THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL No.04 OF 2005

BETWEEN

KASIFA NAMUSISI }
AMINA NABANKEMA } …… APPELLANTS
ABDALLA WAKAALO }

AND

FRANCIS M.K. NTABAAZI ……RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Engwau, Kitumba and Byamugisha, JJ.A) dated 16th September, 2004 in Civil Appeal No.63 of 2001}

THE JUDGMENT OF TSEKOOKO, JSC.

This is a second appeal. It arises from the decision of the Court of Appeal which reversed the judgment of the High Court given in favour of the present appellants by Ouma, J.

The facts of this case are interesting.

From the pleadings and the evidence adduced at the trial, it is evident that by 1980 the respondent, Dr. Francis M.K. Ntabaazi, owned three pieces of land at Ndeeba, a suburb of Kampala. These pieces were known as Kibuga Block 16, plots Nos.654, 655 and 692. He had buildings on the plots. The respondent had obtained two loans from two financial institutions on the

security of those plots.

One of the loans was from the Housing Finance Company of Uganda Ltd (Finance Company). He provided the land in plots 654 and 692 as security for the repayment of that loan. It appears that by November, 1980, the respondent was under pressure to repay a sum of shs 1,150,000/= to the Finance Company on account of that loan. According to the respondent, he asked the late Sulaiti Jaggwe, for a loan of shs 4.500,000/= which the latter allegedly agreed to give. Surprisingly on 13/11/1980, he entered into a Sale Agreement (exh.P1) with the Uganda Hardworking Transport and Trading Company Ltd. (the Transport Company) of which the late Sulaiti Jaggwe (deceased) was the Managing Director. That agreement unequivocally states that the two pieces of land were sold to the transport company for shs 4.5m/=.

That agreement was at the trial tendered in evidence with the consent of the respondent's counsel. The agreement states that the two plots were sold for a **"consideration of shs 4,500,000/=."** The respondent acknowledged that Jagwe paid shs 160,000/= as legal services fees and that the same Jagwe paid shs 1,150,000/= to the Finance Company on account of the respondent's loan (Account No.1550).

Exhibit.P1 provided in subparagraph(c) **payment consideration**, "that the balance of shs 3,190,000/= to be paid to the vendor (i.e., the respondent) **by the purchaser as soon as the vendor signs the transfer forms, for the transfer of the said buildings** (on the two plots) **together with the land referred to above."**

Among other terms, the agreement states that ***" The vendor……. has handed over the said building/house referred to above to the purchaser together with all keys to be the property of the purchaser from the date of signing this Agreement of Sale."***

The deceased signed the agreement on behalf of the Transport Company. There is a certificate at the end of the agreement to the effect that the contents were explained to the signatories before

the signing. The Respondent confirmed this on oath in Court.

Exhibit P.2 is a second **"Agreement of Sale"** executed on 6th May, 1981 between the respondent as vendor and the deceased Sulaiti Jaggwe as the purchaser of **"house/buildings"** on plot 655. **Consideration** is shs 940,000/=. Of that amount, the deceased paid to the respondent shs 560,000/= by a cash cheque No.458355 dated 5th May, 1981. The respondent accepted receipt of shs 560,000/=.
The balance of shs 380,000/= was to be paid in two installments. The first installment of shs 180,000/= was paid by cheque No.458357 dated 5/6/1981 and the second of shs 200,000/= was paid by cheque No.458358 postdated 5/7/1981. Cashing of these cheques is disputed.

Other terms of the second sale included one which stated that the vendor handed to the deceased the houses and the keys. The second other term authorized the deceased to collect the certificate of title from **Barclays Bank (U) Ltd.**, Kampala. The same agreement further stated that the transfer of the said land and **"buildings thereof is effected accordingly"**.

According to evidence of the first appellant the deceased with his family moved into the building soon after the purchase. Within about three weeks, the deceased disappeared. Strangely soon after the disappearance of the deceased, the respondent advised the family of the deceased "to run away" from the buildings. They heeded and vacated the buildings. The first appellant asked the respondent to get tenants for her. The family returned "after Obote 2 War" (1985). The buildings were not occupied. She carried out repairs. She then requested the respondent to get tenants for her. Later, he got Bank of Uganda employees as tenants. He appears to have advised those tenants to pay the rent to him and not to the appellants. This forced the first appellant to seek legal advice from the late Musaala who had drawn the two sale agreements at time of sale.
In 1985 he first appellant and her co-wife obtained

management order to manage the estate of the deceased. Apparently some time in 1985, the respondent consulted Advocate Masaala about the possibility of treating the two sale agreements as mortgages rather than sale agreements. Exhibits P8 (infra) shows that in April,1986 the respondent communicated the same ideas to Musaala through his lawyer, Mr. Buyondo. Musaala did not accede to the idea.

It would seem that after the first appellant had the buildings repaired and got tenants in the buildings the respondent insisted that rent be paid to him. Musaala called the tenants, discussed and convinced them in the presence of the first appellant by showing them the sale agreements that the buildings belonged to Sulait Jaggwe. After that transaction, Musaala was murdered.

Because of the respondent's conduct, the appellants filed a suit against him as administrators of the estate of the deceased. The essentials of the two agreements of sale were pleaded in paragraphs 5 of the further amended plaint including the allegation that the purchase price was paid fully.

In his written statement of defence, the respondent did not specifically deny para 5 of the plaint nor did he deny the transfer of the titles in the properties in the names of the deceased. Instead he averred that the transactions were not sales of lands but loans of money to him by the deceased and the transfers of the titles were meant to secure repayment of the loans. He further alleged in para 5 of his defence that after repayment of the money the properties would be retransfered to him. In paragraph 7 of the same defence, the respondent specifically admitted in respect of the second sale that out of shs 940,000/= the deceased paid him shs 560,000/=.

At the trial six issues were framed for determination. During the trial the appellants testified in support of their claim while the respondent gave evidence which was intended to

contradict or vary the contents of the two agreements in so far as the nature of the transaction is concerned. He explicitly admitted that he received payment of Shs 1,319,000/= in respect of plots 654 and 692 and Shs 560,000/= in respect of plot 655.

Ouma.J, as he then was, who tried the suit, answered the issues in favour of the appellants. In summary the learned trial judge found that:

(a) *The two transactions were sales and not loans.*
(b) *No fraud about transfers was pleaded nor proved.*
(c) *The respondent validly transferred the suit lands to the deceased who fully paid for the same.*
(d) *The respondent was estopped from claiming that the transfers were for something else than a sale.*

The learned judge correctly held that under the old **56 of the RTA**, the certificates of title are conclusive evidence of **"title or ownership".** So he gave judgment for the appellants. The respondent appealed to the Court of Appeal where four grounds of appeal were formulated. Of these four grounds, only the first ground was argued in that Court. It was framed as follows: -

"The learned judge erred in law and fact when he failed to properly evaluate the evidence resulting in the finding that the appellant had sold the suit property and was fully paid."

In the Court of Appeal it was argued for the present respondent that there was no consideration, while the appellants' counsel argued the contrary and supported the decision of the trial judge. The Court of Appeal allowed the appeal on the sole ground that there was no consideration. From that decision the appellants have appealed to this Court. The appeal is founded on four grounds. The respondent filed a notice of one ground for affirming the decision of the Court of Appeal.

Mr.Tibaijuka, counsel for the appellants, lodged written arguments to which, in like manner, the respondent's counsel, Messrs. Nyanzi, Kiboneka, Mbabazi & Co, Advocates, replied.

Out of the six issues framed for determination by the trial Court,

I think that the first and second issues are pertinent in so far this appeal is concerned. They were framed this way -

"1. Whether the defendant sold the suit premises in question to the late husband of the plaintiffs and whether the full purchase prices were paid.

2. Whether the suit premises were transferred to the deceased Suliati Jaggwe as security for loans."

During the trial, the respondent testified as DW4. He was led by Mr. Ayigihugu, his counsel, to give evidence intended to contradict the contents of Exh.P1 and P2 so as to prove that the transactions were loans and not sales. Mr. Mwesigwa Rukutana, appellants' counsel, objected to that evidence. The trial judge expunged that portion of the evidence from the record in his ruling given on 1/4/1997.

It is important to point out at this juncture that because of that ruling, when opening the closing address to the trial judge, Mr. Ayigihugu, who was lead counsel for the respondent (as defendant in the trial court) abandoned issue No.2 (supra). I must stress this point because the trial judge was criticized in the Court of Appeal for his alleged failure to evaluate evidence on loan transactions. When summing up, Mr. Ayigihungu stated:

"I would also point (out) that in view of this Court's ruling dated 1st April, 1997, it would be useless and a waste of time to address court on issue No.2."

Mr. Ayigihugu made these utterances after Mr. Kiapi, who represented the appellants at the trial, had submitted that he had earlier raised objections to the respondent's evidence which objections the judge accepted in his ruling of 1/4/1997. Mr.Kiapi invited the trial judge to answer issue No.2 in favour of the appellants. In the said ruling the learned trial judge had relied, inter alia, on the provisions of **S.90 of the Evidence Act,** and the case of **Fenekasi Semakula Vs. E. S.M.S. Mulondo (1985)** HCB 29 for the view that a written instrument should be regarded as the appropriate and only evidence of the terms of agreements between parties thereto and that no other evidence of the transaction could

be substituted for a written instrument so long as the written agreement or instrument itself exists. The learned judge therefore expunged from the record the respondent's evidence which sought to contradict and vary the two agreements of sale. Consequently in his judgment, the trial judge found that the 2nd issue was redundant partly because both counsel did not address him on it in their closing address but more so because of his **"ruling dated 1st April, 1997."** I take this to mean that parties had in effect accepted that his ruling had disposed of the 2nd issue. It would have been more appropriate if the learned trial judge had stated in his judgment that because of the reasons contained in his ruling of 1/4/1997, the answer to the 2nd issue was in the negative.

