THE REPUBLIC OF UGANDA IN THE SUPREME COURT OF UGANDA AT MENGO

CIVIL APPEAL NO. 7 OF 1998

(CORAM: WAMBUZI, C.J. ODER, TSEKOOKO, KAROKORA, MUKASA - KIKONYOGO, J J. SC)

G.M. COMBINED (U) LTD……..APPELLANT

AND

A.K. DETERGENT LTD…… 1ST RESPONDENT
DEVELOPMENT FINANCE CO. (U) LTD…… 2ND RESPONDENT
FULGENCIO MUNGEREZA ……..3RD RESPONDENT
ERIEZA KAGGWA…….. 4TH RESPONDENT
UGANDA DEVELOPMENT BANK……5TH RESPONDENT.

(Appeal from the Judgment of the Court of Appeal of Uganda before S.T. Manyindo, D.C.J., Amos Twinomujuni, and G.M. Okello, JJ.A dated 15th September 1998 arising from the Judgment of the High Court of Uganda by Her Lordship Lady Justice C. Byamugisha dated 22nd April 1998 in Civil Suit No. 348 of 1994)

JUDGMENT OF WAMBUZI. C.J.

Briefly, the facts in the appeal were that G.M. Combined (U) Ltd. ,the appellant, brought an action in the High Court against A.K. Detergent Ltd. the first respondent, for the recovery of lands which were allegedly unlawfully and fraudulently transferred by the first respondent from the names of the appellant to the names of the 1st respondent. The lands were comprised in seven different leasehold properties at Mbuya.

Particulars of the alleged fraud were:

"a) That the first defendant knew the plaintiff was the owner of the lands.

b) That the first defendant was party to the fraud by lodging transfer instruments while it knew that the alleged transferor had no lawful title in the plaintiff's property to pass to the defendant.

c) The first defendant knew of the defect in title having been put on notice in the local newspaper advert (attached hereto) and a letter to the Director in the plaintiff company, Mr. Ally Karmali (copies attached marked "A" and "B" respectively).

d) The first defendant was party to the fraud having paid no consideration for the said lands or any of the company's properties.

e) The first purchaser was not a bidder of the suit property which was the condition of sale thereof Vat all.

f) The first defendant made the plaintiff's caveat disappear from the Land Registry to make it appear that the land was not encumbered.

g) The first defendant was party to the fraud by paying a gross under-value for the said land or any of the company's properties.

h) The defendant was party to the fraud when it allegedly paid for the property not defined in the sale agreement allegedly executed by the defendant.
The defendant was party to the fraud by not indicating the exact consideration paid for each of the property of the company it is alleged to have paid."

The first respondent in its defence in the main, averred that it had lawfully purchased for value and in good faith all the movable and immovable assets of the appellant in receivership from the dully appointed receivers thereof and the registered titles of the immovable property were dully transferred to the first respondent which claimed to be in lawful possession and denied any fraud or trespass.

Upon their own application, Development Finance Company of Uganda Ltd. ,the second respondent, Fulgencio Mungereza, the third respondent, Erieza Kaggwa, the fourth respondent and Uganda Development Bank, the fifth respondent were joined as defendants.

However, the plaint was not amended to reflect any claim against the four additional defendants.

Be that as it may, the second, third and forth respondents put in a joint written statement of defence claiming that the appellant was a limited liability company in receivership. They agreed the appellant was proprietor of the lands in question but alleged the said lands were sold off by the third and fourth respondents under loan agreements and debentures between the appellant, the second and fifth respondents. They denied any fraud or illegality in the transfer of the properties.

The fifth respondent in its defence claimed, it exercised its rights under a debenture whereby receivers were properly and lawfully appointed and that the properties were lawfully sold.

It appears that the appellant operated a soap factory on part of the suit lands. The factory was set up with funds borrowed by the appellant from the second and fifth respondents and the loans were secured by debentures and mortgages duly executed by the appellant in favor of the second and fifth respondents. Two debentures in favor of the fifth respondent and on debenture in favor of the second respondent were registered at the Companies Registry but not at the Lands Registry.

The debentures provided, inter alia, for the appointed of receivers/managers to realise assets in the event of default on the loans.

The appellant defaulted on the loans and the second and fifth respondents jointly appointed the third and forth respondents to be joint receivers and managers of the appellant.

Within three months of their appointment, the third and fourth respondents sold the suit lands to the first respondent under an agreement of sale dated 21st March 1994. The first respondent was subsequently registered as proprietor of the suit lands on the strength of the transfer instruments or deeds duly executed by the third and forth respondents in their capacity as receivers and managers of the appellant.

The appellant challenged the transfers and sought an order of the High Court cancelling the first respondent's certificates of title. They also sought general damages for trespass and conversion and an injunction restraining the first respondent from trespassing on to the suit lands and passing off as owners of the same.

At the trial only one issue was framed. It was whether the transfer of the suit lands to the first respondent was effectual. But in her judgment, trial judge took the view that although fraud was not specifically framed as an issue, it was obvious from the way the parties conducted themselves that fraud was left to the court to determine. The learned trial judge made the following findings in her judgment.

1. That the appointment of the third and froth respondents as receivers! managers was made not only in accordance with the debentures but also in accordance with section 103(1) of the Companies Act.

2. That under the debentures the receivers/managers were given broad terms with regard to the recovery of the loans.

3. That the receivers/managers were agents of the appellant and as such they had power to sign the transfer instrument.

4. That there *was* a floating charge with was crystallized by the appointment of the receivers/managers.

5. That in case of the floating charge, it had to be supported by an equitable mortgage evidenced by the lodgment of a caveat under section 138 of the Registration of Titles Act because the mortgagor retains the right of redemption of the mortgaged property.

6. That in the instant case, at the time the receivers/managers were appointed no instrument had been registered at the Land Office in respect of the suit lands, although the suit lands had been brought under the operation of the Registration of Titles Act.

7. That non-registration of the instruments including the debentures, under the Registration of Titles Act, meant that the legal interest or estate remained in the appellant as the registered proprietor and that the receivers/managers could only sell the appellant's suit lands if the appellant authorized them to do so by power of attorney under section 154(1) of the Registration of Titles Act. The receivers/managers could not sell the property under the debentures alone since "debentures were not a law unto themselves".

8. That the appellant had proved fraud because:

a) the receivers/managers had sold the suit lands to the first respondent barely three months after their appointment;

b) the consideration was not stated on the transfer instrument when it should;

c) there was no caveat lodged to support the equitable mortgage as required by section 138 by the Registration of Titles Act; and

d) that each respondent, but particularly the first respondent should have testified in defence of the registration of the suit lands into the names of the first respondent.

She concluded that the debentures holders could only realize their security by obtaining an order of the court to sell the suit lands as they had not registered the debentures at the Land Office in order to create a legal mortgage to enable them to convey the legal estate to a subsequent purchaser. Therefore the first respondent could not claim to have dealt with a registered proprietor and so it had no legal protection. The learned trial judge held that there was sufficient evidence on which the Court could safely conclude that the respondents colluded with each other not only to deprive the appellant of its registered legal estate in the suit property, but also its equitable remedy to redemption. Secondly, the transfer instruments executed by the receivers were of no legal consequence. The learned trial judge then allowed the appellant's suit with costs, granted the injunction and directed the Registrar of Titles to cancel the first respondent's registration and reinstate the appellant as proprietor of the suit lands.

Against this decision the respondents appealed to the Court of Appeal.

In its memorandum of appeal, the first respondent had four grounds of appeal, many of which are narrative and argumentative. In summary, they are:

1. That the learned trial judge erred in fact and in law in finding that evidence of fraud had been adduced by the appellant.

2. That the learned trial judge erred in law in shifting the burden of proof to the first respondent to defend its registration as proprietor of the suit lands.

3. That the learned trial judge erred in law by holding:

a) That the debentures not registered at the Lands Registry created only equitable charges not enforceable without a court order;

b) That the transfer instruments executed by the receivers were of no legal consequence.

4. That the appellant had failed to prove its case to the required standard.
In their memorandum of appeal, the third and forth respondents raised 15 grounds. Again, in summary they were:

1. No evidence was led to prove fraud.

2. The transfer of the suit property within three months is no evidence of fraud.

3. Fraud was not in issue and was not left to the court to determine.

4. It was wrong to conclude that the first respondent was registered fraudulently.

5. No evidence of collusion by the respondents was adduced.

6. It was wrong to conclude that there was no consideration.

7. It was wrong to conclude that the first respondent had to prove how it got on the register under section 105 of the Evidence Act.

8. That it was wrong to hold that debentures holders, the second and fifth respondents, had to register the debentures under section 115 of the Registration of Titles Act.

9. That it was wrong to hold that the fourth and fifth respondents were only equitable mortgagees.

10. That it was wrong to hold that the appellant had to execute a separate power of attorney in favor of the debenture holders.

11. That the remedy of redemption was not in issue and it was wrong for the trial judge to delve into it.

12. It was wrong to hold that the second and fifth respondents had to apply to court for foreclosure.

13. That it was wrong to hold that the transfer instruments executed by the receivers were of no legal effect.

14. That it was a misdirection to grant an injunction against the first respondent.

15. That the learned trial judge erred in not following binding decisions.

The fifth respondent also appealed on 6 grounds. Again, in summary they are:

1. The burden of proof was wrongly shifted to the fifth respondent;
2. The learned trial judge wrongly held that the fifth respondent as a debenture holder committed a fraud in the transfer of the suit lands.
3. The finding of fraud against the fifth respondent was wrong;
4. the finding that a debenture registered under the Companies Act creates only an equitable interest was wrong;
5. The holding that the receivers could not transfer property without a power of attorney or court order was wrong; and
6. The doctrine of the equity of redemption was wrongly applied.

