

**IN THE SUPREME COURT OF UGANDA  
HOLDEN AT MENG0**

**CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA & KATO JJ.S.C**

**CIVIL APPEAL NO. 17 OF 2002**

**BETWEEN**

- |    |                               |                      |
|----|-------------------------------|----------------------|
| 1. | <b>FR. NARSENSIO BEGUMISA</b> | ]                    |
| 2. | <b>B. NTIMBA</b>              | ]                    |
| 3. | <b>D. KOMUNDA</b>             | ]:::.....:APPELLANTS |
| 4. | <b>E. KAMONDO</b>             | ]                    |

**AND**

<b>ERIC TIBEBAGA</b>	:::.....:	<b>RESPONDENT</b>
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*(Appeal from the judgment of the Court of Appeal (Mpagi-Bahigeine, Berko and Engwau JJ.A.) at  
Kampala, in Civil Appeal No. 47/2000,  
dated 2<sup>nd</sup> July 2002).*

**JUDGMENT OF MULENGA JSC.**

This appeal originates from a suit that the respondent filed in the High Court in 1997, to recover four adjacent pieces of land from the four appellants. I will refer to the pieces together as the "suit land". In the suit, the respondent alleged that in 1995, the appellants unlawfully trespassed upon and divided the suit land among themselves, and severally continued to utilise it without his consent. He claimed that the suit land is part of an 8-hectare-parcel of land comprised in Kinkizi Block 53 Plot 9, and described as "Land in Muruka Masya, Kirima sub-county", of which he is registered proprietor, under the Registration of Titles Act (RTA).

His case was that he bought that parcel of land as a customary holding from two persons who were migrating from the area. In 1965, he applied for a registered title of the land. The adjudication committee and the government surveyors respectively verified and surveyed the land, after which he was granted a certificate of freehold title, Exh.P1, in 1972. In their joint

defence, the appellants pleaded that they were rightful customary owners of the suit land, which was different from, and was located about 2-3 kilometres away from the land described in the certificate of title. They also pleaded that the respondent owns an un-surveyed 2-acre-piece adjacent to the suit land, but denied trespassing upon it. The 4<sup>th</sup> appellant, together with the 1<sup>st</sup> appellant who claims through him, in addition pleaded *res judicata* in respect of the pieces in their possession. They claimed that the same had been subject matter of a suit between the respondent and the 4<sup>th</sup> appellant, which suit was finally determined in favour of the latter.

The learned trial judge decided that the suit land belongs to the respondent and made an order for evicting the appellants and permanently restraining them from trespassing on it. He awarded the respondent general damages in the sum of shs. 16,000,000/= with interest and costs. The appellants appealed to the Court of Appeal, which granted them leave to adduce additional evidence, before hearing the appeal. Consequently, the evidence before the Court of Appeal was in two parts, namely, evidence adduced during the trial and additional evidence taken by a Commissioner appointed by the Court of Appeal for that purpose. It is useful to first note the background to the additional evidence, as the decision of the Court of Appeal virtually turned on the manner in which that evidence was obtained.

The trial court based its decision mainly on the certificate of title, Exh.P1, which the respondent relied on as proof of ownership of the suit land. Being convinced that the certificate did not relate to the suit land, the appellants, in addition to appealing to the Court of Appeal, complained to the police that the respondent had used that certificate to fraudulently deprive them of the suit land. In the course of investigating that complaint, the police engaged the services of a surveyor from the Lands and Surveys Department at Rukungiri, to ascertain the locations of the land described in the certificate of title and the suit land. The surveyor visited the area and made a report indicating that the two were separately located. On strength of that report, the appellants applied to the Court of Appeal for leave to adduce additional evidence. The court granted the leave. It ordered that the additional evidence be taken by a commissioner, *who may if necessary, visit locus in quo*. With the consent of both parties, it appointed the High Court Registrar the

Commissioner. Following the appointment, the Commissioner recorded evidence from four witnesses and received exhibits. He conducted the proceedings in the presence of the parties and their advocates, partly in his office in Kampala, and partly at the *locus in quo*. His report, comprising oral and documentary evidence from the witnesses and notes of his observations at the *locus in quo* were submitted to the Court of Appeal, and constituted a supplementary record of appeal.

After hearing the appeal, the Court of Appeal held that the additional evidence was worthless because it was obtained in breach of the rules of natural justice, and was adduced in furtherance of a conspiracy to deprive the respondent of the suit land. The court noted summarily that the trial judge's judgment was amply supported by the evidence adduced at the trial, and accordingly dismissed the appeal. Hence the appeal to this Court. The memorandum of appeal to this Court contains one general ground of appeal, namely that: -

***"The learned... Justices of Appeal erred in law and fact in that they failed to adequately evaluate and scrutinize the evidence adduced as a whole with the view to coming to their own conclusion as the 1<sup>st</sup> Appellate Court and thereby prejudiced the Appellants"***

Six other complaints are listed as consequences of that failure, which allegedly *prejudiced* the appellants. They are, however, more like arguments and illustrations in support of the principal ground of appeal. I will consider them as such.