Later in this judgment I will consider the views of counsel for the two sides regarding the existence on our record of appeal of the evidence which the trial judge ordered to be expunged. Connected with this is a hand written exhibit (Exh.DI) which Mr. Tibaijuka referred to as a fake agreement. That document relates to a loan agreement between the deceased and his brother-in-law in 1976. Because of what I will say later when considering the import of the old S.22 of the **Money Lender's Act**, I attach no significance to that agreement. In any event the first appellant in her evidence fully explained the existence of Exhibit DI.

Be that as it may, on the basis of two important witnesses and exhs.PI and P2 the learned trial judge concluded that the respondent sold the suit lands to the deceased. These two witnesses were the 1st appellant, Kasifa Namusisi, who testified as PW3, and of Hajati Fatuma Namusoke (PW2) both of whom the judge found to be truthful witnesses. He rejected the evidence of the respondent. He found that Exh.P1 and Exh.P2, were Sale Agreements and not agreements of loans.
The appeal to the Court of Appeal was initially based on fourteen grounds. These were amended and reduced to four. I have already reproduced ground one.
The other three were formulated as follows:

2. ***The learned trial judge erred in law and in fact when he failed to apply or misinter pretted sections 90 and 91 of the Evidence Act, Cap.43 thereby failing to find that exhibits P1 and P2 were illegal and invalid.***

3. ***The learned trial judge erred in law and in fact when in the course of proceedings he got prejudiced against the defendant and called him a liar.***

4.The learned trial judge erred in law and in fact when he applied the doctrine of estoppel by election.

I purposely reproduce these three grounds because Mr. Muhammad Mbabazi, who represented the respondent in the Court of Appeal, surprisingly abandoned these three grounds and only argued the first ground. His criticism of the learned trial judge was that the judge wrongly evaluated the evidence and arrived at wrong conclusions. He argued particularly that the trial judge made no finding as to whether the deceased paid the full price. Mr. Furah, counsel for appellants, (who were respondents in the court below) supported the judgment of the trial judge, contending that the transactions were outright sales and that the transfer of the suit lands was effective. The respondent had signed transfer forms as well as the sale agreements (Exhs. P1 and P2) and had surrendered the certificates of title to the deceased.

In my opinion the abandonment of the 2nd ground (supra) in the Court of Appeal by the appellant speaks volumes. By abandoning the ground, the respondent, or his counsel for that matter, in effect confirmed the opinion of the trial judge that exh.P1 and Exh.P2 were Agreements of sale.

Be that as it may, in her lead judgment, **Byamugisha J.A.,** held erroneously in my opinion, that because the bank had denied (Exh. D2), payments of one of the deceased's cheques, there was ***"no other evidence of consideration having been paid by other means".*** She held that the trial judge erred when he found

and held that the full purchase price was paid. She further opined that there was no consideration and therefore there was no sale.

The appeal in this Court is based on four grounds.
The first ground of appeal which I consider to be decisive is formulated this way:

The learned Justice and Lady Justices of Appeal erred in law and fact in that they:

(a) **misdirected themselves on the legal nature of consideration; and**

(b) **failed to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny, thereby coming to a wrong conclusion that the suit agreements were not supported by any consideration and wrongly accepted the respondent's version.**

Mr. Tibaijuka, Counsel for appellants, criticized the Court of Appeal for reversing the decision of the trial judge on the basis that there was no consideration. Learned counsel argued strongly that the learned Justices of Appeal misdirected themselves both on the applicable law and on the facts of this case as disclosed at the trial. He argued that the Justices failed to re-evaluate the evidence, as it is required of a first appellate court. He relied on several authorities including **Bogere Moses & Another Vs. Uganda** Criminal appeal No.1 of 1997 (S Ct) and **J.Muluta Vs. S.Katama** Civil Appeal No.11 of 1999 (S Ct). In those cases this Court emphasized that it is the duty of the Court of Appeal, when acting as a first appellate court, to re-evaluate material evidence before arriving at its own conclusions on the case. Learned counsel pointed out, and here I agree with him, that in his written statement of defence the respondent admitted payment by the deceased of Shs 1,150,000/= and Shs 160,000/= in respect of the purchase of plots No.654 and No.692. Further in the same written statement of defence the respondent admitted payment by the deceased of 560,000/= in respect of plot 655. Mr. Tibaijuka argued that the combined effect of the Sale Agreements (exhibits P1 and P2) and the admissions of payment at least of Shs 560,000 in his WSD show there was payment. There was

evidence from the respondent's mouth that the deceased paid shs 1.150,000/= (plus 160,000 paid to advocates) and latter shs 560,000/= in respect of plots 654 and 692 first and plot 655 later. That shows that there was consideration and payment. Counsel also argued that the omission by the respondent to Counter- claim for any alleged balance confirms the fact that the deceased had fully paid for the suit lands.

Learned counsel argued further that the Court of Appeal erred when it equated consideration with performance of the two contractual obligations created by the sale agreements. He relied on such cases as **Qadasi Vs. Qadasi** (1963) EA 142 and **Shiv Construction Co.Ltd.,Vs Endesha Enterprises Ltd** (1999)EA 329(S Ct).

For the respondent, Messrs. Nyanzi, Kiboneka and Mbabazi, Advocates, submitted the contrary.

They contended that the transactions between the deceased and the respondent were loan transactions and not sale transactions. Counsel lamented the manner and procedure in which the trial was conducted. Counsel lamented that reliance by the trial court on technicalities resulted in the exclusion of relevant evidence such as the **"fake"** exhibits, the transfer instruments, the bank statement and the respondent's evidence to prove that exhibit P1 and P2 were evidence of loan transactions.

Let me start by reference to undisputed facts. It is common ground that both the trial judge and the Court of Appeal found that on 13/11/1980 and on 6/5/1981 transactions touching the suit lands between, on the one hand, the respondent as proprietor of the suit lands and, on the other hand, the deceased and his transport company, took place. Counsel for both sides are agreed further that Exh.P1 and P2 state on their face that those two transactions were sales. It is also clear that there is no dispute that the respondent signed some instruments of transfer and that the transfers were effected in the names of the deceased.

During the trial, the trial judge rejected the respondent's evidence intended to vary the import of Exhs.P1 and P2. The purpose of the

evidence was to show that the two transactions were not sales. As I have already stated, the judge concluded that the two transactions were sales. The Court of Appeal held that ***"the transactions in this case were not supported by any consideration and therefore the present appellants are not entitled to the suit properties".*** I shall discuss the question of consideration a little later. For the moment let me consider the exclusion by the trial court of what the respondent's counsel described as relevant **"evidence"** which according to counsel was wrongly rejected by the trial judge.

This evidence consists of **"Fake exhibits,"** the **transfer instruments**, the **bank statement, exh.D2**, and that part of the respondent's evidence aimed at contradicting or varying Exh.P1 and Exh.P2. I find it convenient to begin with the expunging of the **"evidence"** of the respondent.

> I should preface discussion of this point with a reiteration of what I said earlier that the decision by counsel for the respondent in their closing address to acquiesce in the trial judge's ruling of 1/4/1997 weakened the argument that the trial judge erred in his decision to expunge some of the evidence. The purpose of that evidence was to contradict the contents of Exh.P1 and Exh. P2. It is my considered opinion first, that after counsel for the respondent explicitly declined to address court on issued No.2 (supra) the trial judge was entitled to resolve that issue in favour of the appellants. Secondly when, in the Court of Appeal, the respondent abandoned ground two (supra) of his memorandum of appeal the position on the expunged "evidence" remained as it was in the trial Court, namely, that the two transactions were sales. For the sake of clarity I again reproduce ground two.
>
> It reads-
>
> ***"The learned trial judge erred in law and in fact when he failed to apply or misinterpreted sections 90 and 91 of the Evidence Act……. thereby failing to find that exhibits P1 and P2 were illegal and invalid."***

I do not want to speculate on what were the intended arguments on this ground. However it should be noted that section 90 is concerned with evidence of terms of a written contract. The section reads:

"When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, no evidence……. shall be given in proof of the terms of such contract……. except the document itself"

In the decision of this Court [in **General Industries Vs. Non-Performing Assets Recovery Trust**]. Civil Appeal No. 5 of 1998 (unreported), Mulenga, JSC., at page 10 ably explained the import of both S.90 and S.91 of the Evidence Act.

> S.91 excludes oral evidence to contradict a written contract. This section is clear. It states:
>
> > ***"When the terms of any such contract, ……. have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms." [See*** **General Industries Case** *(Supra)].*

The provisos that follow do not affect this case.

> Mr. Mwesigwa Rukutana objected to the admissibility of evidence by the respondent that both exh. P1 and P2 were loan agreements and not sale agreements. The objection was in respect of evidence by respondent (as DW4) intended to contradict or vary both exh.P1 and exh.P2. I think that during his reply to the objection Mr. Ayigihugu substantially conceded to the objection when he said-
>
> > ***"It is true that where there is a document in writing oral evidence is inadmissible for the purpose of varying its written terms."***

This is exactly what the old S.90 (supra) of the E A provides. Yet Mr. Ayigihugu sought to rely on S.91 (Supra) to justify introduction of evidence to contradict the contents of the two agreements of sale.

The trial judge was not persuaded by Ayigihugu's arguments. So he rejected the evidence. I think that the trial judge acted properly.

The next question is what is the effect of expunging evidence which is on the record? Counsel for the respondent argued that once evidence is on court record it should be taken into account in deciding the case. He did not cite any authority to support this strange view. Counsel for the appellants contend that once evidence is expunged it ceases to be evidence and cannot not be taken into account. He criticized the Court of Appeal for relying on the expunged evidence to reverse the judgment of the trial judge.