The Court of Appeal found the following facts not disputed or as having been established:

1. The suit lands belonged to the appellant before they were transferred to the first respondent.

2. That the appellant borrowed money from the second and fifth respondents although the appellant's plaint was silent on this point.

3. That the appellant executed the debentures in question in favour of the second and fifth respondents as security of the loans

4. That under the debentures, the second and the fifth respondents had the power to appoint receivers/managers in the event of default on the loans by the appellant; and

5. That under the debentures, once receiver/managers were appointed they would become the agents of the appellant and they would be entitled to exercise the powers set out in the debentures which included the power to sell the appellant's charged properties.

On review of the evidence and the law, the Court of Appeal found that the single issue framed by the parties before the trial judge, whether the transfer of the suit lands into the names of the first respondent from those of the appellant was effectual, should have been answered in the affirmative unless it was fraudulent.

The Court of Appeal also found that there was no fraud against any of the respondents. The Court allowed the appeals, set aside the judgment and orders of the High Court and substituted therefore an order dismissing the appellant's suit against the respondents awarding costs to respondents in the Court of Appeal as well as in the High Court. It is against this decision that the appellant now appeals to this Court. There are 18 grounds of appeal.

The appellant put in a written submission arguing the grounds of appeal and so did the five respondents.

As a result of an application by the respondents, the learned Kanyeihamba, JSC made an order on 30th November 1998 for additional security for costs to be deposited.

A reference was filed on 6th April 1999 to full court to review the single justice's order. Before the reference was disposed of, other applications were made to the Court to withdraw the appeals against the second, third, forth and fifth respondents. Counsel for the appellant was asked which one of the two applications he wanted heard first, the reference to the full Court or the applications to withdraw the appeals against the second, third, forth and fifth respondents and he opted for the applications to withdraw the appeals. The applications were

consolidated, heard together and were refused on 22nd July 1999 and the appeals against the second, third, forth and fifth respondents stood dismissed.

When this appeal came on for hearing, Counsel for the appellant was asked if in view of the dismissals of the appeals relating to the second, third, forth and fifth respondents he wished to revise the memorandum of appeal. He said he did not except that he had no intention to argue ground 18 (a), otherwise there was no amendment. Counsel for the first respondent had no comment.

In their written submissions, Counsel for the appellant M/S. Kavuma-Kabenge argued first, grounds 14, 15, 16 and 17. These grounds are:

"14. The learned Judges of the Court of Appeal erred in law when they denied the appellant a fair hearing, resulting in a miscarriage of justice.

15. The learned Judges of the Court of appeal erred in law when they injudiciously exercised their discretion and took additional evidence under rule 29 of the Court of Appeal Rules.

16. The learned Judges of the Court of Appeal erred in law and fact when they engaged in injudicious and unjust acts of calling for additional evidence which affected their minds and clouded their vision thereby preventing them from giving the appellant the proper and fair hearing.

17. The learned Judges of the Court of Appeal conduct of the appellant proceedings manifested the existence of a real likelihood of bias that prevented them from giving an impartial and just decision."

What all this amounts to is that the Court of Appeal erred in law in taking additional evidence on its own motion.

Counsel referred to a letter dated 15th July 1998 by the Registrar addressed to counsel for the parties in the following terms.

"I have been directed to inform you that on the day of hearing the said appeal, their Lordships on the Coram would like to have a look at the sale agreements in respect of the suit properties.

Therefore whoever is in possession of the said sale agreements should produce them in court on the 20th July 1998. Their Lordships expect counsel for both parties to be heard among other grounds of appeal on the issue of the sale agreements"

In their reply to this letter, counsel stated

"We in response wish to highlight to their Lordships that no sales agreement was exhibited or tendered in evidence in the High Court during the trial. Everything that happened in the trial court and all documents relating to the trial proceedings are in the record of appeal and the High Court case file, which were availed or ought to be availed to their Lordships. Further the appellants submitted their memorandum of appeal advancing several grounds and none touches on the matter of a sales agreement. We accordingly would seek their Lordships' guidance as to what ground of appeal we shall be arguing in order to answer their queries regarding the sales agreement. Additionally, we would like to be advised on the procedure to tender in the sales agreement for their Lordships perusal without requiring counsel to give evidence from the Bar.

Further, in view of the fact that the first and fifth appellants submitted written presentation to which the respondent replied, we feel that rules 97 and 101(d) are now applicable. And for the second, third and fourth appellants, the same procedure would apply, save for the respondent who opted to make an oral reply and the issue of sales agreement does not arise.

Otherwise, the appellants are concerned with the trend that this appeal seems to be taking away from the adversarial mode of procedure. And on this point the case of ***Jones v. National Coalboard (1957) 2Q 55*** *is very much instructive. Your worship, this case has had a checkered history and any inexplicable trend raises concern to our client. We therefore seek their Lordships' directions on this matter"*

At the hearing of the appeal and at the instance of the court, additional evidence was called and the agreement of sale admitted in evidence as Exh. 1.

Learned counsel submitted that the Court of Appeal had no discretion at all to call for additional evidence on its own without an application by a party under rule 29(1) of the Court of Appeal Rules and the party would be required to show sufficient cause. Learned counsel relied on a number of cases.

In Taylor v. Taylor (1944) 21 EACA 46 special grounds were required to be shown before a court could allow additional evidence to be taken on appeal. In Karmali Tarmhoharned and another v. IH Lakhaini and Company 1958 EA 567/74, the party seeking to adduce additional evidence must show that the evidence was not available at the time of trial or could not with reasonable diligence have been procured. The evidence must be credible and have an important influence on the result of the case. Learned counsel also relied on a number of other cases including Corbett v. Corbett *(1953)* 2 AER 72, Magidu Mudasi v. Uganda SCU Uganda Criminal Appeal No.3 1998.

Learned Counsel submitted that the course taken by the Court of Appeal was contrary to the adversarial system applicable in the country that the court having itself initiated the calling of additional evidence could not properly apply its mind to the requirements for the admission of additional evidence. Reference was made to the case of Jones v. National Coalborad 1957 (2QB) *55* and also to Libyan Arab Uganda Bank v. Adam Vassiliadis Civil Appeal No.9 of 1985.

Learned counsel submitted that given the conduct of the Court of Appeal, the appellant did not have a fair and unbiased trial.

For the first respondent learned counsel Mr. Nkurunziza replied to the arguments of the appellant in the order in which they were made.

As regards grounds 14, 15, 16 and 17 learned counsel objected to the raising of issues (a) and (b) as framed by counsel for the appellant on the ground that they were not canvassed in the Court of Appeal. Those issues were whether the Court could call additional evidence on its own motion and the effect of such a course of action. Learned counsel relied on the case of the United Marketing Company v. Hasham Kara 1963 EA 276. He submitted that in any case the Court of Appeal had power either to call for or allow the taking of additional evidence. The case of Sadrudin Shariff v. Tarolchan Singh s/o Jawala

Singh 1961 EA 72 was relied on. Learned counsel further submitted that from the pleadings and the fact that only one issue was framed, as to whether the transfers were effectual, the appellant had abandoned the claim of fraud or lack of consideration and that there was no finding by the trial judge that there was no consideration. Her finding was that it was not stated on the transfer instruments as required by law.

Finally, learned counsel submitted that the receipt of additional evidence per se did not constitute bias. In learned counsel's view grounds 14 to 17 should fail. The record in the Court of Appeal as recorded by the learned Deputy Chief Justice indicates that on the day of the hearing and in presence of counsel for the parties, the Court said:

"We wish to look at the agreement of sale which is referred to on the transfer instrument"

Mr. Mubiru Kalenge, counsel for the appellant in the Court of Appeal informed the court that the agreement was being photocopied. The Court granted a short adjournment for the purpose. On resumption, Mr. Mubiru Kalenge first called Mr. Munghereza to produce the sale agreements. Apparently, he was the third respondent who was joint receiver with the forth respondent. According to his evidence the joint receivers concluded an agreement of sale of the appellant's property.

There was an objection by Mr. Kalenge, counsel for the appellant to the effect that this was the wrong witness to produce the agreement of sale as there was no proof that this was the agreement which was attached to the transfer instruments. Counsel suggested the Court had powers to summon the Registrar of Titles to testi1,' as to the agreement. Mr. Mubiru conceded this was the wrong witness and applied for an adjournment to call the Registrar of Titles. The application was granted. The Registrar of Titles ultimately produced the sale agreement, which was admitted in evidence as Exhibit 1.

In his judgment the learned Deputy Chief Justice dealt with the matter this way:

"At the hearing of the appeal, we found it necessary to take additional evidence of Edward Karibwende who had testified for the respondent at the trial and who had tendered in evidence the instrument of transfers (Exh. P2). On the transfer instrument is space where the consideration for the transaction should have been indicated. However, in that space there is an entry, which reads;

'See attached agreement of sale'

The agreement of sale was not produced in evidence by Mr. Karibwende and yet the matter of consideration became a bone of contention in the case. Counsel for the respondent objected to the evidence being taken as it could prejudice his client's case. He argued that in an adversarial system like ours, courts should not assist parties by way of evidence, but should leave it to the parties to fight it out. We overruled the objection for reasons, which we reserved. I now give my reasons. We were satisfied that the interest of justice demanded that the transfer and the sale agreement be read together in order to decide the matter one way or the other. We were fully aware of the good old principle that the Court of Appeal should take additional evidence only in exceptional cases. We are convinced that this was such a case as the evidence was relevant and vital for the proper determination of the issue at hand. It is clear that even counsel for the respondent was fully aware of the importance of this evidence, hence their submissions (P 7) that;

'Yet still no evidence of any consideration paid was adduced whether at the trial court or appellate court If the appellant desires to claim protection as a bona fide purchaser, he ought to have sought for additional evidence even on
appeal' (sic).

