evidence clearly shows, the respondent obtained his lease

before the appellant's certificate of title was allegedly cancelled. In a case heard on appeal before this court, Israel Kabwa v. Martin Banoba Musiga. Civ. App. No. 52 of 1995 (SCCA) (unreported), the disputed suit land was originally part of a bigger parcel of unregistered land owned in succession by the family of the appellant. There was undisputed evidence in the case that the respondent's parents had built a semi-permanent house on a portion of the suit land about 1967. It was also factually proved that the appellant and the parents of the respondent were neighbors for sometime. At some point in time the house of the parents of the respondent was burnt down. Subsequently, the appellant processed registration of his part of the land and he and one Mukidi were duly registered as successive proprietors of the land including the suit land. The evidence showed that the appellant acquired the certificate of title to the land inclusive of the suit land when there was a dispute on the suit land. For his case, the plaintiff relied in part on a written sale agreement which was missing and partly on what he claimed to be registered titles, but he could not produce documents to show that he had factually and legally acquired or registered his interests in the suit, even though he gave evidence that these documents had been stolen.

In his leading judgment, Tsekooko, J.S.C., said,

> *"Absence of these sale agreements creates a missing link in the evidence about which plots were sold to the appellant."*

In my opinion, the failure by the respondent in this appeal to show actual evidence of cancellation of the appellant's certificate of title in accordance with the Registration of Titles Act, Cap.205, fatally affects the submissions of respondent that his title was validly acquired and subsists as against that of the appellant.

On the question of whether the expiry of the five years for which the plaintiffs lease was initially granted the lease expired by effluxion of time, the appellant showed that he had applied to have it extended. This is confirmed by the letter of one B.H. Byamugisha for Secretary, Uganda Land

Commission, dated 22nd June, 1992 and reference ULC/1 22 on Uganda Land Commission's headed paper and reading as follows

> *"You will recall that you applied for an extension of lease for 3 years for the above named plot but the ULC had,* ***at*** *its* ***meeting of*** *12 February, 1992 deferred it for the Chief Planner to advise on its proper layout. He has now advised vide his letter to me Ref B. 3 13 of 16 June, 1992 that the layout does not in any way affect any other planning proposals. You are therefore free to continue with your development awaiting the rectification of the minutes at the next ULC meeting"*

It is obvious that for all intents and purposes, the lease was still considered by the relevant authorities as subsisting even though it required regularization. In fact, this phenomenon is quite common in statutory and other leases which are subject to planning regulations and development plans. They are subjected to periodical renewals, especially when the controlling authority has yet to approve whatever developments are authorized on the land. It does not, in anyway mean, that pending renewal, leaseholders for short periods are expected to stop their developments or that overnight those developments, become illegal and owners thereof, trespassers. On the contrary, as earlier observed, before such leases can expire or become the subject of cancellation, elaborate procedures which may involve court proceedings must be complied with. Counsel for the appellant made submissions on this very point and the trial judge agreed with him. However, when Dr. Byamugisha, counsel for the respondent, submitted that the appellant's term for 5 years expired on 1 February, 1990, the Court of Appeal readily agreed without subjecting the claims of the appellant to evaluation. The learned Justice of Appeal, Kato J.A., concluded on this crucial matter that the lease would have ordinarily expired but for the cancellation of the certificate of title with great respect, the learned justice's conclusion is not supported by the evidence.
For the reasons I have given, grounds 1, 2, 3,4,7,8, and 9 of this appeal do, in my opinion, succeed.

Since Grounds 5, 6, & 7 were argued as alternative to the grounds I have already examined and decided upon, it is not necessary for me to deal with them.

In the result, I would allow this appeal and set aside the judgment and orders of the Court of Appeal dated **24th,** November, 1998 and restore and confirm the judgment and orders of the High Court dated **3rd** November, 1995, and I would award costs to the appellant in this court and in the courts below.

DATED AT MENGO THIS 9TH DAY OF August 1999

G.W.KANYEIH**AMBA**
JUSTICE OF THE SUPREME COURT

JUDGEMENT OF ODER, J. S. C.

I have had the benefit of reading in draft the judgment of Kanyeihamba, J.S.C. I agree with him that the appeal be allowed.

As Tsekooko, J.S.C, Karokora, J.S.C and Mukasa-Kikonyogo, J.S.C. also agree there shall be orders as proposed by Kanyeihamba, J.S.C.

A. H. 0. Oder
JUSTICE OF THE SUPREME **COURT**

JUDGEMENT OF TSEKOOKO JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother Kanyeihamba, JSC, and I agree with his conclusions that this appeal should be allowed with costs to the appellant.

Delivered at Mengo this day of 1999.

J.W.N. TSEKOOKO
Justice of the Supreme Court.