I understand the meaning of the word **"expunge"** to be "***to blot out, delete, erase, efface or obliterate".***

The effect of the ruling of the trial judge dated 1/4/1997 was that as the evidence to vary the written sale agreement was inadmissible by virtue of **S.90** of the **Evidence Act**, that evidence was erased from the record. In theory the evidence ceased to be part of the record. The proper view should be that the trial judge could not take into account the said evidence when deciding the case. Appellants' counsel, argued that the evidence should never have been reproduced as part of the record of the Court of Appeal and of this Court. He did not provide authority to support this. However, a reading of **rule 82** of the **Rules** of this Court does not appear to show that expunged evidence should not be part of the record of appeal. It would seem that except for such documents or some other matters that were not admitted in evidence, any evidence that was adduced at the trial becomes part of the record of appeal even though at the trial it was ruled to be inadmissible. Parties may, where necessary, during presentation of arguments on appeal, draw court's attention to its existence to illustrate, for

instance, where a lower court went wrong. It should then be the responsibility of counsel to inform court that the record contains evidence which was expunged from the record. If in an appellate Court a complaint is made that the evidence was wrongly expunged, an appellate Court can rule on the correct status of such evidence. The appellate Court can say whether the trial Court acted properly in expunging it. The cases of **Libyan Arab Uganda Bank for Foreign Trade Vs Vassiliadis** (1987) HCB 32 appears to support this view.

I agree with the conclusion of the learned trial judge that the respondent's evidence whose purpose was to contradict the terms of exh.P1 and P2 was inadmissible under Ss.90 and 91 of the **Evidence Act.**

Instruments of Transfer and Bank Statement. The trial judge clearly ruled that the instruments were inadmissible.

Exh.D2 from the Bank is the most interesting of the evidence. It shows that the deceased's cheques for shs 560,000/=, 180,000/= and 200,000/= respectively, were never paid by Grindlays Bank. The Court of Appeal relied on this evidence (Exh.D2) for the view that the deceased did not pay the purchase price (at least for plot 655).

In this regard, I think that Mr. Tibaijuka was fully justified in his contentions that the Court of Appeal disregarded important evidence before it held that there was no consideration. In her lead judgment, Byamugisha, JA., said-

> ***"The sale agreement (exh. P2) set out the mode of paying the purchase price. The payment was by cheques. The appellant denied having been issued those cheques. The information from the bank (exh.D2) stated that the bank has never paid the said cheques. There is no other evidence of the consideration having been paid by other means. I think, with respect, the learned trial judge erred when he found and held that the full purchase price was paid."***

Clearly, information on Exh.D2 led the learned Justices of Appeal to hold erroneously that there was no consideration. In my opinion the

information on exh.D2 is misleading. With due respect, the learned Justices did not re-evaluate the whole evidence adequately before making the conclusions nor did they appear to have scrutinized the statement of defence. In paragraph 7 of WDS, the respondent averred that-

"The defendant states that as regards Block 16 plot 655 only 560,000/= was advanced to him……."

This is an unequivocal admission of the payment of Shs 560,000/=. As argued by Mr. Tibaijuka, payment was most probably made in cash as the respondent did not deny this payment in his oral evidence in Court. Otherwise the Bank holding the certificate of title would not have released the certificate to the deceased. Further the clearest explanation is found in the evidence of the first appellant.

> The first appellant as PW3 (see page 143) at the end of her evidence in-Chief firmly stated that the "house was sold and not mortgaged……. There was no loan to be paid by the defendant."
>
> During cross-examination by Mr. Ayigihugu she acknowledged that she and her husband, the late Jaggwe, together with their three young children were shared holders in the Transport Company. She explained (at page 144) that the company paid for the house on plots 654 and 692. As regards the name in the title deed this is what she answered. In the land office the plots are in the names of the late Sulain Jagwe. In the sale agreement it was made in the Company. I and the late Sulait Jaggwe first discussed and resolved that the title should be written in the names of the late Sulait Jaggwe." She explained that she and her husband used to discuss these matters at home. So she gave him all powers.

PW3 was thereafter cross-examined by Mr. Buyondo (page 160) on behalf of the respondent. She replied. I know that my husband Jaggwe bought two houses from the defendant. He first bought the flat in 1980 early. He paid for the house fully. There were tenants but they were evicted by the late Jaggwe. We made it our residence.

Later on, the later Jaggwe bought a second building in 1981 and quarters. I know that the deceased paid fully for the second building. I know that the purchase price was paid for fully but by installments.

I know that the purchase price was fully paid and that there is a letter written by the defendant authorizing or instructing ***Housing Finance*** *to hand over the 3 title deeds to the late Sulait Jaggwe. The late Jaggwe rented it to tenants. I did not collect rent from second house. We left the place after the death of our late husband. The defendant told us to run away."*

On 1/4/1997, (page 214) the respondent testified in Court about Exh.P2. He only claimed that ***"the cheques stated in paragraph (b) of exh. P2 were not given to me"*** He was obviously referring to shs 160,000/= and shs 200,000. He said nothing about the cheque for shs 560,000/= which is mentioned in the earlier paragraph (a) of the same exh. P2.

Later on in his evidence in-Chief the respondent stated (page.215 of the record).

"I had deposited Exh. P1 and P2 as securities for the money he (Sulaint) had loaned to me. I saw his wife Kasifa Namusisi. He (sic) took me to their lawyers Sendege. I explained to them regarding Exhibit.P1 and exh. P2."

I go to all these lengths to show that there is evidence of payment.
In his evidence the respondent obviously admits receipt of the money. His visit to "Sendege" was long after the disappearance of the deceased. There can be no doubt at all in my mind that the respondent had received money from the deceased. Had the learned Justices of Appeal considered this evidence they would have inevitably concluded that the deceased paid money to the respondent in respect of the sales. There was therefore consideration and also performance of the contracts of sales.

Instruments of tranfer:

Normally under the old S.91 of RTA a registered proprietor of land or of a lease or of any estate may transfer his interest by a transfer in one of the forms set out in the seventh schedule. The respondent testified that he signed transfer forms. As a result, the deceased was registered as proprietor of the suit lands. When the appellants instituted the action in the High Court, they annexed the sale agreements (exhs.P1 and P2) to the plaint. They did not annex the transfer forms or copies thereof signed by the respondent, perhaps because there was no obvious need to do so. In any case there is no obligation for a purchaser of land to retain copies of transfer forms. Moreover in his written statement of defence, the respondent admitted in **paragraphs 4, 5 and 8** that he transferred the suit lands to the deceased. He repeated this explicitly in his counter-claim which was set out in paragraph 10 of his defence and counterclaim. Contrary to what Byamugisha, JA, stated in her judgment, the respondent never annexed copies of the transfer forms to his written defence.

The first appellant, Kasifa Namusisi, testified as PW3. During cross-examination, Mr. Ayigihugu, counsel for the respondent, at the trial, apparently showed a "transfer form" dated 7/5/1981 in respect of plot 655. The 1st appellant said it bore signatures of the respondent and of the deceased but said that the ones she had seen previously were different. The purchase price was 940,000/= and not 20,000/=.

Mr. Ayigihugu then showed the 1st appellant a transfer instrument purporting to relate to plots 654 and 692. She asserted that the signature appearing on it purporting to be that of the deceased was forged and doubted the genuineness of the signature of the advocates. Mr. Ayigihugu successfully got a Court order directing the 1st appellant to produce true copies of the genuine transfer forms. The forms which were shown to Kasifa Musisi were not put in evidence at that stage. She reported back subsequently that officials in the registry in the land office were unhelpful. The appellants closed their case. The respondent had not tendered any transfer forms in evidence at that stage of the proceedings.

The defence called Robert Opio (DW2). He was a Registrar of Titles in mailo land office. He testified that Block 16 plots 654,692 and 655 were registered in the names of the appellants and one other person on 30.6.1987 under instrument No.K 125447. They were administrators of the estate of Sulaiti Jaggwe. Jaggwe had been himself registered on 27/11/1980 under instrument No.KLA96590 in respect of plots 654 and 692. He had also been registered on 8/5/1981 under instrument No.KLA 96590 in respect of plot 655. Consideration in the former was alleged to be shs 100,000/= and in the latter as shs 20,000/=. The transferor in both cases was Ntabaazi, the respondent. When DW2 was to tender in evidence copies of the instruments of transfer, counsel for the appellants objected to the whole of his (DW2's) evidence on the main ground that since in the written statement of defence, transfer of plots to the deceased was admitted there was no need to adduce DW2's evidence to the same effect. The validity of registration was not challenged. Further, lack of consideration was not pleaded as defence nor in counterclaim. Mr. Ayigihugu resisted the objection contending that the instruments of transfer should be admitted to prove inconsistency between the amounts paid as reflected in exh.P1 **and P2 on the one hand and the instruments on the other.** He did not say the transfers were fraudulent or that none was ever executed.

In his ruling dated 21/11/1996, the learned trial judge upheld the appellants' objections because;

(a) *Initially when the 1st appellant went to the land office searching for instruments of transfer, she was told by land office officials that the same could not be traced.*

(b) *The earlier claim by the 1st appellant that signatures of the deceased on the transfer forms were forged had not been disproved.*

(c) *The issue of variance as to consideration should have been pleaded under 0.6 rule 10 of CP Rules Evidence to prove it cannot be adduced.*

After that ruling the defence abandoned DW2 as a witness. So the

instruments were not tendered in evidence. I do not with respect appreciate how the learned Justices of Appeal could look at and rely on documents not admitted in evidence at the trial to bolster the respondent's case. A situation similar to this arose in **Dhanji Ramiji Vs Malde Timba** (1970) EA 422. An appellant was cross-examined on an affidavit at the trial but the affidavit was not admitted in evidence. On appeal in the E.A. Court of Appeal, appellant's counsel sought to rely on that affidavit to support appellant's case. The E.A.Court of Appeal, held that it could not look at the affidavit as it was not part of the evidence at the trial.

CONSIDERATION

I turn now to the question of whether or not the Court of Appeal was justified in its conclusions that there was no consideration at all and therefore there were no valid sales of the suit lands.

As stated earlier, Lady Justice C.N. Byamugisha, JA., gave the lead judgment with which the other two members of the court agreed. In her lead judgment, the learned justice -

(a) *Criticized the trial judge for upholding Mr. Mwesigwa Rukutana's objection to the admissibility of the evidence of the land office registrar (DW2). That the rejection was premature.*

(b) *She stated that the respondent had attached to the written statement of defence two copies of instruments of transfer* ***(I have studied the WSD but I did not find any indication that the transfer instruments were annexed to it).***

(c) *Consideration stated in both instruments of transfer is less than what the witnesses say was paid for the properties,*

(d) *There was no evidence of instrument signed by the (transferor) transferring his interest to the deceased for the consideration paid by the deceased. (Actually in his evidence the respondent admitted signing the forms).*

(e) *If indeed payment was made fully, there was no evidence of acknowledgement by the seller.*

(f) *The burden shifted to the (buyers) to prove that the purchase price mentioned in the sale agreements was*

actually paid and received by the vendor.