The appellants' Advocates filed written submissions under r.93 of the Rules of this Court. The main thrust of the submissions is that the Court of Appeal failed in its duty as a first appellate court, to scrutinise the evidence closely and to base its decision on pleadings, the framed issues, the evidence as a whole and the grounds of appeal. They argue that if the court had done so properly, it would have concluded that the land described in Exh.P1 comprised in Block 53 Plot 9, and located in Muruka Masya, is different from the suit land that is un-surveyed, unregistered

and located in Muruka Kijubwe, Block 59. It would also have found that the appellants are customary owners of the suit land, and have not trespassed upon it or on the respondent's land. The Advocates criticise the Court of Appeal for misdirection on several issues. According to them, the court misconstrued the role of the Commissioner by wrongly proceeding as if the appeal was against his report, rather than against the judgment of the trial court. Secondly, they argue that there was no rational basis for either the court's finding that there was a conspiracy to deprive the respondent of his land, or for its holdings that the additional evidence was obtained in breach of rules of natural justice, and that the Commissioner and the witnesses before him, were biased. In the alternative, they submit that even if there had been any bias it was not necessarily fatal to the appellants' case. Thirdly, the Advocates argue that the unwillingness, expressed by Berko JA, to invalidate the respondent's certificate of title was misplaced since invalidation of the certificate was not in issue. The appellant's contention was that the certificate does not relate to the suit land. At the hearing in this Court, Mr. Babigumira, counsel for the appellants, responding to submissions for the respondent, mainly stressed that no prejudice was caused to the respondent by the surveyor's report as the respondent and his counsel, were present when the Commissioner received and recorded the additional evidence and cross-examined the witnesses.

Mr. Makeera, counsel for the respondent, made oral submissions at the hearing of the appeal, having failed to lodge a written reply in time. His starting point was that the Court of Appeal rightly took into account the decision of the trial court, which had heard the witnesses and seen their demeanour. He submitted that the Court of Appeal was under no legal obligation to re-appraise the whole evidence although it had the discretionary power to do so. In support of that proposition, learned counsel relied on the wording of r.29 of the Rules of the Court of Appeal, which provides that when determining a first appeal, the court "*may re-appraise the evidence*". In his view, failure to invoke the discretionary power thereby given is not a fatal error. He contended however, that in the instant case the Court of Appeal had amply re-appraised the evidence and rightly rejected the additional evidence. He supported the holding that the

additional evidence was obtained in breach of the rules of natural justice because the surveyor's report, which was the basis of the evidence, depended on the appellants' information alone, without any in-put from the respondent. Learned counsel described the surveyor's evidence that the certificate did not relate to the suit land, as utterly unreliable because, according to him, the surveyor did not have the blue print when he visited the land. The learned Berko JA., gave the lead judgment with which the other members of the Coram concurred. Apart from summarily re-stating the respective cases of the parties and a brief comment on a remark by one witness at the trial, the learned Justice of Appeal did not refer to, let alone re-evaluate the evidence adduced at the trial. He focussed his attention virtually on the additional evidence only. He even hardly evaluated that. He separately reviewed the evidence of three witnesses and separately decided to reject each. He did not reject the evidence because it is false, but because he thought that the first two witnesses obtained theirs improperly, and that the third testified to support the appellants' conspiracy. On the evidence of the surveyor who made the report, the learned Justice of Appeal concluded -

***"In my view, the evidence of Mr. Nyakikura Stanley, PW1, which is the bed-rock of the appellants' case, deserves no credit as it was obtained in flagrant breach of natural justice and the learned Commissioner ought not (to) have attached any importance to it."***

Of the CID officer who conducted the investigations, he said -

***" Like PW1, PW2 never met the respondent during his investigation and did not collect statement from him. Even though he said that he did not know where the disputed land was, nevertheless, he confirmed that the disputed land was what the first appellant had shown to him. In my view, such a one sided investigation should not carry any weight with any court of law and ought to have been rejected by the Commissioner with the contempt it deserved."*** The third witness, a Senior Staff Surveyor, testified *inter alia* that upon discovery that the land described in the certificate of title issued to the respondent did not tally with the land he applied for, the assistant registrar wrote to him requesting him to return the certificate but the respondent refused. The learned Justice of Appeal commented on that evidence thus -