It was for this reason that we overruled the objection and admitted the agreement of sale in evidence.

I must, in the first place and with great respect to those concerned, express my surprise at the informal manner this case was handled at the various stages. In the High Court, the Court of first instance, only the first respondent was sued. Although four other parties were added as defendants and they filed defences dealing with the allegations in the plaint, there was no amendment to the plaint or other pleading either to allege any claims against the additional defendants or to answer any points raised in their defences. It is pretty obvious to me that one reason the four defendants applied to be joined was to protect their interests.

From the amended plaint, amended only to show that there were four other defendants, the appellant's claim was that the first respondent's registration as proprietor of the suit lands

should be cancelled because the transfer of those lands was unlawful and was obtained by fraud. Particulars of the fraud were given as set out earlier in this judgment.

In their joint written statement of defence, the 2nd, 3rd, and 4th respondents stated that the suit lands belonging to the appellant were sold by the third and fourth respondents under loan agreements and debentures between the appellant and the second and fifth respondents, the terms of which were breached by the appellant. They alleged that the third and fourth respondents had power to sell. Fraud and illegality in the transfers of the properties were denied. They referred to the circumstances in which the property was sold.

The fifth respondent in his defence referred to its rights under the debentures. On the pleading, only one issue was framed by the parties, which was:

"Whether the transfer of the said lands into the names of the first defendant from those of the plaintiff was effectual"

That was the basis on which the evidence was led. This means in practical terms that any other matters raised in the pleadings were no longer in issue. They were not contested. Fraud had been alleged only against the first respondent and it had been denied. It was no longer in issue.

Lack of consideration was alleged as part of the fraud only against the first respondent. It was denied. It was no longer in issue.

I wish to point out here, it I may, that on the appellant's own pleadings it was admitted that there was consideration for the sale of the suit lands but the price was so low as to be fraudulent on the part of the first respondent. It is well established that the courts will not inquire into the sufficiency or adequacy of the consideration as long as there is some consideration. Lord Somrvel of Harrow in Chappell and Company v. Nestle Company Ltd. 1960 AC 87, said:

"A peppercorn does not cease to be good consideration if **it** *is established that the promisee does not like pepper and will throw away the corn"*

These matters, which were not in issue, should not, in my view, have been alluded to in the trial court. I notice some remarks by the trial court on failure by a party to give evidence, but with respect the evidence to be led depends on what the issues are. There are the matters the court is required to answer. Any evidence called is intended to resolve the issues before the Court.

Be that as it may, the Court of Appeal found it necessary on its own motion to take additional evidence. The Court did not say under what law it took the evidence. It was in the interest of justice to enable the Court decide the matter one way or the other. With the greatest respect, justice must be administered according to the law. I think it is well settled that additional evidence is taken on appeal in exceptional circumstances as the Court of Appeal stated. The exceptional circumstances are usually that the evidence was not available at the time of the trial or could not have been obtained using reasonable diligence and that the evidence is credible and likely to influence that result of the case.

The Registrar of Titles, Edward Karibwende called by counsel for the second and third respondents to produce the sale agreement in the Court of Appeal gave evidence in the trial court. There he was called by the appellant. In so far as is relevant, this evidence was as follows:

"….I have come with Leasehold Register, Vol.1491, Folio 8 Plot 399 Mbuya, Kampala District. The Registered proprietor is A.K Detergent Uganda Ltd. It was registered on 24/03/94 under instrument No. 262213. The original proprietor was G.M Combined (U) Ltd.

Witness is asked to look at Instrument 262213 and asked who transferred the lands. It was Kaggwa and Mungereza as joint receivers and managers. It was not the plaintiff who transferred the land. In land transaction, it is the registered proprietor, or his dully appointed attorney who is authorized to transfer land.

An attorney is one appointed by the registered proprietor. There is no other document which appoints an attorney other than power of attorney. Mungereza and Kaggwa did not transfer as attorneys. They transferred by virtue of an appointment dated 13th December 1993. The attached is appointment as receiver and manager by virtue of section 103 of the Companies Act and as holders of debentures registered on 17/07/1985, 28/03/1 990, 3/06/ 1991, 6/07/1993. The debentures were not registered on the Land Register. The debentures are not

on record. Debentures are registerable with us. I have not come across situations where debentures are registered.

Witness is shown a copy of whether it is debenture and he says it is a debenture mortgage. The debenture is registerable as a mortgage. 1 perceive a debenture to be a charge on the company property. For us we deal with mortgages.

The R.T.A talks about mortgages as registerable charges on land. 1ff encounter with a charge not registerable under the Registration of Titles Act, I will request the presenter to make it fit into the Act like lodging a caveat. The debenture can support a caveat. There is no caveat on the land. The debenture was not registered. Mungereza and Kaggwa were strangers to the register. They were not proprietors. A non-proprietor can not transfer property. I know the law, which governs change of proprietorship. Witness is asked to read the provisions of section 91 of the Registration of Titles Act. The witness is also asked to read section 51 of the same Act.

Kavuma: I pray to tender the transfer instruments and the titles.

Defence. No objection

Order: Transfer instruments marked Exh. P1 and the titles exh. P2"

It would appear to me that the transfer instruments were produced not to show that there was a sale but to show who had transferred the land and in what capacity. The case for the appellant being that the receivers/managers who had affected the transfers had no power to do so. Clearly it was not intended to produce any sale agreements by this witness and in my views and with respect, it is irrelevant that those instruments referred to the sale agreements having regard to the party by which and the purpose for which they were tendered in evidence.

In cross-examination by counsel for the fifth respondent the witness said transfer forms have sale agreements attached. If anyone was interested in the sale agreement, there was the witness who had the agreements. He was not asked to produce them.
I am a little uneasy at the course taken by the Court of Appeal in taking the additional evidence in this case, but I need not decide this matter. First as I have already said in this judgment on the pleadings and from the evidence, there is little doubt and indeed the Court of

appeal expressly found that that the appellant borrowed large sums of money from the second and fifth respondents. It defaulted on the loans and its property was sold to recover the money loaned or some of it. In my view it is irrelevant that the amount of money was not stated. The sale apparently was admitted and what was in issue was whether or not the sellers, that is the receivers/manages had the power to do so and whether they had power to transfer the properties sold.

Secondly, if the first respondent asserts that he is a bona fide purchaser the onus is on it to prove the purchase for value. It the Court if Appeal cannot on the evidence make up its mind one way or the other, then the party with the burden of proof has failed to discharge the burden and I do not think that the Court should aid such a party to prove its case at that point in the proceedings by clari1,'ing evidence not produced by the party but by the opposite party. It should be noted that an attempt was made to put in evidence an agreement of sale by counsel for the second respondent through Patrick Oguli (DW1) at the trial. Admission of the agreement was objected and counsel was allowed by the court to withdraw the application to tender the agreement in evidence. In my view it was not necessary to take the additional evidence and I see no failure of justice as a result of such a course.

Thirdly, in so far as is relevant, section 184 of the Registration of Titles Act provides as follows:

"No action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor under the provisions of this Act, except in any of the following cases:

a)……..

b) ……..

c) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bonafide for value from or through

a person so registered through fraud.

d)……..

and in any case other than as aforesaid, the production of the registered certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action

against the person named in such document as the grantee, owner, proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding".

It looks to me that the appellant must prove fraud against the first respondent in order to impeach the latter's title to the suit lands. The Court of Appeal found quite rightly in my view, that there was no fraud established against the first respondent. Accordingly, it is unnecessary to inquire into the question whether the first respondent was a bona fide purchaser for value because it did not buy the property from a third party who was registered through fraud.

Fourthly, the witness who produced the additional evidence was called by counsel for the 3rd and 4th respondents. The appeals against these respondents were dismissed on 23rd July 1999 at the instance of the appellant itself. That being so, the appellant cannot now argue any of the matters which affect the cases which were dismissed. The issue here in first whether there was a sale or not Both the 2nd and 3rd respondents said in their evidence and the Court of Appeal found that they sold the property as receivers/managers. The appellant cannot now question that fact on this appeal against the first respondent who was not the seller.

For these reasons grounds 14, 15, 16, and 17 should fail.

Next grounds 10, 11, 12, and 13 were argued together. They are:

"10. The learned Judges of the Court of Appeal erred in law and fact when they admitted parole and extrinsic evidence of an agreement of sale to prove that the consideration of US$1,891,000 given therein was also a term of Exh. P2.

11. The learned Judges of the Act of Appeal erred in law when they improperly and unlawfully admitted inadmissible evidence of a sale agreement.

12. The learned Judges of the Court of Appeal erred in law and fact when they held that the interest of justice demanded that the transfer and sale agreement be read together in order to decide the matter one way or the other.

13. The learned Judges of the Court of Appeal erred when they incorporated into (plaintiff Exh. 2) the transfer forms extrinsic and inadmissible evidence in a sale agreement (Court Exh. 1).

In view of my holding on grounds 14, 15, 16, and 17,1 do not think I need deal with grounds 10, 11, 12, and 13 which are really different aspects of grounds 14, 15, 16 and 17. I do not follow learned counsel's argument that those grounds raised issues which were not argued in the Court of Appeal because parties had closed their written submissions under rule 97 of the Court of Appeal Rules. The letter of the Registrar admitted by counsel both sides clearly states that:

> ***"Counsel for both parties to be heard among other grounds of appeal on the issue of the sale agreements"***

Indeed objections were raised not only about which witness should produce the agreements but also as to the reception of the evidence at the stage. The latter objection was overruled and reasons were given in the judgment of the Court.