It is true, as I said earlier, that the old section 91 of the RTA stipulates that a proprietor of land may transfer his interest in that land by a transfer in one of the forms set out in the 7th schedule to the Act. It is also true that in the case of payment of money as the purchase price, a sum of money as consideration may be mentioned in the transfer form. But with respect I do not think that the learned Justice of Appeal was justified in ignoring the relevant portions of the respondent's written statement of defence and of his own oral evidence on oath in court acknowledging -

(a) The initial payment of shs 1,310,000/= in respect of the sale of plots 654 and 694.

(b) The initial payment of shs 540,000/= in respect of sale of plot 655.

These two are part performance of the contracts and are fulfillment of consideration.

The respondent is a medical doctor, an educated man who at the time of the two transactions was aged 56 years, having been in practice apparently for quite some time. According to his own evidence he had borrowed money from banks. He can be credited with knowledge of operations of banks for he had obtained at least two bank loans. It is evident from his own evidence that he had provided the suit land to the Finance Company and to Grindlays Bank to secure the two separate loans which were obviously in arrears of payment. It is difficult to imagine or assume that with that type of the respondent's background, he could ask the deceased to act as a good Samaritan by himself (deceased) borrowing money from his own bankers, on security of the titles of the respondent so as to give that same borrowed money to the respondent for no consideration. The defence did not offer a plausible or any explanation of what benefit the deceased derived from each of the two transactions if the transactions were to be treated as mere loans? Was the respondent expected to pay any interest on the two loans and if so how much? We do not know. What was the period of the repayment of the loans? We do not know. Is it practically plausible that the deceased would have agreed to lend shs 4.5m/=

to the respondent, pay in part only shs 1,3100,000/= within a day or two days upon the execution of **"Sale agreement"** but fail later to release the balance of shs 3,650,000/=? Would it be a reasonable inference to make that after the deceased had failed to pay to the respondent that remaining balance of shs 3.650,000/= on the first alleged loan, the two would enter into a fresh loan agreement barely six months later for a further loan of shs 940,000/= out of which only shs 560,000/= is released? It needs a lot of convincing for any reasonable person to accept the respondent's evidence that while the deceased had allegedly failed to complete payment of shs 3.650,000/=, the same respondent would agree to receive another part payment on a fresh loan and go further to sign transfer forms and allow the deceased to be registered as proprietor of the respondent's properties. The respondent would not so easily allow the deceased to redeem title deeds from the two banks, transfer suit lands to deceased before the balances of loan money was given? Like the trial judge I am not convinced by the version of evidence given by the respondent.

These questions must have been uppermost in the mind of the learned trial judge when, during the testimony of the respondent, the judge observed (page 200)that-

> ***"This witness is a liar. I find it inconceivable that he again went to Sulaiti Jaggwe who refused to lend him the full amount of shs 4.5 million in regard to his certificate of title deeds of houses in Block 16 plot 692 and 654. As if that was not sufficient disappointment to him, again went to Sulaiti Jaggwe to borrow shs 940,000/= in regard to his property in Block 655 in regard to which Sulaiti Jaggwe also refused to lend him the money, in both cases after the witness had transferred the certificate of the title deeds in the names of Sulaiti Jaggwe."***

This passage should be understood in the context of the fact that earlier, on the same day, while the respondent was still testifying before the learned judge in examination in-chief claiming that she

4.5m/= was a loan and not a sale, the learned judge noted that -

"Witness avoids questions."

> The trial judge was in a better position to see and observe the demeanour of the respondent whom the judge found unreliable and that is why he disbelieved the respondent and believed the appellants that the transactions were sales and not loans. It is well settled that an appellate court will always be loath to interfere with a finding of fact arrived at by a trial judge and will only do so when after taking into account that it has not had the advantage of studying the demeanour of a witness it comes to the conclusion that the trial judge is plainly wrong. **See Jiwan Vs Gohil** (1948) 15 EACA page 36 and **R.G.Patel Vs Lalji Makaiji** (1957) EA 314.
>
> Whilst the trial judge can be criticized for rejecting the evidence of DW 2 before he wrote the judgment, on the facts, it is reasonable to conclude that he would have attached little weight on the amounts stated in the instruments even if he had not excluded them from evidence, in view of the evidence of the 1st appellant and in as much as the instruments would have had little effect, if any on the respondent's case.

In these circumstances and on the evidence available, I respectfully agree with Mr. Tibaijuka's criticism of the Court of Appeal that the Court erroneously equated **"consideration"** with performance. The two doctrines mean different things in the law of contract, as I understand that law. Consideration in crucial at the time the contract is formed and its sufficiency is really not the business of the Courts.

> In my opinion even if it were assumed that not all the money for the sale had been paid this would not affect the efficacy of the sale agreements in regard to consideration.

The story of the alleged loan transactions is a mystery. It is as mysterious as the fact that the deceased, who together with his company purchased the suit lands, disappeared within weeks after he entered the suit premises. According to the 1st appellant, soon

after the disappearance of Sulaiti Jaggwe, the respondent advised her to vacate the premises and run away which she did. Later she asked the respondent to get her tenants. The respondent is evasive in his evidence in court on this matter. In his evidence he admits visiting one of the advocates of the appellants to explain exh.P1 and P2. This appears to have been in 1986, long after the death of Jaggwe (page.215).

There is evidence (exh.P8) which is a letter, written on 18/4/1986, to Mr. Buyondo, who was the second counsel for the respondent at the trial, indicating that the respondent attempted to have the sale agreements changed into something else. This letter is very revealing. Like the trial judge I consider it imperative to reproduce its contents in full:

18th April,1986

Y.S.Buyondo ESQ.,
Advocate,
P.O Box 4550,
KAMPALA.

Dear Sir,

RE: RESIDENTIAL PREMISES ON KIBUGA BLOCK 16 PLOTS 692 AND 554 SITUATED AT NDEBA TRADING CENTRE - SULAIT JJAGWE

We refer to your letter dated 9th April, 1986, related to the above premises, we have to reply as follows: -

1. Our documentary evidence in our hands from the beginning reveals that the vendor your client, did sell the properties to Mr. Sulaiti Jjagwe, the bona fide purchaser for value and registered Mailo proprietor of the said properties.

2. ***At the time of the transaction for the said properties,***

between Mr. Francis M.K. Ntabazi and Mr. Sulaiti Jaggwe, our Paul Masaala, Esq., asked your client "Your name is famous in Ndeba; Why are you selling your premises? Mr. F.M.K. Ntabazi replied I am going to the village to settle, I am tired of the city life.

3. ***Your client came to our office last year, and requested our Paul Musaala Esq., whether it can be possible to alter the complete executed contract. Our Paul Masaala Esq., did not accept his request.***

4. ***We may have to remind you perhaps that the Estate of Sulaiti Jaggwe is for the beneficiaries who are minors and no person has right to negotiate or change any complete EXECUTED CONTRACT OR TRANSACTION without the consent and approval of the Court of Law.***

Thanking you and with all good wishes.

Yours faithfully,

For MUSAALA & CO.

cc. ***The Applicants of Management Order,***
Sulaiti Jaggwe's Property.

A copy of this letter was handed to the first appellant by Musaala himself after he had read its contents to her. Since a copy was addressed to her as one of the applicants for the management order, she proved its authenticity: See **Dhanji Ranaji Vs Malde Timber** (1970) E.A.422 at page 425.

The learned trial judge relied, justifiably, partly on **S.30(b)** of the **Evidence Act** and admitted the letter. Section 30 (b) of the Evidence Act reads as follows:

"30: Statements, written or verbal, of relevant facts, made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, …… are themselves relevant facts in the following cases -

(a).

(b). When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty. or of the date a letter or other document usually dated, written or signed by him."

The letter is admissible because:

- It is relevant.
- Musaala, its author is dead.
- Musaala wrote it in ordinary course of business and in the discharge of professional duty.

These are the requirements stipulated by S.30 (b). See **Commissioner of Customs Vs Panachand** (1961) EA. 303 at P.307 where an identical provision in the Kenya Evidence Act was interpreted.

Neither Mr. Ayigihugu nor Mr. Buyondo (to whom Musaala had written the letter) cross-examined the first appellant on it. Mr. Buyondo did not deny that Musaala wrote it to him. When Mr. Buyondo joined Mr. Ayigihugu in objecting to the admissibility of the letter, he stated.

"We are not challenging the document. All we are saying is that we cannot cross-examine the witness on it."

Indeed this letter was a reply to a letter written a week earlier by Buyondo. So he could not challenge it. In relation to the letter the 1st appellant gave the following pertinent piece of evidence.

> ***"As I was leaving Musaala's Chambers, I met the defendant going to Mr. Musaala's office. I discovered later when I went back to Musaala's Chambers, he give me a copy of a letter addressed to Mr. Y.K.Buyondo I know the contents of the letter. Mr. Musaala read its contents to me. It informed Mr. Buyondo that the Sale Agreement be changed (sic) into mortgage agreement."***

The first appellant visited Musaala on 24/4/1996. That is nearly a

week after 18/4/1996, the date on which the letter was written. The letter shows that the respondent changed his mind nearly 5 years after the execution of the sale agreements and of the transfer of the suit lands. Although in his evidence (page 216) the respondent denied visiting Musaala's Chambers, he nevertheless claimed that he only visited M/S Sendege & Co. Advocates. He did not explain why he visited Sendege. His denial may well be a lie because apparently it was Musaala who was handling the affairs of Jaggwe's family. It is rather a pity that Buyondo's letter itself was not put in evidence. A perusal of the evidence of the first appellant shows that not only was she resilient when testifying in court but she appears to have been consistent throughout her testimony. No wonder the learned trial judge was so impressed that he concluded that the **"evidence of Kasifa Namusisi, PW3, was not dented in cross - examination".** This clearly shows that the trial judge was impressed by the first appellant. But not so impressed by the respondent whom, as I noted earlier, he found to be a liar and for which he has been unjustifiably criticised.