*"If indeed an error was detected as far back as the 1970's, then it is strange that no action was taken beyond the mere letter asking the respondent to return the title. According to the evidence of this witness the original land title issued to the respondent ...is still at the land office and has never been cancelled. If that is the truth ... how can the respondent be accused of forging a land title? In my view the claim by the Lands and Surveys Department that the land title was issued in error cannot be true. This clearly lends support to the respondent's conspiracy theory that the Appellants conspired to take the land from him. At the locus in quo the Respondent tried to show the Commissioner a print where a mark-stone had been removed, but the learned Commissioner was not prepared to listen to him. Instead the Commissioner referred to the evidence of PW1 and PW3, which I have found to be **unreliable.**" (emphasis is added)*

These excerpts tend to support the criticism that the learned Justice of Appeal misconstrued the role of the Commissioner. The Commissioner did not make findings. He had no power to reject evidence with or without contempt, nor to attach importance to it or not. His role was to record oral evidence, receive exhibits and note observations at the *locus in quo*; and to submit the record to the court, for the court to make its findings thereon. That is what he did. I will consider the concerns for which the learned Justice of Appeal criticised and rejected the additional evidence later in this judgment. It suffices here, to observe that the learned Justice of Appeal allowed his perceptions of the alleged breach of rules of natural justice and the conspiracy theory, to obscure the necessity for him to weigh the evidence as a whole on its merit. In the circumstances, I am unable to agree with Mr. Makeera's view that the Court of Appeal amply evaluated any of the evidence before it. That leads me to consider counsel's novel proposition that the court was under no legal obligation to re-evaluate the evidence in view of r.29 (1) of the Court of Appeal Rules 1996, which provides -

*"29. (1) On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the Court may -*

(a) *re-appraise the evidence and draw inferences of fact; and*

(b) *in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*" (emphasis is added)

I notice the slight change from the wording of the otherwise identical predecessor to that rule, i.e. r.29 (1) of the Court of Appeal for East Africa Rules, 1972, which provided that " *the Court shall have power, (a) to re-appraise evidence..*". In my view, however, that change did not alter the purport of the rule. By either wording, the rule declares the court's power to re-appraise evidence, rather than imposes an obligation to do so. The legal obligation on a first appellate court to re-appraise evidence is founded in the common law, rather than in the rules of procedure. It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. This principle has been consistently enforced, both before and after the slight change I have just alluded to. In **Coghlan vs. Cumberland** (1898) 1 Ch. 704, the Court of Appeal (of England) put the matter as follows -

*"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong .... When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."*

In **Pandya vs. R** (1957) EA 336, the Court of Appeal for Eastern Africa quoted this passage with approval, observing that the principles declared therein are basic and applicable to all first appeals within its jurisdiction. It held that the High Court sitting on an appeal from a Magistrate's court had -

***"erred in law in that it had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect"***

The principle behind **Pandya vs. R** (supra) was subsequently stressed in **Ruwala vs. R** (1957) EA 570, but with explanation that it was applicable only where the first appellate court had failed to consider and weigh the evidence. More recently, this Court reiterated that principle in **Kifamunte Henry vs. Uganda**, Criminal Appeal No. 10/97 and **Bogere Moses & Another vs. Uganda**, Criminal Appeal No. 1/97. In the latter case, we had this to say -

***"What causes concern to us about the judgment, however, is that it is not apparent that the Court of Appeal subjected the evidence as a whole to scrutiny that it ought to have done. And in particular it is not indicated anywhere in the judgment that the material issues raised in the appeal received the court's due consideration. While we would not attempt to prescribe any format in which a judgment of the court should be written, we think that where a material issue of objection is raised on appeal, the appellant is entitled to receive an adjudication on such issue from the appellate court even if the adjudication be handed out in summary form... In our recent decision in Kifamunte Henry vs. Uganda we reiterated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind.... Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law."***

Accordingly, I would hold that the Court of Appeal erred in law in failing to evaluate both the initial and the additional evidence, and that it is incumbent on this Court to re-evaluate the evidence as a whole, which I now proceed to do.



Although at the trial eight issues were framed from the pleadings, I think the crucial questions for this Court to answer in this appeal, are -

- > Is ownership of the suit land, or any part of it, *res judicata*?
- > Does the certificate of title, Exh.P1, relate to the suit land or any part of it?
- > Have the appellants or any of them trespassed on the suit land?

**Is ownership of the suit land res judicata?**

The defence of *res judicata* is a bar to a plaintiff whose claim was previously adjudicated upon by a court of competent jurisdiction in a suit with the same defendant or with a person through whom the defendant claims. In the instant case, the 1<sup>st</sup> and 4<sup>th</sup> appellants pleaded that defence in respect of the parts of the suit land they possess, contending that the 4<sup>th</sup> appellant had recovered them from the respondent in Civil Suit No.99/64, and had sold one to the 1<sup>st</sup> appellant. The respondent did not deny the suit. He testified that in 1964 he lost part of his land at Kijubwe, to the 4<sup>th</sup> appellant in a court case, and that subsequently the 4<sup>th</sup> appellant sold that land to the 1<sup>st</sup> appellant. However, he maintained, that the land he lost to the 4<sup>th</sup> appellant was not part of the suit land because it had been excluded from his land that was surveyed after he applied for title in 1965. On this issue, the respondent relied only on his oral testimony.