Learned counsel argued grounds 1, 2, and 3 together. They are:

"1. The learned Judges of the Court of Appeal erred in law and fact when they overruled the trial judge and instead found that the transfer of the suit lands was effectual.

2. The learned Judges for the Court of Appeal erred in law and fact when they refused and or failed to apply the law provided in the Registration of Titles Act (Cap. 205) to the transaction of the suit property which is under the operation of the Registration of Titles Act and the authority of the Supreme Court cited and binding upon the Court David Sejjaaka Nalima v. Rebecca Musoke SCCA No. 12 of 1985 when they held that debentures which are not registered under the Registration of Titles Act created an interest for the respondents in the appellant's suit lands registered under the Registration of Titles Act (Cap 205).

3. The learned Judges of the Court of Appeal erred in law and fact when they found that debentures registered under Companies Act created a legal mortgage over the suit property, which is registered land under the operation of the Registration of Titles Act"

Ground 1 offends rule 81 of the Rules of this Court in that it does not state in what way the Court erred.

Ground 2 also offends the same rule in that it is verbose, narrative and argumentative.

Be that as it may, learned counsel submitted in essence that the suit lands are registered under the Registration of Titles Act and accordingly, the Court of Appeal erred in holding the transactions over the suit property were not governed by the Registration of Titles Act but by the Companies Act. That charges registered under the Companies Act cannot affect land registered under the Registration of Titles Act. Learned counsel relied on section 96(6) of the Companies Act defining a debenture holder's interest. The Court of Appeal erred in holding that there was a legal mortgage registered under the Companies Act. Learned counsel submitted that the High Court had applied the correct law, that is the Registration of Titles Act to the transactions over the suit lands and that the Court of Appeal erred in not applying the correct law. Learned counsel referred to section 3 and 51 of the Registration of Titles Act and argued that debentures not registered under the Registration of Titles Act are not effectual. A number of cases were cited in support of his arguments.

Counsel for the first respondent supported the judgment of the Court of Appeal and described the interpretation given to section 96 of the Companies Act by counsel for the appellant as misconceived.

If I understand counsel for the appellant correctly, the complaint in these three grounds is that the debentures which were not registered under the Registration of Titles Act did not confer authority on the receiver/managers to transfer land registered under the Registration of Titles Act. Learned counsel relied on sections 3 and 51 of the Registration of Titles Act which provide as follows:-

"3. Except so far as is expressly enacted to the contrary, no Act or rule so far as inconsistent with this Act shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Act. This Act shall not be construed as limiting or a bridging the provisions of any law for the time being in force in Uganda relating specially to the property of married women.……..

51. No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to

any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature; and, if two or more instruments signed by the same proprietor and purporting to affect the same estate or interest are at the same time presented to the Registrar for registration, he shall register and endorse that instrument which is presented by the person producing the duplicate certificate of title"

The point here is that the receivers/managers under debentures, which were not registered under the Registration of Titles Act has no estate to transfer.

The debenture holders were the second and fifth respondents. They appointed the third and fourth respondents as joint receivers/managers who transferred the suit property to the first respondent. All four additional respondents applied to be joined as defendants in the High Court as I have already stated to protect their interests. All five respondents filed written submission in answer to the point raised in the memorandum of appeal as I have already stated in my judgment. The appeals against the second, third, fourth and fifth respondents were dismissed at the appellant's own instance of withdrawing the appeals. In my view, it is not open to the appellant to raise issues pertaining to the appeals that were dismissed and for these reasons the three grounds should fail. In any case having regard to the provisions of section 184 of the Registration of Titles Act, it does not appear that those are grounds for impeaching the 1st respondent's title as I have already observed in this judgment.

Learned counsel for the appellant then argued grounds 4, 5, and 6 together. They are:

"4. *The learned judges of the Court of Appeal erred in law and fact when they refused and or failed to apply the provisions of the Registration of Titles Act and found that the debentures which were not registered under the Registration of Titles Act constituted the third and fourth respondents' attorney of the appellant who could effect transfer of the suit property to the first respondent.*

5. The learned Judges of the Court of Appeal erred in law and fact when they held that the transfer and registration of the first respondent was effected by the third and fourth respondents as receivers/managers of the respondent with full powers to transfer the appellant's registered land.

6. The learned Judges of the Court of Appeal erred when they found that transfers signed by the third and fourth respondents were of any legal consequence ".

These grounds are different aspects of grounds 1, 2, and 3 and would in my view fail for the same reasons.

Grounds 7 and 8 were as follows:

"7. *The learned Judges of the Court of Appeal erred when they overruled the frail judge finding of fraud on the part of the first appellant.*

8. The learned Judges of the Court Appeal erred when they found that the first respondent was a bonafide purchase of the suit property for value without notice or defect in title"

As earlier remarked in my judgment, ground *7* by itself does not identify where the Court of Appeal went wrong. Apparently, this was through the Court's finding that the 1st respondent was a bona fide purchaser, which is ground 8.

In his written submission counsel stated that the appellant had proved that its property had been transferred fraudulently:

a) That the properties were transferred by the third and fourth respondents who had no capacity or lacked capacity to transfer the suit property.

b) That the first respondent had paid no consideration.

Learned counsel submitted that the appellant was accordingly entitled to an order for the cancellation of the transfers executed upon such acts. Further, that the appellant had proved that there was no consideration paid by the first respondent. That accordingly, the first respondent could not have been a bona fide purchaser. Further, that the statement of the amount of consideration was a legal requirement under section 91 of the Registration of Titles Act which was not fulfilled rendering the transaction illegal.

As to (a), the transfers of the said lands related to the appeals against the third and fourth respondents which were dismissed and accordingly do not lie against the first respondent.

As regards (b), the issue of consideration has already been dealt with in my judgment whilst considering the other grounds of appeal.

In my view, grounds 7 and 8 must also fail.

Lastly, ground 18 provides:

"The learned Judges of the Court of Appeal erred in law and fact when they awarded costs to all the respondents:

a) *When the second, third, fourth, and fifth respondents had joined proceedings on their own application.*

b) *When in setting aside the judgment of the trial court, they based their decision on evidence unilaterally called by themselves.*
c) When questions which they considered to set aside the judgment were neither grounds of appeal of the respondent nor were they the fault of the appellant"

Learned counsel indicated quite rightly in my view, that he did not intend to argue ground 18 (a). The issue of taking additional evidence referred to in ground 18(b) has been dealt with in considering the other grounds of appeal.

As regards ground 18 (c), I find nothing new raised in the part of the written submission relating to this ground.

All in all, I would dismiss the appeal with costs here and in the court below. As the other members of the Court agree with my proposed orders, it is so ordered.

Dated at Mengo this •••15TH ..... .day of February 2000.

S.W.W. WAMBUZI
CHIEF JUSTICE.

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL
……
W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT

JUDGMENT OF ODER - JSC:

I have had the benefit of reading in draft the judgment of Wambuzi - CJ. I agree with him that the appeal should fail. I also agree with the orders proposed by him.

I wish to comment only on the appellant's criticism against the Court of Appeal regarding the admission of the additional evidence and the allegation of bias against the appellant by that Court.

The facts of the case are so well set out by the learned Chief Justice in his judgment that I shall not repeat them here, except those I consider to be necessary for my purpose.

These criticisms are made on grounds 12, 13, 14, 15 and 16 and 17 of appeal, most of which are repetitions of one another. The additional evidence, the subject matter of the criticism was the Sale Agreement by which the third and fourth respondents sold the suit property to the 1st respondent as Receivers and Managers appointed by the second and fifth respondents as debentures holders. The debentures were executed by the appellant as security for loans lent to the appellant by the two last mentioned respondents. The receivers/managers transferred the suit property to the first respondent by a transfer instrument tendered in evidence at the trial by the appellant's witness, Edward Karibwende as exhibit P.2. On the transfer instrument was a space where the consideration for the transaction should have been indicated. However, in that space there was an entry which read: ***"see attached Agreement of Sale"*** The Agreement of Sale was not produced by the appellant's witness Karibwende at the trial. Nor was it produced by the first respondent who, in my view, should have done so since it was its case that it was a bona fide purchaser of the suit property for value without notice. The Agreement of Sale stated the consideration paid by the first respondent and the appellant knew of its existence. Why then did the appellant still aver in paragraph 6 and 7 of his plaint that property transferred to it without any title, claim or colour of right, and that the transfer was done fraudulently? The appellant also alleged absence of consideration to be one of the particulars of fraud on 1St respondent's part. The learned DCJ was justified to say:

"I cannot comprehend why the respondent chose to put in evidence the transfer instruments but not the accompanying Sale Agreement in order to determine the point"

In my view the only inference which can be drawn from this is that the appellant deliberately omitted to tender the Sale Agreement to defeat the ends of justice and thereby mislead the Court on the important issue of consideration. In the circumstances, my view is that the appellant should be the last party to complain that the Court of Appeal erred by admitting the Agreement of Sale as additional evidence.

My next comment in this regard, is that what the Court of Appeal admitted as additional

evidence was actually nothing new. It was not new evidence. It was evidence already on record. The Sale Agreement in question was part of the instruments of transfer, which were already on record. It constituted part of the instruments of transfer and had to be read together with it. In the case of: *Castelino v. Rodrigues 1(1972) E.A.223* it was held by the Court of Appeal that a reference in a document to an annexture incorporates the contents of the annexture in the document. On the basis of this authority, since the Agreement of sale was referred to in the instruments of transfer it contents must be considered to have been incorporated in the instrument of transfer.