Although the trial judge did not repeat this impression of him (about the respondent) in his judgment, a perusal of his rulings especially, those of 6/9/1995 and of 1/4/1997 clearly shows that he was impressed by the 1st appellant.

Learned counsel for the appellants argued forcefully that the Court of Appeal misdirected itself on the legal nature of consideration. I have already alluded to relevant evidence showing consideration.

Under the English Law of contract which is the applicable law in Uganda, consideration is important. **"An Act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable."** See **Cheshire, the Law of contract, 8th Edition,** at page 60. Thus the doctrine of consideration implies or means reciprocity. The notion of reciprocity is crucial to the idea of contract. There is a wealth of case law in this country and in East Africa illustrating the operation of the doctrine of consideration.

Some of the cases cited to us include **Qadasi Vs Qadasi** (1963) EA. 142, G.M. **Combine (U) Ltd. Vs. A.K. Detergents & others (1999)** EA 84 and **Shiv construction Co, Ltd Vs Endesha Enterprises** (1999) EA. 329. In paragraph 5 of his statement of defence and in his evidence, the respondent contended that he could not have sold the said properties at such a low price if it was in fact a sale. However, apart from his averments in the WSD and his own opinions in Court, the respondent produced no particular evidence to show what was the actual price of the suit lands at the time material to this case. In regard to low price, Wambuzi CJ, as he then was, observed in the **GM Combine case,** at page 93/94 that:

> ***"I wish to point out here, if I may, that on the appellants 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 <u>Chapell and Co. Vs Nestle Ltd</u>. (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"***

In the **Qadasi case** the Court of Appeal for East Africa discussed the doctrine of consideration and its sufficiency.

The appellant and the respondent had for many years prior to 29th May, 1949, been running under an agreement known as "Zam" a bakery which they had purchased many years earlier, and on that date they renewed the agreement in writing. A **"Zam"** was the name given in Aden to a type of agreement in use there whereby two persons agree to share a business turn and turn about. The renewed agreement provided, inter alia, that each party would run a bakery for a period of six months, that each was bound to take over his turn on the day it was due and that if he refused to do so the other would have the right to claim damages or compensation.

The agreement also provided that in the event of either party refusing to hand over the bakery on completion of his turn, he would be liable to pay the other party a sum of Rs. 20/- per day until the bakery was handed over. On April 13, 1961, the appellant filed a suit in the Supreme Court of Aden claiming that the respondent's **"zam"** had expired on January 4, 1961, and that the respondent had refused delivery to the appellant for his turn and the appellant claimed a declaration that he was entitled to six months' **"zam"** and a decree for specific performance and compensation at the rate provided in the agreement. In his defence the respondent alleged that the appellant was "given" **the zam as being the son-in-law and servant of the respondent** and that he had broken the agreement by failing to run the bakery for about five months, necessitating expenditure on repairs and replacements, and that, therefore, he had informed the appellant that he "would not like to continue the zam". He also denied the claim for specific performance, alleging that there was no **consideration for the zam agreement** and that the appellant was himself in breach of the agreement and was guilty of laches. The Supreme Court held that there was no consideration to support the agreement in question and dismissed the suit on that ground. Thereupon the appellant appealed and the respondent filed a cross-appeal contending that the decision of the Supreme Court should be affirmed on other grounds. The Court of Appeal for Eastern Africa allowed the appeal and held that -

(i) the agreement of May 29,1949, contained reciprocal promises in that each party undertook to run the business in turn for periods of six months and thereafter to hand it over to the other.

(ii) these promises had value in the eyes of the law for each party had an interest, with financial implications, in having the business continuously operated in order that customers would be retained and the goodwill thereby maintained, consequently.

(iii) there was accordingly consideration sufficient to support the

agreement.

PAYMENTS OF PURCHASE PRICE

On the question of payment of the full price the pleadings in this case are instructive, I think. As I stated earlier, the appellants pleaded in para.5 of their original plaint drawn as follows: -

> ***"5 The cause of action arose as below : -***
> ***That on the 13/11/1980, the defendant sold land comprised in Kibuga Block 16 PLOT 654, and 692, Ndeba and on the 6/5/1981 sold land comprised in Kibuga, block 16 plot 655, Ndeba to the late Suilati Jaggwe, as per copies of agreements of sale attached hereto and marked "Annexture A and B". That after the said sale the defendant signed transfers in favour of the said deceased, who became registered proprietor thereof".***

The two sale agreements exh.P1 and P2 show that the first sale was for shs 4.5m/= and the second sale was for shs 940,000/=. The respondent appears to have filed his written statement of defence in court on 3/10/1988. In its paragraphs 5, 6, and 7 the respondent averred as follows: -

> ***"5 The defendant will contend that he could not have sold the said properties at such a low price if it was in fact a sale. That the agreement between late Sulaiti Jaggwe and defendant was that after the payment of the money lent to the defendant, the late Sulaiti Jaggwe would execute the transfer in favour of the defendant.***
>
> ***6.The defendant will contend that he was repaying the money advanced to him by the late Sulaiti Jaggwe by crediting the late Jaggwe's account with Grindlays Bank A/C No.297-664 copies of available bank slips are attached hereto and marked annexture 'A'.***
>
> ***7. The defendant states that as regards block 16 plot 655 <u>only shs 560,000/= was advanced</u> to him. The***

sum of shs 380,000/= was not advanced because the bank had not released the funds to the late Sulaiti Jaggwe."

Here no where does the respondent deny in his written statement that shs 4.5m/= was not paid. If part of it had not been paid, the obvious inference is that the respondent would have stated so as indeed he did in paragraph 7 in regard to the part payment for plot 655. In these circumstances the learned trial judge was entirely justified in rejecting the respondent's evidence which he gave at the trial claiming that the deceased only deposited shs 1,316,000/= in respect of part payment of plots 654 and 692. The evidence of the respondent denying payment of the balance of shs 3,690,000/= is an unexplained departure from his pleadings and this tends to support the trial judge's finding that the respondent was lying. The decision of this Court in **Akisoferi W.Biteremo Vs Damscus Munyanda Situma** (SCC Appeal No.15 of 1991) (unreported) supports the view that a party who departs from his pleadings and gives evidence contrary to his pleadings would be lying.

I note that during the trial and before the appellants closed their case, they were allowed to again amend their plaint. On 19/4/1993 the new plaint was served on Messrs. Ayigihugu & Co, Advocates, who were lead counsel for the respondent. In subparagraph (iii) of paragraph 5 of the new plaint, the appellants averred:

"That on completion of payment of the purchase price, the defendant signed transfer forms in favour of the deceased."

Apparently, the respondent did not file an amended or any other written defence to deny the above averment. It was only when he was testifying in Court on 5/2/1997 that be cleverly denied payment of the balance. This is what he stated in evidence in chief (page 193).

"Sulaiti did not pay all the 4.5million. He paid me shs 1,150,000/= plus shs 160,000/= which he paid to M/s. Musaala and Co, Advocate. I signed the agreement between me and the Company Hardworking Sulaiti

Jaggwe signed the agreement for the Company Uganda Hardworking."

(Court, Exh. P1 is given to the witness who identifies it as Company Uganda Hard Working).

The witness then continued.

"Apart from paying shs 1.150,000/= and shs 160,000, I was not given the balance of shs 4.5 million. Exh.P1 shows model of payment. Agreement shows shs 1.150,000/= was paid and shs 160,000/= was paid. Balance of shs 3,190,000/= was not paid. <u>It was to be paid after transfer of the certificate of title in his names.</u>
This was a loan. I was going to pay by installment."

At that point it seems the respondent was avoiding answering certain questions from his own counsel which prompted the trial judge to note that: -

"WITNESS AVOIDS QUESTIONS"

The respondent continued testifying in chief in the afternoon of the same day. Adjourning the hearing the learned trial judge made the following pertinent note on the record. I have already quoted it but for the sake of emphasis I quote it again.

"Court: This witness is liar. I find it inconceivable that he again went to Sulaiti Jaggwe who refused to lend him the full amount of shs 4.5 million in regard to his certificate of Title Deeds of houses in Block 16 Plots 692 and 654. As if that was not sufficient disappointment to him, he again went to Sulaiti Jaggwe to borrow shs 940,000/= in regard to his property in Block 655 in regard to his which Sulaiti Jaggwe also refused to lend him the money in both cases after the witness had transferred the certificates of the title deeds in the names of Sulaiti Jaggwe."

In his written arguments, the respondent's counsel argues that these observations show that the trial judge was prejudiced against the respondent. I would point out that a judge is perfectly entitled and

has power under **Order 16 Rule 9** of the CP Rules to the following effect-

> ***"The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination"***

Obviously this rule enables a trial judge to record instantaneous impressions he gains about a witness while the impressions are fresh. Such impressions are instructive in evaluating the credibility of witnesses. In deciding a case a trial judge can legitimately use his impressions of the witness to determine whether to believe the witness or not. That is proper.

In this case on that day when the note was made, the respondent had been testifying before the learned judge since morning. Earlier in the morning the judge had observed that the respondent **"avoids questions".**

In these circumstances and taking into account the contents of both the plaint together with contents of Exh. P1 and P2, on the one hand, and the written statement of defence, it is my considered opinion that the learned trial judge was justified in accepting the version of the evidence given by the appellants in preference to the version given by the respondent.

The learned Justices of the Court of Appeal criticised the trial judge for rejecting the instruments of transfer which the respondent's counsel attempted to introduce in evidence and so the learned justices held that the judge erred in that regard. The court further held that there were no instruments of transfer to support the appellants' claim that the suit lands were properly transferred to them.

As I said earlier in this judgment, I think with respect that Lady Justice Byamugisha misdirected herself on the facts when she stated that copies of instruments of transfer were attached to the written statement of defence. Nowhere does the written statement of defence say so nor did any witness for the respondent testify to that effect. The respondent himself did not claim this. The only annextures to WSD were **"available bank slips."** These were not

produced as evidence as their authenticity was lacking.