The 4<sup>th</sup> appellant testified that in 1964, he bought from one Sendegeya, the parts of the suit land occupied by the 1<sup>st</sup> appellant and himself, about one-quarter of a kilometre from his home. At that time, the respondent was already settled on a bordering piece of land. During that same year, the respondent encroached upon it. He sued the respondent in the Magistrate's court. While the suit was still pending, the respondent applied for a land title, and the adjudication committee recommended the application. The 4<sup>th</sup> appellant appealed against the committee's decision because of the suit pending in court. According to him, because of that appeal, the respondent's land was not surveyed. The suit lasted from 1964 until 1976 when, (after a trial, an appeal and a re-trial), the trial court decided that the land belonged to the 4<sup>th</sup> appellant. In support of his evidence, the 4<sup>th</sup> appellant produced as Exh.D1, copy of the Kirima Magistrates Court judgment in Retrial of Civil Suit No.99/64, dated 30.11.76. The respondent's appeal in Kabale Chief

Magistrate's Court, Civil Appeal No. MKA 130/76, was dismissed on 17 August 1978. In 1982, the 4<sup>th</sup> appellant sold about one-half of that land to the 1<sup>st</sup> appellant, retaining the other half for himself. The 1<sup>st</sup> appellant also testified that in November 1982 he bought a piece of about 4 acres of land at Rwakarengyero village, Karubanda sub-parish, Kijubwe parish, from the 4<sup>th</sup> appellant who retained an adjoining piece. He cultivated the land and gradually built semi-permanent houses. He started construction of a permanent house in 1990. The respondent's land was separated from his own by the portion retained by the 4<sup>th</sup> appellant.

According to Exh.D1, the 4<sup>th</sup> appellant was plaintiff in Civil Suit MKA 99/64, suing the respondent for recovery of land at Rwakarengyero. The plaintiff (4<sup>th</sup> appellant) claimed that he purchased the land in dispute from Sendegeya. The defendant (respondent) claimed he bought the same partly from one Kanyarwanda and partly from Sendegeya, and that he successfully litigated on it against one Nyirakigwene. Sendegeya testified in support of the plaintiff. The court found that the land in dispute was in Rwakarengyero village, while the land, which the defendant (respondent) bought from Kanyarwanda and litigated with Nyirakigwene, was in the adjoining village of Karubanda. It held that the whole land in dispute was lawfully sold to the plaintiff (4<sup>th</sup> appellant) by Sendegeya. It is unnecessary to go into all the reasons that led the court to its decision, as it is not in dispute that the judgment is binding on both the respondent and the 4<sup>th</sup> appellant. However, I am constrained to refer to a contradiction, which to my mind discredits the respondent's assertion that the suit land in the instant case is different from the land in dispute in the earlier suit. According to Exh.D1, the respondent claimed in the earlier suit that he had a registered title over the land in dispute, and that he had deposited the certificate of title with Commercial Bank at Kabale. This is a very material contradiction of his evidence in the instant case, that the land disputed in the earlier case was excluded from the land over which he obtained title, and that it is not part of the suit land. Further, I also note from Exh.D1 that the respondent sought to rely on a falsified document. The court found that the sale agreement, which the defendant (respondent) produced to prove purchase of the disputed land from Kanyarwanda, was forged because "the words showing what is on the land and where it extends were added on later on by a different author"; i.e. subsequent to the signing and witnessing of the agreement. That, to say the least, raises grave doubts on the respondent's credibility as a witness. All that notwithstanding, however, the learned trial judge held that the subject matter of the dispute in the earlier suit was not the same as the suit land in the instant case. He came to that conclusion as follows -

***"According to the Magistrate .... in Civil Suit No.99 of 1964 ... the land in dispute in that case was the land the plaintiff originally bought from Raphael Kanyarwanda. According to the plaintiff that land is not in dispute in this present suit. The plaintiff under cross-examination said:***

***"This land I bought from Raphael Kanyarwanda is not in dispute. Part of it is included in this land title. Part of it is what Elias Kamondo took in the other case. The land I bought from Baragakanwa is included in this land title.' Earlier the plaintiff testified that:***

***"That part of the land which had been won by Elias Kamondo was not included in the land title as surveyed'. In these circumstances the subject matter of the dispute in the earlier suit is not the same as in the present suit and therefore is not res judicata."***