In the case of: *Rex v. Yakobo Busigs s/o Mavego (1945) 12. EACA 60* the Court of Appeal for Eastern Africa made a distinction between new evidence in a trial and evidence adduced to elucidate evidence already on record. That was a Criminal Appeal in which that Court had to consider the powers vested in the High Court of Uganda to call additional evidence under section 317 (1) of the Criminal Procedure Code when dealing with an appeal from a subordinate Court. I think that the principle enunciated therein equally applies to the exercise by our Court of Appeal of its discretion under rule 29 of the Court of Appeal Rules.

In *Yakobo Tsairi Busigo* case (supra), the Court of Appeal for Eastern Africa said this:

"Realising that such jurisdiction must always be exercised with great care ***(The King v. Robinson (1917) 2 KBD 1098),*** *we are of the considered opinion that this is a proper case for its exercise. Quite apart from the fact that the evidence shall throw light upon the case (****The King v. Robinson****) (supra) this is not a question of directing new evidence to be taken but merely of directing the elucidation of evidence already on the record. In that respect this case can be distinguished from* ***Rex v. Sirasi Bachumira (1936) 3 EACA 40,*** *in which Crown counsel suggested that in the interest of justice this Court should send back the case for a retrial or for the taking of further evidence and the Court although expressing the view that it had power to do either refused to exercise the power on the ground that additional evidence should not be taken to fill a gap in the prosecution case. The facts in that case were that there was no evidence identifying the person named Matundi, who was admitted to hospital seven days after a person of the same name had been stabbed.*

I think that the principle stated in that case is applicable to the instant case. The additional

evidence taken by the Court of Appeal was not new evidence but evidence taken merely for elucidation of evidence already on record namely the instruments of transfer.

The last point I wish to make regarding the appellant's criticism of the Court of Appeal for taking additional evidence is that at the trial, only one issue was framed for the trial Court's determination. It was whether the transfer of the suit lands to the first respondent was effectual. This by no means indicated that absence of consideration was an issue.

All in all, I agree with the learned Deputy Chief Justice when he said this in his judgment:

"The matter of consideration is easily explained by the fact that the instruments of transfer clearly indicated that the consideration was stated on the Sale Agreement. I cannot comprehend why the respondent chose to put in evidence the transfer instruments but not the accompanying Sale Agreement. I also think that in the circumstances the trial Judge ought to have called for the Sale Agreement in order to determine the point.

In any case there was incontrovertible evidence of Mr. Ogule that the receivers/managers had sold the suit land to the first appellant. Even in its plaint, the respondent admits that there was a sale for consideration albeit inadequate. And as Karibwende stated in this Court under cross examination by Counsel for the respondent, the Agreement of sale (which he produced in Court) shows the consideration as US Dollars 1,891,000. The respondent who seems to have deliberately kept this vital evidence out of Court cannot be heard to complain about the matter"

In the circumstances, my view is that the Court of Appeal was justified in taking the additional evidence and that it properly exercised its discretion under rule 29 of its Rules.

Regarding the criticism of bias, it is clear that there was no evidence of bias on the part of the Court of Appeal. The allegation of bias arose only out of the
exercise by that Court of its discretion to call additional evidence under rule 29 of its Rules.
Rule 29(1).
"0) On any appeal from a decision of the High Court acting in the exercise of it original jurisdiction, the Court may: a re-appraise the evidence and draw inference of fact; and
b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial Court"

This rule in my view, does not preclude the Court of Appeal from taking additional evidence on its own motion. As I understand it, the submission of the appellant's learned Counsel mean that because of our adversarial system of litigation, the Court of Appeal was biased because in the instant case the Court of Appeal took additional evidence on its own motion. If such argument were to be upheld by this Court, it would mean that the object of rule 29 would be entirely defeated, because every time the Court of Appeal exercised its discretion on its own motion it would be labeled biased.

In its allegation of bias the appellant should have shown more evidence than just the fact the Court of Appeal requested for the production of an annexture to a document already on record, which the appellant itself had omitted to tender in evidence. In his learned treatise ***"The Discipline of Law"*** *(Butterworth,* ***London, 1979 at pages 86-*** *87),* Lord Denning addressed the question of bias and referred approvingly to what Devlin J (as he then was) said in: ***Exparte Barusley and District Licensed Valuers Association (1960) 2 QBJ. 169,*** where he set out the standard to be applied on the question of bias:

"In *considering whether there was a real likelihood of bias, the court does not look at 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 f 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 be given to other people. Even if he was a impartial as could be, nevertheless fright minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which or 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:*

In this instant ease, the learned Deputy Chief Justice gave, in my view, sound reasons for admitting the Sale Agreement as additional evidence. He said:

"We *are fully aware of the good old principle that the Court of Appeal should take additional evidence only in exceptional cases. We are convinced that this was such a case as the evidence was relevant and vital for the proper determination of the issue at hand: It is clear*

that even Counsel for the respondent was fully aware of the importance of this evidence, hence, their submissions (page 7) that:

'Yet *still no evidence of any consideration paid was adduced whether at the trial or Appellate Court, if the appellant desires to claim protection as a bona fide purchaser, he ought to have sought for additional evidence. It is for this reason that we overruled the objection and admitted the Agreement of Sale in the evidence"*

It is apparent that the Court of Appeal in exercising its discretion to direct that the Sale Agreement be tendered in evidence was not moved to favour one side or the other, but rather by a desire to arrive at just conclusion in the case. Both parties were aware of the Sale Agreement. That the Court of Appeal was moved by the desire to reach a just conclusion is indicated by the fact that it was not moved by either party to admit the evidence but it moved its own motion. Further, the Court of Appeal addressed its request for the Sale agreement to the parties together not to one party at the expense of the other. The Agreement was received in presence of both the parties; and Counsel for the appellant was given an opportunity to address the Court on the question of its admissibility. He also cross-examined the witness who tendered the document. In all respects, the conduct of the Court of Appeal appears to have been fair to both parties.

In the circumstances, the allegation of bias against the Court of Appeal was obviously unjustified.

For these and other reasons I would dismiss the appeal with costs. Dated at Mengo this ...15th day of February 2000.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL

…….
W. MASALU MUSENE

REGISTRAR, THE SUPREME COURT

JUDGMENT OF TSEKOOKO, JSC.

I have had the advantage of reading in draft the judgment prepared by my Lord the learned Chief Justice and I agree that this appeal *should* be dismissed with costs here and below.

This appeal has interesting features about it. Therefore I will make observations as I concur in the judgment of the learned Chief Justice.

The appeal is against the judgment of the Court of Appeal delivered on 15th September 1998 by which the Court reversed a decision of the High Court. The appellant Company, A.K. Detergents Ltd., originally sued the respondent Company; G.M Combined (U) Ltd. alone, to recover land which was allegedly unlawfully and fraudulently transferred to the respondent. The plaint was later amended by order of the trial judge and at the instance of four other parties. Those four other parties were added to the suit as co-defendants. The plaint was amended only by inclusion of the names of those four as parties; the appellant's claim remained surprisingly in its original form against the first respondent only and the appellant did not at all make any claim against the other four parties jointly or severally, or any one of the four parties, even after these four had filed their defences in which they asserted certain rights adverse to the appellant's claims.

The four parties are the Development Finance Company of Uganda Ltd (hereinafter called "DFCU", Fulgencio Munghereza, Erieza Kaggwa and Uganda Development Bank hereinafter referred to as "UDB").

The appellant was the registered proprietor of seven plots of the suit lands situated at Mbuya in Kampala. They are comprised in seven separate individual certificates of title, which were tendered in evidence at the trial. The appellant operated a soap factory on one of these pieces of land comprised in leasehold Register 1362 Folio 21. That factory was set up with funds borrowed by the appellant from the DFCU and UDB. The loans were secured by debentures and mortgages duly executed by the appellant in favour of DFCU and UDB. The debentures (two in favour of the UDB and one in favour of the DFCU) were registered at the Registry of Companies but not at the Registry of Lands. The three debentures and their certificates were put in evidence as Exh. DVI and further debentures as Exh DI and Exh DII. The debentures provided, inter alia, for the appointment of receivers/managers to realize the DFCU and UDB assets in the event of default on the loans by the appellant.

The appellant defaulted on the loans, whereupon DFCU and UDB jointly appointed Munghereza and Kaggwa to be joint receivers and managers of the appellant. The appointment was made in writing as required under the debentures. Within three months of their appointment, Munghereza and Kaggwa sold the suit lands to the first respondent under an Agreement of Sale dated 21st March, 1994. The agreement was not tendered in evidence during trial but it was produced in the Court of Appeal as Exh. 1. The first respondent was subsequently registered as proprietor of all the suit land on the strength of transfer instruments duly executed by Munghereza and Kaggwa in their capacity as receivers/managers of the appellant. These transfer forms are Exh P1 to P7.

The appellant challenged the transfers and sought an order of the High Court cancelling the first respondent's certificates of title. The appellant further sought general damages for trespass and conversion and an injunction restraining the respondent from trespassing on the suit lands converting and passing off as owners of the same. In its plaint the appellant's claim against the first respondent was, in summary, that the latter had fraudulently and without a claim of right acquired the first appellant's suit lands. Particulars of the alleged fraud were set out in paragraph 7 of the plaint.

Paragraph 8 and 9 of the amended plaint contained alternative claims which are to the effect that the purported sale and transfer of the suit lands to the first respondent by the Receivers/managers was illegal and therefore of no consequence.