Further, it must be noted that the question of lack of the instruments was not an issue for the trial judge to determine. Both in his written statement of defence and in the counterclaim (para 10) the respondent averred that he signed instruments of transfer and that the process of transfer was effected. He confirmed this in his oral evidence in court. The certificates of title which were produced in court show that the suit lands had been duly transferred to the deceased. The written statement of defence did not allege that the transfer was fraudulent. The respondent did not give evidence in Court to challenge the validity of the transfer. In the circumstances, the learned judge was correct in holding that the certificates of title were conclusive evidence of title to the deceased. The old sections 56, and 184 of RTA which are relevant to this case support this holding.

The issue of the deceased having made payments by cheque are irrelevant. I have already discussed the payments. It must be noted that exh.P2 [in paragraph (a) thereof] shows shs 560,000/= was paid by cash cheque. Although the letter from the bank states that no cheque for that amount was paid, the respondent himself acknowledged receipt of shs 560,000/= as first payment in respect of plot 655. The irresistible inference must be that the deceased paid the money either in cash or by another cheque. Otherwise the respondent could not have acknowledged that the money was paid. Indeed, the certificate of title for plot 655 was redeemed from Barclays Bank after that payment before the deceased was registered as proprietor.

The question of the respondent remaining in possession of the buildings as owner is not credible.

The 1st appellant impressed the trial judge. Therefore her evidence that she and other appellants allowed the respondent to collect rent for them must be accepted as against that of the respondent whom the judge found to be a liar. The respondent never counterclaimed for any balance. His claim that he was repaying the deceased's loan is an afterthought and was justifiably rejected by the learned trial judge. In view of what I have said before, the evidence of the banker is not helpful to the respondent's case.

In the circumstances, and with all due respect to the learned Justices of the Court of Appeal, they erred in their conclusions that:

- There was no consideration;
- If the deceased was a purchaser, the properties would not have remained in possession of the seller.

In my opinion there was consideration disclosed on the face of the transactions. Even if no full payment had been made as claimed by the respondent the remedy for the respondent is not hard to find. The two agreements provided for the course of action.

> Ground one of the appeal ought, therefore, to succeed. As it is the foundation of this appeal, this conclusion would dispose of this appeal. I see no need to consider the rest of the grounds. The ground for affirming the appeal is dismissed with costs to the appellants.

Money Lenders Licence

Counsel for both sides were prompted by Court to address us on a question which was not canvassed in the two Courts below, whether both transactions are enforceable. Counsel for the respondent contended that the transactions are unenforceable because there is no evidence to prove that the deceased, an alleged money lender, had a valid moneylender's licence as required by the provisions of the **Moneylenders Act**. It is also argued that Exh.D1 is evidence that the deceased was a moneylender.

> I think that exh.DI cannot be a basis for the view that Jaggwe was a money lender. Assuming that it was a loan agreement, between himself and his brother in-law, there is no credible evidence explaining why Exh. P1 and P2 were not couched in similar terms as Exh.D1, which was executed in 1976, namely that the transactions were loans. Anyway the first appellant satisfactorily explained the status of exh.D1 in her evidence.

I would have dismissed in a few words this question of contravention of the **Money Lenders Act**. I am forced to discuss it a little more because of its controversial nature and because of the opinion of my learned brother, Kanyeihamba, JSC.

In view of the provisions of section, 22 of the **Money Lenders Act** and on the evidence available in this case, it would amount to a travesty of justice to hold that the sales were loans affected by S.3 of the Act. With respect to counsel for the respondent I think that he has misinterpreted S.22 (1) (c) of the Act.

There is no evidence at all on the record showing that the deceased had no moneylender's licence as required by section 3 of the **Moneylenders Act** or at all. Indeed in his own evidence, the respondent was non-committal on this point. At page 216 of the record during cross examination, he stated that

"I did not know that the late Sulaiti Jaggwe had money lenders licence."

Besides, as I stated earlier, at the trial no issue was framed for the determination by the trial judge about whether the deceased was or was not a money lender and if he was, whether he had a valid moneylender's licence. If such licence had been in issue, no doubt it would have been framed and determined on the evidence available. I can assume (wrongly or correctly) that most likely if the deceased was a moneylender, he had a valid moneylender's licence. That is why no issue in that regard was framed. Indeed even in the Court of Appeal, this point was not raised. The appellant's counsel has argued that the transactions were not loans as claimed by the respondent but that the transactions were sales as found by the trial judge. I have considered this when discussing the first ground of appeal.

There is also a suggestion that the Memorandum of Association of the Transport Company did not allow the company to buy land. My Lord the learned Chief Justice has discussed this point. Paragraph 3(b) of that Memorandum of Association of the Transport Company shows that the company could acquire real property.
There is a further suggestion that exh.P1 confirms that shs

4.5m/= was a loan. A proper reading of all the provisions of exh.P1 does not suggest in any way at all that the transaction was a loan to the respondent. It actually states that shs 1,150,000/= was to be used to repay the respondent's loan in the Finance Company so as to redeem the title deeds from there.

Because of the erroneous interpretation of the first sale agreement. I am forced to reproduce the contents of it (exh. P1).

REPUBLIC OF UGANDA

AGREEMENT OF SALE

VENDOR: **DR.F.M.K.NTABAZI** of P.O Box 1501, Kibuye/Kampala, Uganda.

PURCHASER: UGANDA HARDWORKING TRANSPORT & TRADING COMPANY LIMITED, P.O Box 1151, Kampala, Uganda.

SUBJECT MATTER: Land on Kibuga Block 16 Plots No.692 and 654, together with a House/Building having Up-stairs as under:

(a) Ground Floor consisting of one big shop in front of it, one big garage, 2 big rooms, stores, toilets, 2 small rooms and a passage.

(b) Up-Stairs consisting of one dinning room, one sitting room, big kitchen, 4 bed-rooms, bath-rooms, toilets, a passage, a verandah, and three other rooms. Situated at Ndeba Trading Centre on Masaka Road. The said Building/House is the second from Masaka side to that of Dr. F.M.K.Ntabazi's Building (the vendor) and from Kampala side it is the third. The said Building/House, was built of concrete Blocks and thatched with concrete.

PAYMENT CONSIDERATION: Shs.4.500,000/= (shillings four and half million).

PAYMENT: (a) Shs.160,000/= (shillings one hundred and sixty thousand) paid in cash to the vendor by the Purchaser on the date of signing this agreement of sale.

(b) Shs.150,000/= (shillings one million, one hundred fifty thousand only, is paid on cheque No.H/A 433888 of 13/11/80 payable to **Housing Finance Company of Uganda Limited,** P.O Box 1539, Kampala, Uganda, **being loan on account No.U.1550, obtained by the vendor referred to herein, from the said Company.**

(c) That the balance of Shs 3,190,000/= (shillings 3 million nineteen hundred thousand is to be paid to the vendor by the purchaser as soon as the vender signs the Transfer Forms, for the transfer of the said building together with the land referred to above.

(d) That the vendor is responsible to pay for all electricity charges in arrears and rates to the City Council of Kampala up to the date hereof.

OTHER TERMS: (a) The vendor referred to above has handed over the said Building/House referred to above to the Purchaser together with all keys to be the property of the purchaser from the date of signing this agreement of sale.

(b) That the Title Certificates of the said land were deposited with the above mentioned Company for loan and shall be handed over to the Purchaser as soon as payment for

loan has been made by the Purchaser as per para (b) payment hereof.

(c)
……
……

(d) That in default of either party to comply with the terms and conditions as stated herein above, such default shall be referred to Court of Law.

IN WITNESS WHEREOF, the parties hereunto have set their respective hands at Kampala this 13th day of November, one thousand Nine hundred and Eighty.

SIGNED by the said
DR.F.M.K. NTABAZI ----------

In the presence of

SIGNED by the said
SULAITI JAGWE ----------The Managing Director
For and on behalf of
UGANDA HARDWORKING TRANSPORT & TRADING COMPANY LIMITED
In the presence of:

I certify that the contents herein were first read over and explained to them when they appeared fully to under-stand the same.

Filed by: -

M/S. Musaala & Co.
Advocates,

P.O Box 4804,
Kampala.

The problem with this agreement is the draftsman's language and style.
Whilst the whole document must be read to understand where and for what purpose the certificates of title were deposited, it is the careful reading of (b) under PAYMENT and (b) under OTHER TERMS which brings out where the certificates were deposited and for which loan. Thus (b) under PAYMENT clearly shows that the respondent had to clear with Finance Company a loan of Shs 1,150,000/= whereas (b) under Other Terms indicates that the Finance Company held the Title deeds because of the respondent's loan of shs 1,150,000/=. The title deeds would be released to the purchaser after the purchaser pays shs 1,150,000/= to the Finance Company on behalf of the respondent. The respondent states so in his evidence.

From his own mouth this is what the Respondent said during examination in-chief (page 193).

> ***"I had the security but it was in the Housing Finance of Uganda. I had deposited the security, i.e., the title deed for a loan of shs 1,150,000/= from Housing Finance of Uganda. He redeemed the title deed by paying shs 1,150,000/=. The certificate of title was in respect of Block 16 Plot 692 and 654."***

The respondent claimed that the deceased needed the agreements in order to be able to raise money from his banks so as to lend that borrowed money to the respondent. This sounds ridiculous. The irresistible inference I can draw from the two transactions is that in either case the respondent had probably defaulted to repay the banks loans and that each of the banks might have been poised to dispose off his property. Fearing the worst, the respondent must have opted to pre-empted that by offering his property to the deceased to buy. That is the rational explanation. I find it extremely difficult to accept that out of whatever humanitarian motivation or

considerations, the deceased would take all the trouble to obtain loans from banks for purposes of only lending the same money to the respondent to enable the latter to redeem his property. Neither the respondent in his written statement of defence or in his evidence nor the agreements tell us the benefit which the deceased derived or would derive from such arrangement. Secondly both in the Court of Appeal and in this Court, the issue was not raised or pursued as an independent ground of appeal. This is because it was never an issue at the trial.