Clearly, the learned trial judge misconstrued the evidence as to what land was in dispute in the earlier suit, and in my opinion, this was because he only considered the respondent's assertion as a given. If he had also considered the evidence of the 4th appellant and the judgment of the Magistrate's court, he would have realised that the land which the 4th appellant had sued for, and which the court had adjudicated upon in his favour, was the land he had purchased from Sendegeya, not the land the respondent had bought from Raphael Kanyarwanda. It is noteworthy that during both the trial in the High Court and the taking of additional evidence, the respondent did not indicate the location of the 4th appellant's other land, which allegedly was excluded from the survey, and is not part of the suit land. On the sketch the Commissioner drew at the locus in quo, the land claimed by the respondent encompasses more than the land occupied by all the appellants, save for a small portion to the north-western extreme, far from the boundary with the respondent's undisputed land. That portion however, was not identified as the subject of the earlier suit.

In view of all the foregoing, I find that the subject matter in Kirima Court Civil Suit No.99/64 was land at Rwakarengyero village, Kizhubwe parish, in Kirima, which the 4<sup>th</sup> appellant purchased from one Sendegeya, and that it is that part of the suit land in the instant case, which is in possession of the 1<sup>st</sup> and 4<sup>th</sup> appellants.

***Does the Certificate of Title Exh.P1 relate to the suit land?***

The first three issues framed at the trial clearly indicated that that the relation of the certificate to the suit land was in issue. They were: whether -

- > the disputed land is situated at Kijubwe and not Masya;
- > the certificate Annexure "A" ...relates to the disputed land; and
- > the disputed land has any title deed at all.

Surprisingly, the learned trial judge did not consider if it was proved that the suit land was "titled". In his judgment, he proceeded on the premise that the suit land was "titled land" without dispute. Thus on the first issue he held -

***"On the evidence before me I am satisfied that the plaintiffs titled land over which this dispute has arisen is situated in present day Kijubwe parish and not Masya."*** (emphasis is added) In answer to the second and third issues, which he recast as '*whether the disputed land has title and if so what title*', he just said -

***"I have already found as a fact that the plaintiffs land has a certificate of title. That title can only be impeached for fraud .... The plaintiff on the evidence before court cannot be held responsible for his certificate of title bearing reference to Block 59 rather than say 53. On this evidence I find that fraud on the part of the plaintiff has not been proved. Therefore in answer to the second issue I find that the plaintiffs land has a certificate of title namely Kinkizi Block 53 Plot 9."*** (emphasis is added ).

With due respect to the learned trial judge, he made those findings without taking into consideration all the material evidence. He appears to have considered the respondent's evidence with only such of the evidence for the appellants as was compatible with the respondent's case, and to have overlooked the rest. I have to consider the evidence as a whole.

The respondent produced two exhibits in support of his claim of ownership of the suit land. Exh.P1 is a certificate of title issued under the RTA on 20.1.72 to Erick John Tibebaga, the respondent, as the proprietor of freehold estate in land registered as Kinkizi Block 53 Plot 9, measuring 8.0 hectares and described as Land in Muruka Masya Gombolola Kirima. Exh.P2 is a

cyclostyled form headed "Adjudication Committee Certificate No.9". The form indicates, *inter alia* -> that the respondent applied for adjudication of his land at Rwakarengero village, Kijubwe Mukungu, Muruka Masya; and

> that the adjudication committee visited the land on 25.2.65, decided that the respondent had bought that land and was recognised as its customary owner; and recommended that the land be surveyed.

The respondent testified that his land was located on Rwakarengero hill, in Kijubwe Parish. He explained that at the time he applied for and obtained the title, the hill was in Masya Parish (Muruka), but subsequently Masya Parish was split into two new parishes, named Masya and Kijubwe. His land is located in Kijubwe, though the certificate of title still bears the name of Masya.

Several witnesses testified for the appellants. Both the 1<sup>st</sup> and 4<sup>th</sup> appellants testified in person as to their acquisition of the parts of the suit land in their possession. However, no substantial evidence was adduced to prove the acquisition by the 2<sup>nd</sup> and 3<sup>rd</sup> appellants of the part of the suit land in their possession. The 2<sup>nd</sup> appellant's son testified on his behalf as his attorney, virtually to reiterate the pleaded defence. The 3<sup>rd</sup> appellant did not testify. Other evidence adduced was to show that Exh.P1 did not relate to the suit land. It will suffice to summarise the three most pertinent pieces of that evidence, namely: Exh.D3; and the testimonies of DW5 and DW6.