The first respondent's defence was to the effect that it had purchased the suit land from the receivers/managers for value and in good faith and that it had acquired clean titles. Further, the first respondent denied that it was guilty of fraud or trespass. DFCU, Munghereza and Kaggwa put in a joint statement of defence. UDB filed a separate defence. However, the cumulative effect of the defences of these four was that DFCU and UDB had lawfully appointed Munghereza and Kaggwa. Receivers/managers of the appellant under the debentures following default on the loans by the appellant. That the appellant's suit lands had been lawfully sold by Munghereza and Kaggwa in exercise of he powers granted to them by the debentures. Munghereza and Kaggwa had then properly transferred the suit lands to the first respondent who had paid the full purchase price. Munghereza and Kaggwa contended that they had title to the appellant's property as receivers/managers of the appellant under the debentures which were duly executed by the appellant but whose terms the appellant had breached. Munghereza and Kaggwa also contended that the suit property was not encumbered, that the property had been sold at the best market value obtaining at the time and that the first respondent's bid was the best amongst all bids received by Munghereza and Kaggwa.

At the trial only one issue was framed by trial Court for determination. It was whether the transfer of the suit lands to the first respondent from the appellant was effectual. It puzzles me that the trial judge and the parties chose not to frame fraud as an issue at the commencement of the trial although the appellant had alleged fraud against the first respondent which fraud was denied.

Be that as it may, the appellant called one witness, Edward Karibwende (PWI) a Registrar of Titles. His evidence relevant to issues in this appeal was to the effect that the transfers to the first respondent were made by Munghereza and Kaggwa. Receivers/managers of the appellant and that Munghereza and Kaggwa were not named on the suit lands' certificates of title as proprietors thereof; that the debentures under which Munghereza and Kaggwa were appointed receivers/managers of the appellant were not registered at the Land Registry, that the Registrar who effected the transfers of the suit land to the first respondent must have perused those transfers and accompanying documents and got satisfied that they

were in order; that in land transactions, it is the registered proprietor or his duly appointed attorney who is entitled to transfer land; that an attorney is one appointed by the registered proprietor under a power of attorney; that Munghereza and Kaggwa did not transfer the appellant's lands to the first respondent as attorneys of the appellant but as receivers/managers of the appellant; that the debentures were not registered on the land register as mortgages when they should have been and that no caveat was lodged by anyone on the suit lands.

The first respondent and UDB did not lead evidence. DFCU, Munghereza and Kaggwa called one witness, Patrick Ogule (DWI), the Legal Manager of DFCU. The gist of his evidence was that when the appellant defaulted on the loans, DFCU and UDB appointed Messrs. Munghereza and Kaggwa joint receivers/managers of the appellant. The appointment was done under the debentures, which had been registered with the registrar of companies as a charge. The receivers/managers sold the suit lands to the first respondent in accordance with the provisions of the debentures. The debentures did not refer to specific properties of the appellant but referred to all the appellant's immovable properties. In his view the debentures created a fixed charge over all the immovable assets of the appellant and in particular the freehold and leasehold properties of the appellant.

Although only one issue was framed for determination as I have already indicated, the learned trial judge in the course of her judgment took the position that although fraud was not framed as an issue for her to determine, it was obvious from the way the parties conducted themselves that fraud was left to the court to determine.
In her judgment the learned trial judge made a number of findings. First, that the appointment of Munghereza and Kaggwa was receivers/managers was made not only in accordance with the debentures but also in accordance with section 103(1) of the Companies Act. Second, that under the debentures, the receivers /managers were given broad terms with regard to the recovery of the loans. Third, that the receivers/managers were agents of the appellant and as such they had power to sign the transfer instruments. Fourth, that there was a floating charge which was crystallized by the appointment of the receivers/managers. Fifth and this finding is of great interest, that in case of the floating charge it had to be supported by an equitable mortgage evidenced by the lodgment of a caveat under section 138 of the Registration of Titles Act (RTA), because the mortgagor retains the right of redemption of the mortgaged

property. Sixth, that in the instant case, at the time the receivers/managers were appointed, no instruments had been registered at the Land Office in respect of the Suit lands although the suit lands had been brought under the operation of the Registration of Titles Act. Seventh, and again this is a remarkable finding, that non- registration of the instruments including debentures, under the Registration of Titles Act, meant that the legal interest or estate remained in the appellant as the registered proprietor and that the receivers/managers could only sell the appellant's suit lands if the appellant authorized them to do so by power of attorney under section 154(1) of the Registration of Titles Act. The receivers/ managers could not sell the property under the debentures alone since "*debentures were not a law unto themselves* "Eight, that the appellant had proved fraud because:

(a) The Receivers/managers had sold the suit lands to the first respondent barely three months after their appointment.

(b) The consideration was not stated on the transfer instruments when it should,

(c) There was no caveat lodged to support the equitable mortgage as required by section 138 of the Registration Act, and

(d) That each respondent, but particularly the first respondent should have testified in defence of the registration of the suit land into the names of the first respondent.

Regarding fraud in respect of the four co-defendants the learned judge expressed herself as follows:

"If in the process of enforcing the debentures the receivers commit fraud, the plaintiff as the principal is entitled to sue them. They were accountable to it. The plaintiff's plaint was not amended to show that the receivers and debentures holders committed fraud. <u>It did so by implication when it questioned how the first defendant's name got on the register.</u> Therefore an explanation was needed to show that the receivers and debenture holders had the right to sell the plaintiff's registered lands without any power of attorney executed for them for that purpose and in a view of the fact that debentures were not registered under the RTA" (underlining mine) ."

The judge concluded that the debenture holders could only realize their security by obtaining an order of court to sell the suit lands as they had not registered the debentures at the land office in order to create a legal mortgage to enable them to convey the legal estate to a subsequent purchaser. Therefore the first respondent could not claim to have dealt with a registered proprietor and so it had no legal protection. The learned judge then held that the defendants colluded with each other not only to deprive then held that the defendants colluded with each other not only to deprive the plaintiff of its registered legal estate in the suit property but also its equitable remedy of redemption. Consequently the transfer instruments executed by the receivers were of on legal consequence.

She gave judgment for the appellant. The first respondent and its four co-defendants appealed to the Court of Appeal, which reversed the decision of the trial judge. Hence this appeal.

The grounds of appeal and the written arguments submitted in support thereof roundly offend the rules against prolixity (rule 8 1(1) of the Rules of this court). The grounds are lengthy and argumentative. I shall consider these grounds in the order in which they were argued by the appellant and the first respondent.

At the outset I must state that this appeal was not made any easier when the appellant withdrew appeal against original respondents number 2 to *5.* As the appellant withdrew the appeal against the original 2nd, 3rd , 4th and 5th respondents, we dismissed the appeal against those respondents on 22/07/1999 and awarded costs against the appellant. The withdrawal of the appeal from those four respondents, resulting in dismissal of the appeal against them, in my opinion adversely affects most of the grounds of the appeal and clouds the appeal itself.

It now, for instance, appears to me that grounds 1, 2,3, 4, *5* and to some extent ground 6 need to be considered - certainly ground 18 (a) is now irrelevant. In other words capacity and actions of the 3rd and 4th original respondents to transfer suit land as agents or attorneys of the appellant with necessary power to effect transfers are unassailable because that is what the Court of Appeal found and we confirmed this by the dismissal of appeal against these respondents. Equally, actions of the second and fifth

respondents were confirmed when appeals against them were dismissed in consequence of the application to withdraw the appeals.

The written arguments for the appellant are in six blocks. The arguments first dealt with grounds 14, 15, 16 and 17 as the first block. The second block comprises grounds 10, 11, 12, and 13, the third block contains 1, 2, and 3; the fourth block consists of grounds 4, *5*, and ground 6; the fifth block contains 7 and 8, the last and 6th block consists of ground 18.

I shall consider these grounds in order in which they were argued. The first block of Ground 14, *15,* 16, and 17 are formulated as follows:

14. The learned Judges of the Court of Appeal erred in law when they denied the appellant a fair hearing resulting in a miscarriage of justice.

15. The learned judges of the Court of Appeal erred in law when they injudiciously exercised their discretion and took additional evidence under Rule 29 of the Court of Appeal Rules Direction, 1996, contrary to the adversarial mode of justice administration.

16. The learned Judges of the Court of Appeal erred in law and fact when they engaged in injudicious and unjust acts of calling for additional evidence, which affected their minds and clouded their vision thereby preventing them from giving the appellant a proper and fair hearing.

17. The learned judges of the Court of Appeal conduct of the appellant (sic) proceedings manifested the existence of a real likelihood of bias that prevented them from giving an impartial and just decision.

By these four grounds of appeal, the appellant claims there was lack of fair hearing and there was bias on the part of the Court of Appeal; that this offended the principle of fair play. The Court is accused by Mr. Kavuma Kabenge, counsel for the appellant, of failure to observe rules of natural justice regarding fair hearing enshrined in Article 28 of the Constitution. The Court is accused of calling additional evidence under Rule 29 of the

Rules of the Court of Appeal without valid reason. That that action is evidence of bias. Counsel for the appellant cited the following decisions: *Libyan Arab Uganda Bank for Foreign Trade and Development and another v. Vassiliadis, Supreme Court Civil Appeal No. 9 of 1985* (unreported); *Isaac N. Ojok v. Uganda Supreme Court Criminal Appeal No 33/91* (unreported) *Taylor v. Taylor (1944) 11 EACA 46; K. Tarmohamed. Lakhani (1958)* EA *567* (which lay down principles of admitting additional evidence) and *Dharansy Morarji v. Summen Naresh Supreme Court Civil Application 22/96.* These cases were cited to support the views that:-

a) The discretion by the Court of Appeal to take additional evidence (under R 29) must be exercised for sufficient reason.

b) That in order to exercise its discretion the indulgence of the Court must be sought and the sufficient reason shown by the Court.

c) In case of an application to a single judge, a party dissatisfied with such judgment can make a reference to a full court.

d) That evidence of bias on the part of a judge will result in setting aside the trial court judgment by an appellate court.