Assuming, for the sake of argument, that the deceased was a moneylender and that in that capacity he, or his Transport Company, lent money to the respondent, there is a provision in the **Moneylenders Act** which excludes the application of the Act to the two transactions. At the request of the court, counsel for the two sides belatedly presented written arguments on this point. The provision is section **22(1)(c)** of the **Moneylenders Act [Cap 264 of 1964 (Revision of Laws of Uganda)** which is now S.21 of Cap.273]. It reads:

"S.22 (1) This Act shall not apply-

(a)

(b)

(c) to any money lending transaction where the security for repayment of a loan and interest on the loan is affected by execution of a legal or equitable mortgage upon immovable property or of any bona fide transaction of money lending upon such mortgage or charge.

(2) The exemptions provided for in this section shall apply whether the transactions referred to are affected by a money lender or not."

It would be contrary to known standards of statutory interpretation to hold that this section would not protect the two transactions in this case. The language of the Act is plain and unambiguous.

I accept arguments by Mr. Tibaijuka that this provision would clearly exempt the two transactions between the deceased and the respondent from the application of the Act. This is the

interpretation which a number of Courts in East Africa have placed on S.22(1) (c) or identical provisions. This view was upheld by the Privy Council in the case of **Coast Brick Tile Vs. P. Raichand** (1966)E.A.154. The other cases are S**.N.Shah Vs. C.M.Patel (1961) E.A 397,Buganda Timber Co.Ltd. Vs. Mulji Kankji Metha (1961) E.A 477 and D.Jakana Vs. C. Senkaali (HCCS No.491 of 1984) (1988-1990) HCB 167.**

It is not necessary for me to analyse the judgments in these cases because they are plainly clear.

On the basis of these decisions with whose reasoning I agree, I think that the **Moneylenders Act** is not applicable in this case and, therefore, the transactions are unaffected.

I would allow the appeal with costs here and in the courts below.

I would set aside the judgments and order of the Court of Appeal. I would dismiss the notice for affirming the decision of the Court of Appeal. I would restore the orders of the learned trial judge with slight modifications as follows:

(i) I would grant a declaration that the appellants are entitled to the suit properties.

(ii) I would grant an order directing the Registrar of Titles to retransfer the suit properties into the appellants' names.

(iii) I would grant a permanent injunction to restrain the respondent and/or his servants/agents from interfering with the suit properties.

(iv) The respondent is to pay the appellants shs 480,000/= as money had and received by him as rent from the suit properties from October 1997 to October, 1988, with interest at 10% from date of filing the suit till payment in full.

(v) I would uphold the award of Shs 1,000,000 as general damages with interest at the rate of 8% p.a from 5/6/1997,

being date of judgment in High Court till payment in full.

(vi) The respondent is to pay the appellants the costs of this appeal and that in the courts below.

Delivered at Mengo this 17th day of January 2006

_____

J.W.N.Tsekooko
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO
(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.SC)

CIVIL APPEAL NO. 4 OF 2005

BETWEEN

1. KASIFA NAMUSISI }
2. AMINA NABANKEMA} :::::::::::::::::::::::::: APPELLANTS
3. ABDUL WAKAALO }

AND

M K NTABAZI :: RESPONDENT

(Appeal from the judgment and orders of the Court of Appeal of Uganda at Kampala (Engwau, Kitumba and Byamugisha, JJ.A) dated September 2004 in Civil Appeal No. 63 of 2001).

JUDGMENT OF ODOKI, CJ.

I have had the benefit of reading in draft the judgments of my learned brothers, Tsekooko JSC, and Kanyeihamba JSC as result of which it has become necessary for me to spell out the reasons for my conclusion that this appeal should succeed.

The background to this appeal has been outlined in the judgment of my learned brothers, and I need not repeat it.

The Court of Appeal allowed the appeal filed by the respondent against the appellants who had obtained judgment in the High

Court on the sole ground that the appellants failed to prove that consideration was paid by Sulait Jaggwe for the two properties allegedly purchased by him from the respondent. It was the case for the respondent that the transactions between him and Jaggwe were mortgages by deposit of title deeds secure loans from Jaggwe, who disappeared soon after the transactions had been concluded. The appellants are the administrators of his estate.

The case for the appellants which the trial judge accepted was that the two parties entered into two separate sale agreements of the two properties, and subsequently, the respondent signed transfers which led to the registration of properties in the names of Jaggwe, and certificate of title were issued. The respondent did not seriously dispute these facts.

The respondent's defence was that the transfers were to enable him obtain loans from Jaggwe who promised to retransfer the properties to the respondent, upon completion of payment of the loan. The respondent claimed he paid off the loans. The trial Judge accepted the appellants evidence and rejected the respondent who he found to be a liar. He gave judgment in favour of the appellants.

On appeal, in her lead judgment, Byamugisha JA, with whom other Justices of Appeal agreed, criticized the trial judge for refusing to allow the Registrar of Titles to produce copies of the certificates of title in Court, but allowed the appeal on the ground that consideration had not been proved to make the contract of sale of the suit property valid.

She then concluded,

> ***"As matters stand now there is no evidence of the instruments signed by the appellant transferring his interest in the suit properties to Sulait Jaggwe for the consideration allegedly paid by the latter. The first respondent testified that she knew that "That purchase price was fully paid by installments."***

Indeed payment was made fully as she testified, there was no evidence of acknowledgement by the seller. The appellant maintained throughout that he signed blank transfer instruments for purposes of obtaining a loan or loans and there was not outright sale. The onus therefore shifted to the respondents as the alleged buyers to prove that the purchase price mentioned in the sale agreements was actually paid and received by the appellant. The second agreement P.2 set out the mode of paying the purchase price.

The payment was made by cheques. The appellant denied having been issued with those cheques. The information from the bank (Exh. D.2) stated that the bank has never paid the said cheques. There is no other evidence of the consideration having been paid by other means. I think with respect, the learned trial judge erred when he found and held that the full purchase price was paid. In my humble opinion the transactions in this case were not supported by any consideration and therefore the respondents are not entitled to the suit properties. I think this is one of those cases in which this Court can go behind the fact of registration."

The last sentence of the passage I have quoted from the judgment of the learned Justices of Appeal is the crux of this appeal. When can a Court go behind the fact of registration? This issue forms the third ground of appeal in this Court.

The cardinal principle of registration of title is a certificate of title is conclusive evidence of title. Section 59 of the Registration of Titles Act, Cap 230 provides,

> ***"No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any information or irregularity in the application or in the proceedings previous to the registration of the***

certificate, and every certificate issued under this Act shall be received in all Courts as evidence of the particulars set forth in the certificate and of entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."

It is also well settled that a certificate of title is only indefeasible in a few instances which are listed in Section 176 of the Registration of Titles Act. The section protects a registered proprietor against ejectment except in cases of fraud, among others.

In the present case, the respondent transferred his titles to Sulait Jaggwe allegedly as security for loans. The respondent did not execute a legal mortgage or an equitable mortgage by deposit of title deeds, which are the normal methods of securing loans by real property. Instead he signed sale agreements and blank transfers to Jaggwe who immediately obtained certificates of registration for the two properties.

The respondent can only impeach the title of Jaggwe on ground of fraud. Unfortunately the respondent did not plead or prove fraud which must be strictly proved. For the same reason I do not find any merit in the argument that the suit's property was sold to a company but was transferred and registered in the name of Jaggwe, since it was not proved that the registration was obtain by fraud. The fact that the appellants were the lawful administrators of the estate of the late Jaggwe was not disputed.

In these circumstances I do not see how the certificates of title held by the appellants can be impeached. The respondent admitted receiving various amounts of money from Jaggwe in

consideration for the transfer of the properties. I do not know what kind of consideration was needed to complete the transfer transaction. In any case this fact was not pleaded in the defence or counter claim. On the contrary the defendant admitted receiving at least Shs.560,000/=, in respect of the transfer of Plot 655.

In my view, therefore, the Court of Appeal erred in holding that there was no consideration proved for the transfer of the properties, and that this amounted to a circumstance which could be sufficient to impeach the title of the appellants.

The issue of the applicability of the Money Lenders Act to the transaction in this case was not raised in the two lower Courts, but we asked both counsel to address us on it. The respondent alleged that the late Sulaiti Jaggwe was carrying out the business of money lending which was denied by the appellants. There was no evidence to show that Jaggwe had a money lenders licence. The burden was on the respondent to prove this fact. He failed to do so. Secondly, if the transactions between Jaggwe and the respondent were money lending transactions, they were, in my view, exempted from the operation of the Money Lenders Act by Section 21(1) (c) of the Act, on the ground that they involved security of real property and were therefore in the nature of legal or equitable mortgages, which would be governed by the Registration of Titles Act and the Mortgage Act. The respondent would, in that case, have appropriate remedies under those Acts. For these reasons, I do not find the Money Lenders Act applicable to this case, not to affect the result I have reached.

I therefore agree with Tsekooko JSC that this appeal should be allowed. I concur in the orders he has proposed.

As Karokora JSC also agrees, with the Judgment of Tsekooko JSC, this appeal is allowed with orders as proposed by Tsekooko JSC.

Dated at Mengo this 17th day of January 2005

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO
(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA AND KANYEIHAMBA, JJ.SC)

CIVIL APPEAL NO. 4 OF 2005

BETWEEN

1. KASIFA NAMUSISI }
2. AMINA NABANKEMA} :::::::::::::::::::::::::: APPELLANTS
3. ABDUL WAKAALO }

AND

M K NTABAZI :: RESPONDENT

(Appeal from the judgment and orders of the Court of Appeal of Uganda at Kampala (Engwau, Kitumba and Byamugisha, JJ.A) dated September 2004 in Civil Appeal No. 63 of 2001).

JUDGMENT OF ODER, J.S.C

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC, I agree with him that the appeal should be dismissed with no order for costs.

Dated at Mengo this 17th day of January 2006

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

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA

AND KANYEIHAMBA, JJ.SC.)