Exh.D3 is a certificate of title issued to one Arisen Tibenderana on 9.5.69, as registered proprietor of freehold title over land registered as Block 59 Plot 13, and described as *Land in Muruka of Kizubwe in the Gombolora of Kirima*. As I understand it, the relevance of that evidence is to show that contrary to the respondent's explanation, Kijubwe was in existence as a Muruka, and was designated Block 59, as early as 1969. Though not conclusive, that suggests that if land in Kijubwe was registered in 1972, it would not be registered in Block 53; nor would

it be described as *Land in Muruka Masya* as in Exh.P1. If the certificate issued to the respondent in 1972 related to his land in Kijubwe, it would have shown the land to be registered in Block 59, and to be described as *Land in Muruka Kijubwe*. DW6, Bwogi Lawrence, Assistant Commissioner for Surveys and Mapping, gave technical evidence, describing the professional skills he used to locate Block 53 Plot 9 on two types of maps. His finding was that the land registered as Block 53 Plot 9 is located in Masya parish and not in Kijubwe parish. DW5, Yusuf Kagumire, a former Chief Registrar of Titles, testified that in 1975 he wrote to the Assistant Registrar of Titles, Kabale, directing him to survey the respondent's land. He gave the directive because, following complaints to him, and after examining office records, he had concluded that the respondent's land had not been surveyed, and that the certificate, Exh.P1, was issued to the respondent in error. Copy of the letter dated 25<sup>th</sup> April 1975, and produced as Exh.D4 reads - "**Kigezi - Block 53 Plot 9.**

*Following a discussion held in my office on the 24<sup>th</sup> day of April 1975 between Mr. Akankwasa of Hunter and Greig, and Kagumire regarding the above matter, we formally agreed as follows:-*

- (1) **That Tibebaga's land has never been surveyed as he has always maintained and that a wrong title was issued to him in error.**
- (2) **That you ask the District surveyor to survey Tibebaga's land following the boundaries which were ascertained by the former adjudication committee held in March 1965.**
- (3) **That as soon as Tibebaga's title is ready, he will cause the title which was formerly issued to him in error to be produced in exchange of the new one - as he alleges to have deposited the same in the Bank.**
- (4) **That there is no need of calling on an adjudication committee again as this might cause new difficulties etc.**

***The above proposals are acceptable to me and you may proceed accordingly."***

Clearly, the three pieces of evidence are relevant and very material to the issue: whether Exh.P1 relates to the suit land. However, in his judgment, the learned trial judge did not allude to any of that evidence in answering the issue. The only evidence of DW5 and DW6 that he considered

was that both witnesses testified that Exh.P1 appeared on the face of it, to be a genuine certificate of title. He also misdirected himself on DW6's evidence in the judgment, where he misquoted the witness to have said that Block 53 Plot 9 was in Kijubwe parish. The record shows that the witness said at least twice, that his finding was to the contrary, i.e. that the plot was located in *Masya parish and not Kijubwe parish*.

The respondent had the burden to prove his ownership of the suit land. For that purpose, he opted to rely principally on the certificate of title, Exh.P1. It is trite that a certificate of title issued under the RTA, is conclusive evidence that the person named in the certificate as proprietor, is possessed of the estate in the land described in the certificate. See section 59 of the RTA Cap. 230 (formerly s.56 of Cap.215: 1964 Ed.). As the learned trial judge observed, such certificate of title can only be impeached for fraud. It is otherwise sacrosanct. Accordingly, on the face of it, by producing Exh.P1, the respondent proved conclusively that he is proprietor of a freehold estate in an 8-hectare-parcel of land registered as Kinkizi Block 53 Plot 9, which is described in the certificate as *Land in Muruka Masya Gombolora Kirima*. Section 59 of the RTA expressly stipulates that the certificate -

***"shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Register Book" (emphasis is added).***

In my view, it follows that the inviolability of a certificate of title is circumscribed in as much as it is confined to the particulars in the certificate. The court therefore, cannot receive the certificate as evidence of particulars, which are not set forth in it. For that reason, and particularly in view of the defence, the respondent also had to show that the particulars in Exh.P1, relate to the suit land on the ground. He fell far short of doing that. He did not show, and I have not found, any nexus between his application for title and the certificate he obtained. The most significant gap is the lack of any independent evidence to prove the respondent's assertion that the land, which the adjudication committee verified as his, was surveyed, let alone to show that Exh.P 1 was issued on strength of a survey of that land. The remark by Berko JA, that *the respondent tried to show the Commissioner a print where a mark-stone had been removed* and the latter did not listen, cannot be a substitute of such proof. I must emphasise that the

inviolability of a certificate of title under the RTA is hinged on a survey that determines and delimits the land to which the certificate relates.