For the respondent Messers Mulenga & Karemera, in effect contended, inter alia, that the appellant is precluded at this stage from challenging the competence of the Court of Appeal to call and receive additional evidence on their own. Counsel further argued that the Court of Appeal acted properly in adducing additional evidence and that there is no evidence of bias on the part of the Court of Appeal. Counsel cited *United Marketing Co. v. Kara (1963) E.A 273, Sharriff Vs. TSingh (1961) E.A 72* in support. Counsel also referred to *Mbogo v. Shah (1968) E.A 93* to support the contention that an appellate court will not interfere in the exercise of discretion by an inferior Court unless it is satisfied that the inferior Court's decision is clearly wrong because the Court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration

matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

Subject to the discussions that follow, I do not accept the contention of Messrs Mulenga & Kalemera that at this level of the proceedings, the appellant cannot challenge the competence of the Court of Appeal to take additional evidence.

The issues raised by the four grounds of appeal can be summarized as follows:

Why didn't the parties produce in evidence the sale agreement during the trial of the suit? Was the Court of Appeal right or wrong in admitting the sale agreement under Rule 29(1) (b) of its Rules? Proceedings show that appellant's counsel produced the instruments of transfer contained in the space reserved for insertion of consideration the words *"see attached sale agreement"* No reason was given why he left out the sale agreement. Further proceedings show that when Mr. Mubiru-Kalenge, counsel for the 2nd, 3rd and 4th respondents half-heartedly attempted to introduce the sale agreement during the trial, counsel for the appellant successfully objected.

I am generally not happy about the procedure adopted by the Court of Appeal in producing the sale agreement. Although application to produce the sale agreement was abandoned in the trial court, counsel for 2nd to 4th respondents referred to this sale agreement obliquely in ground *5* of the memo of appeal to the Court of Appeal.

Be that as it may, I do not, with respect, accept the contention by appellant's Counsel that because previous Courts of Appeal do not appear to have admitted additional evidence under equivalent of Rule 29, therefore the present Court of Appeal should not have adduced additional evidence in the manner it did. I think that this is a sweeping statement. Each appeal will depend on its own fact. *Elgood v. (1968) EA 274* is one of example showing reception of additional evidence by Court of Appeal.

In view of the course adopted by the appellant in the prosecution of the whole appeal in this court, I do not agree that in this case production of the sale agreement in the Court of Appeal occasioned injustice to the appellant.

I have stated that the manner in which the sale agreement was adduced in the Court of Appeal can be criticized. However all the parties agree that there was a sale of the appellant's properties by Munghereza and Kaggwa and that it is the first respondent who purchased the property. It was the effectiveness of the transfer of the properties which was contested by the appellant. The transfers were made by Munghereza and Kaggwa. In the plaint no claim was made challenging the transfers by these two gentlemen. The withdrawal of the appeal in this court against these two amounts to saying that the actions of Munghereza and Kaggwa in transferring the properties was proper and effective. Therefore in my opinion the imputation of bias against the Court of Appeal, assuming it had a basis, has been overtaken by the withdrawal of the appeal against the original four respondents.

A discussion of fair hearing is not complete without reference to Article 28 of the Constitution. Clauses (2) to (12) are relevant to criminal trials. Clause (1) is general and it reads as follows:

"28(1) *In the determination of Civil rights and obligations or any criminal charge , a person shall be entitled to a fair speedy and public hearing before an independent and impartial Court or tribunal established by law"*

Clearly this provision requires inter alia, that a court which hears any ease: (i must be fair to all parties;
(ii) must be independent, and
(iii) must be impartial.

To be fair means to act without bias. Similarly to be independent or impartial means that the court should not be biased. If requirement for any Court to hear and decide cases fairly and without bias on the part of a presiding officer is not observed, this will normally result in an appellate court upsetting the decision which is based on violation of fairness and or which is based on bias: See *Isaac N. Ojok v. Uganda* (supra) *Libyan Arab African Bank v. Adam Vassiliadis* (supra) explains what is meant by bias. Because Mr. Kavuma Kabenge dwelt so much on the issue of bias, I here quote a portion of Odoki JSC's judgment in the *Libyan Arab e.t.c Bank* case upon which the same advocate relied.

"Bias may be established against a person sitting in a judicial capacity on one of 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 C. EG. C Ltd v. Lannon QB 577. Bias therefore means a real likelihood of an operative prejudice whether conscious or unconscious. See . Justice of Queens Court (1908) 2 JR 282. In considering the possibility of bias, it is not the mind of the judge, which is considered, but the impression 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. EG.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. The court looks at the impression, which would be given to other people. Even if he was impartial as could be, nevertheless if right-minded persons would think that in the circumstances 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.Huggius (1895) IQB 563. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: See Cam bone Justice, Exparte pearce (1955) 1QB 41,48-51 fjj4)2 All E.R. 850 and Reg.v. Nailsworth Licensing Justice Exparte Bird (1953) 1 WLR 1046 (1953) 2 ALL ER 652. There must be circumstances from which a reasonable man would think* ***it*** *likely or probable that the judge would or did favour one side unfairly at the expense of 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 often quoted passage, in R. v Sussex Justice Ex pane Mearthy (1 924) 1 KB 256 at P259.

"a long line of cases shows that it as not merely of some importance but is of fundamental importance had 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 a 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. Justice of Queen's Court (supra) cited in R v. Combone Justice ex parte peace (supra) ".

Mr. Kavuma Kabenge contended that the conduct of the Justices of Appeal before and during the hearing abundantly show that there was a real likelihood of bias of an operative prejudice against the appellants. He based this contention on the followings:

(a) The failure by the judges to give a ruling on the objection of counsel for the appellant against the admissibility of Court Exhibit 1.

(b) Calling a witness who is later disqualified as wrong witness and another called in substitution.

(c) Concocting statement as if made by a witness whereas not viz "Mr. Karibwende testified that he had in his possession the bid documents which were presented to this office together with the transfer forms and sale agreement".

(d) Re-opening the appeal, which had been closed without amending the grounds of appeal, and the issues arising therefrom.

(e) Determining issues placed before them on appeal without hearing the appellant and adding other issues and in respect of which no opportunity to be heard was given to the appellants.

(f) Making findings on factual issues not placed before the court by the parties viz; that US$ 1,891,000 was the consideration paid for the suit properties.

These contentions are serious but do they constitute bias?

As I said earlier, the admission of the sale agreement is open to criticism. But can it be said that by calling for admitting the sale agreement, the Court of Appeal violated the rules against fair hearing or unbiased determination of disputes? With some reluctancy

and with respect, I think that the Court of Appeal's decision to admit evidence was uncalled for. I say so because of the following reasons; The sale agreement was known to exit by both parties and the practice under which additional evidence may be adduced was not resorted to. It is very rare that an appellate court allows a party to adduce further evidence in that court and never unless the are exceptional circumstances See *Taylor v. Taylor (1944)11 EA CA 46 Mohindra v. Mohindra (1955)22 EA CA 274; Elgood v. R (1968) EA 274 K Tarmohamed v. Lakhanis (1958) EA 567.*

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However because the appellant withdrew the appeals against the four respondents whose effect is that the sale and transfer of the properties to the first respondent by Munghereza and Kaggwa, must be accepted to be valid, there is no injustice, which was occasioned to the appellant by admission of the sale agreement by the Court of Appeal. Accordingly grounds 14, *15,* 16 and 17 must fail.

The second block of grounds of appeal are grounds 10,11, 12,and 13. These grounds read as follows:

10. The learned Judges of Court of Appeal erred on law and fact when they admitted parol and extrinsic evidence of an agreement of sale of prove that the consideration of US$ 1,891,000 given therein was also a term of Exh P2.

11. The learned Judges of Court of Appeal erred in law when they improperly and unlawfully admitted inadmissible evidence of sale agreement.

12. The learned Judges of the Court of Appeal erred in law and fact when they held that the interest of justice demanded that the transfer and sale agreement be read together in order to decide the matter one way or the other

13. The learned Judges of the Court of Appeal erred when they incorporated into (plaintiff exhibit 2) the transfer forms extrinsic and inadmissible evidence in a sale agreement (Court Exhibit 1).

In his written arguments, again appellant's counsel concentrated his criticism on the admission of the Sale Agreement. In a way I have considered the issues raised by these grounds.

Furthermore, I am not persuaded that a sound basis has been given by the appellant to impute bias on the part of whole or any member of the Court of Appeal. That Court might have improperly exercised its discretion in admitting the sale agreement. But I see no evidence of bias.

According I think that grounds 10, 11, 12, and 13 must fail.

I find no need to consider the remaining grounds of appeal.

I would dismiss the appeal with costs here and below.

Delivered at Mengo this . . . .15th .... day of February.. .2000

J.W.N TSEKOOKO

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS

A TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE

REGISTRAR THE SUPREME COURT

JUDGMENT OF KAROKORA, J.S.C.

I have had the benefit of reading the judgment in draft prepared by the learned Chief Justice and I agree with him that the appeal should be dismissed with costs. I only wish to comment on the aspect of the manner in which additional evidence was admitted.

Counsel for appellant criticised the Justices of Appeal for having, on their own motion, called additional evidence when no application had been made by respondent. It was contended for appellant that the reception of the additional evidence when the Court had not been moved was prejudicial to the appellant's case. In the circumstances of the case, it was contended, that the learned Justices of Appeal biased themselves on the basis of the new evidence and therefore denied the appellant its right to a fair and impartial hearing.

The substance of their complaint is contained in the following paragraphs of the Memorandum of Appeal:

(14) The learned Judges of the Court of Appeal erred in law when they denied the appellant a fair hearing, resulting in a miscarriage of justice.

(15) The learned Judges of the Court of Appeal erred in law when they injudicially exercised their discretion and took additional evidence under rule 29 of the Rules of the Court of Appeal contrary to the adversial mode of justice administration.

(16) The learned Judges of the Court of Appeal erred in law and fact when they engaged in injudicious and unjust acts of calling for additional evidence, which affected their minds and coloured their vision thereby preventing them from giving the appellant the proper and fair hearing.

(17) The learned Judges of the Court of Appeal conduct of the appellant proceedings manifested the existence of a real likelihood of bias that preventing them from giving an impartial and just decision.

Counsel for the appellant submitted in their written submission that the Court of Appeal had no discretion at all to call for additional evidence on its own motion without application evidence on its own motion without application by the party under Rule 29(1) of the Court of Appeal Rules whereby the applicant would be required to show sufficient cause for being permitted to adduce additional evidence. A number of authorities were cited which the

learned Chief Justice has referred to and resolved and so I do not find need to repeat them in my concurring judgment.

In support of the reception of the additional by the Court of Appeal, each Counsel submitted that the Court of Appeal had powers to do so under Rule 29 of the Rules of the Court. Prof. Ssempebwa, Counsel for the 5th respondent submitted, rightly in my view, that the Sale Agreement was not new evidence as alleged by the appellant, but evidence, which was already on record in the proceedings. I do agree with Prof. Ssempebwa that the Sale Agreement was part of the transfer instrument which was already on record, because the transfer instrument had provided, in the space provided for insertion of consideration, *"See Attached Sale Agreement."* Therefore the Sale Agreement formed part of the transfer instrument of the property the 1st respondent bought from receivers/managers. Prof. Ssempebwa cited the case of *Jeraf Sharif & Company v. Shota Fancy Stores (1960) £4 374* where the Court of Appeal for East Africa held that attachments to a document form part of that document and must be read along with the document. He referred to another case of *Castelino* v**.** *Rodridnes (1972) E4 223* where the East Africa Court of Appeal went further and held that a reference in a document to an annexture incorporates the contents of the annexture into the document.

On the evidence, it is evident that throughout the record of Appeal it was not disputed that the transfer instrument expressly referred to the Sale Agreement as being attached to the Transfer Instrument. However, at the trial when an attempt was made by respondent to introduce the Sale Agreement for purpose of providing that consideration had been paid by the 1st respondent, Counsel for appellant resisted its introduction in the evidence, but the transfer instruments had for each property expressly stated in the space provided for consideration *"See Attached Sale Agreement"* instead of stating the amount of money paid as consideration for the property. So the Sale Agreement was annexed to the transfer instrument for each of the properties, which the I St respondent purchased, from Munghereza and Kaggwa who were joint receivers/managers of the property in issue having been appointed by the 2nd and fifth respondents who were the debenture holders.

It must be noted that from the above cited authorities which I agree with, there is no doubt that the attached Sale Agreement formed part of the transfer instrument on which it had been attached and had therefore to be read along with the transfer instrument. Furthermore, it is pertinent from the above authorities that a reference in the Transfer Instrument to Sales

Agreement incorporated the contents of Sale Agreement, which had been incorporated in Transfer Instruments. Accordingly the Sale Agreement was part of the evidence albeit the fact that the appellant had resisted its introduction in evidence when the relevant witness testified before the trial Judge. In the circumstances, I agree with Court of Appeal that it was entitle to invoke its discretionary powers under Rule 29(1)(b) of the Court of Appeal Rules, 1996, to have access to this document which had been with held from the trial Court by appellant, although being an annexture to transfer instrument, it was part of the evidence. Paragraph (b) of sub-rule (1) of Rule 29 of the Rules of the Court of Appeal expressly empowers the Court on its own motion to take additional evidence provided there is sufficient reasons for the Court to do so. It is not true, as the appellant submitted in his written submission that the Court could not on its own motion, take additional evidence. The Court was empowered by the law to exercise its discretion to take additional evidence, if sufficient reasons existed in order to arrive at a fair and just decision. In the circumstances, the Court of Appeal was perfectly entitled, pursuant to Rule 29(l)(b) of the Rules of the Court, to order for this evidence to be adduced for purpose of elucidating on it since it was part of the transfer instrument.

The East African Court of Appeal had occasion to discuss calling new evidence at a trial and elucidating on evidence already on record in the case of ***R v.*** *Yakobo Busigo s/o Mayogo (1945) 12 EACA 60.* There the Court of Appeal held that the appellate Court had jurisdiction to take in evidence at the appellate stage that elucidates on the evidence already on record, as opposed to the introduction of an altogether new matter that was never raised or does not emerge at all from the evidence already on record. I find this authority relevant and applicable to this appeal.

For instance, in the instant case, the Sale Agreement was already referred to in the transfer instrument and had already been referred to in the testimony of the witnesses at the trial. Therefore, it was not new evidence as appellant sought to imply in his submission. And as Manyindo, DCJ stated in his judgment, I agree that justice demanded that the transfer instrument be read together with the Sale Agreement. Furthermore, it must be noted that the appellant's other argument was that the learned Justices of Appeal biased themselves on the basis of the new evidence and therefore denied the appellant its right to a fair and impartial hearing. With due respect to the above submission, I must state that there is nothing to support the appellants' allegation of bias and unfair hearing.

There is evidence on record which shows that both parties were aware of the Sale Agreement, because the transfer instruments of the properties which the 1st respondent bought from the receivers/managers appointed under the debenture, which the appellant never disputed, stated that for consideration which the 1st respondent paid ***"See the attached Sale Agreement".*** The appellant had claimed that the 1St respondent had given no consideration. Yet the Transfer Instruments had indicated that Sale Agreement contained the consideration, which the 1st respondent had paid. In my view, the Court of Appeal could not sit by and watch a glaring injustice pass when they were looking on, without calling for that evidence which both parties were clearly aware of, on the grounds that our system of justice is adversial. **164**

In my view, justice demanded that the Sale Agreement had to be read together with the Transfer Instrument. And I respectfully agree with the judgment of the Deputy Chief Justice on this point at page 173 of the record of appeal when he stated as follows:

"At *the hearing of the appeal, we found it necessary to take additional evidence o of Edward Karibwende who had test Wed for the respondent at the trial and who had tendered in evidence of the Instrument of Transfer (exh. P2). On the Transfer Instrument is a space where the consideration for the transaction should have been indicated. However, in that space there is an entry, which read,* ***'See attached Sale agreement"***

The Agreement of Sale was not produced in evidence by M Karibwende and yet the matter of consideration became a bone of contention in the case. He argued that in an adversial system like our courts should not assist parties by way of evidence, but should leave it to the parties to fight it out. We overruled the objection for reasons, which we reserved. I now give my reasons. We were satisfied that the interest of justice demanded that the transfer and sale agreement be read together in order to decide the matter one way or the other. We were fully aware of the good old principle that the Court of Appeal should take additional evidence only in exceptional cases. We are convinced that this was such a case as the evidence was relevant and vital for the proper determination of the issue at hand. It is clear that even Counsel for the respondent was fully aware of the importance of this evidence, hence their submission (page 7) that:

'Yet still no evidence of any consideration paid was adduced whether at the trial or appellate court. If the appellant desires to claim protection as a bona fide purchaser, he ought to have sought for additional evidence even on appeal (sic)'

That it was for this reason what we overruled the objection and admitted the Sale Agreement in evidence"

In view of the above and having regard to the fact that the Sale Agreement was admitted in evidence in presence of both parties under the provisions of Rule 29(1) (b) of the Rules of the Court after each party had cross-examined the witness, the question of bias against the appellant would not arise. Furthermore, in my view, the admission of such evidence would not render the hearing to be unfair in favour of the respondent; especially considering the fact that the Sale Agreement was evidence, which was already on record with the transfer instrument, which each party knew throughout the trial.

It must be noted that against appellant's submission of bias and unfair hearing by the Court of Appeal when it admitted additional evidence, Prof. Ssempebwa Counsel for 5th respondent, cited Lord Denning in his learned Treatise *"The Discipline* of Law" Butterworths, London 1979 at page 86-87 where the learned author addressed the question of bias and cited the dicta of Delvin in the case of RVS Barnsley Licencing *33* Ex parte Barnsley & District Licensed Victuallers Association (1960) 2QB 167 where he set out the standards to be applied on question of bias as follows:

"In considering whether there was a real likelihood of bias, the court does not look at 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 f 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 be given to the other people. Even if he was as impartial as could be, nevertheless fright minded persons would think that, in the circumstance, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. 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"

There is no doubt that the above standards are a reflection of good common sense and would apply here and in my view, when such standards are applied to the instant case, it becomes clear that the appellant's allegation of bias and unfair hearing against it, would not stand, because each party was well aware of the existence of the Sale Agreement. Each party fully participated in the hearing of the additional evidence and no allegation of bias and unfair hearing was raised before the Court of Appeal. The witnesses were cross-examined. Clearly on the evidence no reasonable man would say that the Court of Appeal in admitting the Sale Agreement acted with bias and that it unfairly favoured one side at the expense of the other. The Court of Appeal in admitting the additional evidence did what the law authorized it to do in an appropriate case like this one.

In the result grounds 14, 15,16 and 17 would fail.

I would in the circumstances dismiss the appeal and adopt the orders made by learned Chief Justice.

Delivered at Mengo this 15th Day of February,. . .2000.

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL

……
W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT

JUDGEMENT OF MUKASA-KIKONYOGO,JSC.

I have had the benefit of reading in draft the judgement prepared by the Hon. Chief Justice. I agree that this appeal must be dismissed. I have nothing useful to add.

Dated at Mengo this ……15th …….day of …….February…..2000.

L.E.M. KIKONYOGO
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL
…….

W.MASALU MUSENE

REGISTRAR, THE SUPREME COURT