The evidence for the appellants, on the other hand, goes a long way to show that Exh.P1 does not relate to the suit land. I attach particular reliance on the evidence of PW5 and PW6 who were independent professional witnesses. I find that their evidence is credible. In my view, PW5, as Chief Registrar of Titles, had no reason in 1975 to want the respondent's land to be surveyed and a fresh certificate to be issued to him, as intimated in Exh.D4, other than because he was satisfied that it was necessary to rectify an error made in the issuance of Exh.P1. Secondly, there is no evidence to contradict PW6's unchallenged professional evidence that the land to which the certificate relates is not in Kijubwe parish, but in present Masya parish. Anyone conversant with the system of land registration would appreciate the significance of that evidence. Indeed, the learned trial judge tacitly acknowledged that Exh.P1 did not relate to the suit land when he observed that the respondent *"cannot be held responsible for his certificate of title bearing reference to Block 59 rather than say 53"*. This is a slight slip because the certificate refers to Block 53 rather than 59. Nevertheless, the observation shows that the trial judge realised that the particulars in the certificate do not tally with the suit land. In holding nevertheless that the certificate related to the suit land, the learned trial judge took Exh.P1 as proof that the respondent was proprietor of land comprised in "Block 59" and located "in Muruka Kijubwe", when those particulars were not set forth in the certificate. Neither section 59 of the RTA nor any other law permitted him to do so.

Notwithstanding the scathing criticism directed at it by the Court of Appeal, the additional evidence further supports my conclusion that Exh.P1 does not relate to the suit land. It suffices to highlight only its pertinent aspects. Nyakikuru Stanley, the surveyor whose report sparked off the process of calling additional evidence, explained how he went about locating the land registered as Kinkizi Block 53 Plot 9, and the suit land, using blue prints from the office and undisputed certificates of title of neighbouring registered land. He testified that he located and opened the boundaries of Block 53 Plot 9, and established that it was in Masya parish, thus corroborating



DW6's evidence. The same witness also testified that he visited the suit land shown to him by one of the appellants. Using the blue print for Block 59 and opening the boundaries of adjacent land registered as Block 59 Plot 28, he established that the suit land was not surveyed, and that it was located in Block 59 in Kijubwe parish. The significance of that evidence lies in the elementary principle of the land registration system under the RTA, namely that a certificate of title relates to only one parcel of land. The evidence of DW6 and the surveyor established that the particulars set forth in the certificate of title, Exh.P1, relate to a specific parcel of surveyed and registered land located in present Masya parish, and not to the suit land. The Court of Appeal criticised the surveyor for visiting the two locations in absence of the respondent, but it is obvious that the presence of the respondent would not have made any difference. It is not suggested that he visited or was shown the wrong land. Upon the Commissioner's visit to the *locus in quo*, the respondent by his counsel said he had no interest in the surveyed and registered land in Masya parish. Instead, he confirmed the suit land to be that which the appellant had shown to the surveyor. Caleb Mwesigwa, Senior Staff Surveyor's main evidence was on the error in the issuance of Exh.P1 and the attempt to rectify it. He testified that soon after it was issued, the land office discovered an error. Asked what the error was, he replied -

***"The error was that the land described in the title did not tally with the land which belongs to Mr. Tibebaga."***

He narrated what was done upon discovery of the error, starting with the Chief Registrar of Titles' instructions in Exh.D4 to survey the respondent's land. He produced correspondence that ensued, pursuant to the instructions. Two of the letters indicate why the instructions were not carried out and the error remained unrectified. In one dated 31.10.79 to the District Surveyor, the Assistant surveyor wrote - "***When I went to survey Tibebaga's land, I called the members of the former adjudication committee,... four of them came and in addition .... Chiefs and his neighbours were all present.***"

(1) ***On the land he has no permanent boundary, he changes boundary from time to time.***

(2) ***He does not agree with his neighbours over the boundary, he wanted to enclose some portions of his neighbours.***

(3) ***The members of the former adjudication committee showed me the true boundary, but he disagreed with them.***

(4) ***The court gave ruling on this land in favour of the interested parties, and Mr. Tibebaga disagreed with the court's boundaries.***

(5) ***I did not survey the land because Mr. Tibebaga's land had no boundaries possible for surveys...*** In the last of the exhibited letters dated 7.11.79, the District Surveyor responding to the Commissioner's several letters said -

***"Before I could reply I wanted to talk to Mr. Tibebaga because three surveyors have been to the site and failed to carry out the survey because he disagreed with his neighbours. Some of the reports of the surveyors who have been to the site are attached for your information.***

***Mr. Tibebaga reported to this office on... 5th November 1979 and I asked him to provide me with transport to go and see whether I can do the survey myself because he claims that the surveyors who went there did not want to do his work."***

This evidence corroborates that of PW5. In addition, contrary to the observation by Berko JA, that *no action was taken beyond the mere letter asking the respondent to return the title*, this evidence tends to show that efforts to rectify the error were frustrated by lack of co-operation from the respondent.

As I mentioned earlier in this judgment, the Court of Appeal gave two main grounds for rejecting all the additional evidence, namely that the evidence was obtained in breach of natural justice and that it was in furtherance of conspiracy to deprive the respondent of his land. With the greatest respect to the learned Justices of Appeal, I find those grounds untenable, if not misconceived. The alleged breach of rules of natural justice is that the CID officer did not invite the respondent to make a statement and to be present when the officer and the surveyor visited

the land under investigation. I am not aware of any rule of natural justice that requires an investigator of a criminal offence to invite the suspect to be present for viewing potential evidence or compilation of the investigation report. The criticism would have made some sense, if the respondent was prosecuted without prior opportunity to respond to the accusation, or if a court had acted upon the surveyor's report without giving the respondent a hearing. As it happened, however, the surveyor gave evidence before the Commissioner. The respondent had opportunity and used it to cross-examine him and to be heard on that evidence. In my view, what the learned Justice of Appeal called "one sided investigation" caused no prejudice to the respondent.

The learned Justice of Appeal gave no reason for accepting the conspiracy theory. I can only surmise that, he derived it from the evidence that in October 1985, the respondent was attacked by a gang of people and forced to flee from his home and land. The appellants confirmed that evidence but denied having participated in the attack. In my opinion, however, whether they participated or not, it is farfetched to deduce that even the professional witnesses, together with the correspondence they produced dating back to the 1970's, were part of the conspiracy. The evidence clearly shows that far from seeking to deprive the respondent of his land, the Department sought to rectify an error and ensure that he obtains title to his own land. In my view, with due respect, the conclusion by the Court of Appeal that it "is not true" that the certificate was issued in error is against the weight of evidence. The error is glaring. The certificate of title, Exh.P1, does not relate to the suit land. It was issued to the respondent in error because it relates to land for which he did not apply. Much as I agree with the trial judge that the respondent cannot be held responsible for that error, I do not accept that he can take advantage of the error and use the certificate to prove ownership of land to which the certificate does not relate. I am satisfied that, having regard to the evidence as a whole, the concurrent decision of the courts below is wrong. I should observe in passing, however, that the respondent must bear responsibility for his failure to heed the proposals in Exh.D4 to rectify the error. Because of that failure, he now holds a certificate of title for land in which he admittedly has no interest, and his

land over which he wanted registered title, remains unregistered. I agree that invalidation of the certificate of title that Berko JA was unwilling to order was not in issue. Short of rectification by the Registrar of Titles, an invalidating order can only be in a suit by the owner of the land to which the certificate relates.

The Court of Appeal upheld the trial court decision that the suit land belongs to the respondent and that the appellants trespassed on it. The remaining question, although the respondent did not canvass it, is whether this Court should uphold the decision of the lower courts though the respondent does not have a certificate of title over the suit land. According to the Commissioner's sketch made at the *locus in quo*, in addition to the piece that everyone admitted belongs to the respondent, the land he claims to own includes the suit land, a piece in possession of the Parish local administration and another in possession of one Kagashanga. The Parish and Kagashanga were not party to the original suit and so the land in their possession is not subject of this appeal. I have already found that the land in possession of the 1<sup>st</sup> and 4<sup>th</sup> appellants was subject of Civil Suit No.99/64, in which a competent court decided that the land belonged to the 4<sup>th</sup> appellant. The 1<sup>st</sup> appellant claims part thereof through him. I would therefore hold that the defence of *res judicata* set up by the two appellants in respect of that land ought to succeed. Lastly, I find that the respondent did not adduce sufficient evidence to prove that he has any superior right over the land in the possession of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. Consequently, I would hold that the respondent failed to prove that he was owner of the suit land or any part of it and/or that the appellants trespassed on the suit land or any part of it.

In the result, I would allow this appeal and set aside the judgments and orders of the courts below, and substitute an order dismissing the respondent's suit. I would award to the appellants costs in this Court and in the courts below.

### **JUDGMENT OF ODER, JSC**

I have had the advantage of reading in draft the judgment of Mulenga, JSC; I agree with him that the appeal should succeed.

As Tsekooko, Karokora and Kato JJ.S.C agree the order of the court shall be as proposed by Mulenga, JSC.

**JUDGMENT OF KAROKORA, JSC:**

I have had the advantage of reading in draft the judgment prepared by my learned brother, Mulenga, JSC, and I agree with him that this appeal should succeed. I also agree with the orders he has proposed.

**JUDGMENT OF TSEKOOKO, JSC:**

I have had the benefit of reading in advance the judgment prepared by my learned brother, Mulenga, JSC, and I agree that this appeal should succeed. I also agree with the other orders he has proposed.

**JUDGMENT OF C.M. KATO, JSC.**

I have had the advantage of reading the judgment of my learned brother, Mulenga, JSC in draft. I agree with him that this appeal should be allowed with costs to the appellants.

***Dated at Mengo this 22<sup>nd</sup> day of June 2004.***