CIVIL APPEAL NO. 04 OF 2005

B E T W E E N

1. ***KASIFA NAMUSISI }***
2. ***AMINA NABANKEMA } :::::::::: ::::::::::***
   APPELLANTS
3. ***ABDALLA WAKAALO }***

A N D

FRANCIS M. K. NTABAAZI: :::::::::: :::::::::: RESPONDENT

{Appeal from the decision of the Court of Appeal at Kampala (Engwau, Kitumba and Byamugisha, JJ, A) dated 16th September 2004, in Civil Appeal No. 63 of 2001}

JUDGMENT OF KAROKORA, JSC:

I have had the benefit of reading in draft the judgment prepared by my learned brother, the Hon. Justice Tsekooko, JSC and I agree with him that the appeal should be allowed with costs here and in the courts below. I, however, wish to briefly add my comments arising from the facts as brought out in paragraph 4 of the

amended plaint in which the plaintiffs sought an order directing the defendant/respondent from wrongfully claiming ownership of the premises comprised in Kibuga Block 16 Plots 654, 655 and 692, Ndeeba and for removal of caveats lodged thereon and for refund of Shs. 480,000= as money had and received by the defendant in respect of the premises for the months of October 1987 to October 1988 and mesne profits.

The defendant/respondent denied that he could not sell the suit property at such a low price.

The facts of the case are set out in the judgment of Tsekooko, JSC and therefore, I do not need to repeat them.

There was overwhelming evidence which the learned trial judge considered after a long protracted hearing and concluded that Kibuga, Block 16, Plots 654, 692 and 655, Ndeeba were sold by the respondent and transferred and registered in the names of the late Sulaiti Jjaggwe and thereafter later transferred to the appellants, the administrators of the Estate of Sulaiti Jjaggwe.

The learned trial judge after finding that the title deeds in respect of Kibuga Block 16 Plots 692, 654 and 655 had been tendered in evidence without any objection from the defence and in view of the admission in the WSD and in the counterclaim that he had transferred the said plots to Sulaiti Jjaggwe, held that the respondent was estopped from retracting his earlier admission that he had transferred the suit properties to the late Sulaiti Jjaggwe. The learned trial judge concluded that after the respondent had transferred the suit properties in the names of Saluiti Jjaggwe and after the suit land was registered in the names of the late Sulaiti Jjaggwe and the deceased was issued with title deeds of

ownership, the certificates were, according to old section 56 of RTA, conclusive evidence of ownership. The learned trial judge made his conclusion after he had rejected the respondent's evidence to the effect that Exh. P1 and P2 were not loan agreements but sale agreements, the respondent having signed transfer forms and the sale agreements. He held that by the above respondent's conduct, he had surrendered the certificates of title of the suit land to the deceased.

The respondent appealed to the Court of Appeal which reversed the decision of the trial judge mainly on the ground that there was no consideration at all and that therefore, there were no valid sales of the suit properties.

It must be noted that in his pleadings the respondent never pleaded in his WSD that there was no consideration paid by the deceased, Sulaiti Jjaggwe nor did he raise absence of consideration in his counterclaim. In fact the respondent admitted in his WSD and in his oral evidence that the deceased paid Shs. 1,150,000= and Shs. 160,000= in respect of the purchase of Plots 654 and 692. He further admitted payment by the deceased of Shs. 560,000= in respect of Plot 655.
However, the respondent stated in para 5 of his WSD that he could not have sold his properties at such low price if it was in fact a sale. This was the nearest plea by the respondent on the issue of consideration, which plea goes to sufficiency or adequacy of consideration which the courts are not concerned with. His Lordship Justice Tsekooko, JSC, has ably discussed the law dealing with doctrines of consideration and adequacy or sufficiency of consideration in the law of contract in his lead judgment. I agree with him and would have nothing useful to add to what he stated and the authorities he has cited.

On the issue of transfer of the suit properties, the respondent

stated in his WSD and in his counterclaim that he signed Instruments of transfer of the suit properties and that thereafter the transfers were effected, registering the properties in the names of Sulaiti Jjaggwe. What is clear is that no fraud was raised in the WSD or in the counterclaim regarding the transfer of the suit properties. In the result, I would agree with the conclusion of the learned trial judge that the certificates of the title in respect of the suit properties were conclusive evidence of the title to the deceased from whom the appellants derived the titles as administrators of the estate of the deceased, Sulaiti Jjaggwe.

Clearly, the certificate of titles to the suit properties are under section 59 of the Registration of Titles (RTA) conclusive evidence of the appellants' ownership of the suit properties.
Section 59 of the RTA provides that:

"No certificate of title issued upon an application to bring land under this Act shall be impeached or defensible by reason or on account of any informality or irregularity in the application or of the certificate, and every certificate of title issued under this Act, shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power."

Consequently once the properties were duly transferred and registered in the names of Sulaiti Jjaggwe through whom the

appellants are claiming, as administrators of the estate of Sulaiti Jjaggwe, then the onus was on the respondent to prove that the transfer/registration of the deceased Sulaiti Jjaggwe was through fraud, which fraud was never pleaded in the WSD or in the counterclaim or that there was no consideration. I must reiterate that no fraud was pleaded and proved. In the result, fraud does not arise. Further, as I have already stated in the course of this judgment, the respondent admitted in his WSD and in his oral evidence that the deceased Sulaiti Jjaggwe made some payments in respect of Plots 654, 692 and 655. In my view, if there was no full payment of the agreed purchase price, the remedy was to sue for the balance of the purchase price in accordance with the provisions of the sale agreements Exh. P1 and P2, but not to rescind the sale agreement when the vendor had already transferred the title deeds of the suit properties into the names of the buyer, Sulaiti Jjaggwe. Consequently, Sulaiti Jjaggwe's titles to suit properties are indefeasible as no fraud was pleaded and proved against Sulaiti Jjaggwe in the manner he got the titles.

Lastly, on the issue of whether the transaction between the respondent and the late Sulaiti Jjaggwe was governed by the Money Lenders Act which never featured before the trial court, Court of Appeal or in the Memorandum of Appeal to this Court, I find this issue to be an afterthought; because it never appeared in the Sale Agreements Exh. P1 and P2 and was never raised in the pleadings ie. in the WSD, counterclaim, evidence of the

respondent or even in the submission before the learned trial judge or before the Justices of Appeal and as a result, neither the learned trial judge nor the Justices of Appeal made a decision on it. This issue was never part of the grounds in the Memorandum of Appeal before the Supreme Court. It came belatedly in written submission at the request of this Court.

Be that as it may, Money Lenders Act would not apply to this transaction as it was never raised in the pleadings before the trial judge and no evidence was led to show that the transaction was a loan governed by the Money Lenders Act. In fact the transaction was governed by sale agreements Exh. P1 and P2 between the respondent and the deceased, Sulaiti Jjaggwe, through whom the appellants are claiming. Clearly the transaction between the parties in this case was not governed by the Money Lenders Act. Consequently, I would agree with the conclusion of Hon. Justice Tsekooko, JSC. That the appeal should be allowed with costs here and in the courts below.

Dated this: 17th day of: January 2006.

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT
AT MENGO
(CORAM: ODOKI C.J, ODER, TSEKOOKO, KAROKORA, KANYEIHAMBA, J.J.S.C)

CIVIL APPEAL NO. 04 OF 2005

BETWEEN

KASIFA NAMUSISI
AMINA NABANKEMA ========== APPELLANTS
ABDALI WAKAALO

AND

FRANCIS M. K. NTABAZI ========== RESPONDENT

[An appeal from the Judgment and decision of the Court of Appeal (Engwau, Kitumba, Byamugisha, J.J.A) dated 16th September 2004 in Civil Appeal No. 63 of 2001]

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft the lead judgment of my learned brother, Tsekooko, J.S.C, and I find myself in a position where my own findings on some issues differ from his. I will therefore dissent from the majority of my colleagues on this appeal.

This case has had a long and chequered history. This is its background. The appellants are the administrators of the estate of the late Sulaiti Jaggwe. Letters of administration were granted to them by the High Court as long ago as in 1997. There is no clear evidence of the date and month in which those letters were granted.

Be that as it may, the case for the appellants is that on 13th November, 1980, the respondent sold his land, comprised in Kibuga Block 16 Plots 654 and 692 at Ndeeba, to a company called M/s Uganda Hardworking Company. A sale agreement (Exb P1) was allegedly signed between the respondent and the Late Sulaiti Jaggwe who was managing director of the company. The alleged purchase price was Shs. 4,500,000. A deposit of Shs. 160,000 was said to have been paid by Grindlays (now Stanbic) Bank through cheque No. 433880. Apparently, the agreement omitted to provide a date on which the balance of the purchase price was to be paid or when the transfer of the suit property into the names of the purchaser would be effected.

On the 8th, May, 1981, the respondent is alleged to have entered into another agreement of sale with the same Late Sulait Jagwe. This time the subject matter of the sale was Kibuga Block 16 Plot 655 situated at Ndeeba. It is alleged that M/s Musala & Co. Advocates drew the agreement of sale **(Exb P.2)**. The purchase price for this latest acquisition was Shs. 940,000. A deposit of Shs 560,000/= is stated to have been paid by a cash cheque No. 458355, dated 5th May, 1981. This time the sale agreement apparently provided the manner and dates by which the balance was to be paid. It was to be satisfied by payment in two instalments, the first of which was for Shs. 180,000 by cheque No. 458357 dated 5/06/1981 and the second by cheque No. 458358

dated 05/07/1981. The other terms of the agreement were that the vendor had already handed over the house or houses together with the keys to the purchaser on the date of signing the agreement.

According to the evidence given by the appellants, the certificates of title to the suit property had been held by Barclays Bank as security for a loan which were later collected by the vendor. According to the land titles that were exhibited in court, the first property, the subject matter of the alleged first sale, was transferred into the names of the late Sulaiti Jaggwe on the 27th November, 1980, at 8:50 a.m. by means of Instruments No. Kla 96589 and 96590, respectively.

The second property, the subject matter of the alleged second sale was transferred into the names of the late Sulaiti Jaggwe on 8th, May, 1981. The latter transfer was apparently witnessed by the Late Musaala whose stamp was embossed on the sale agreement. It is the contention of the appellants that after the completion of the payment of the purchase prices, the three properties were transferred into the names of the late Sulaiti Jaggwe.

According to the testimony of one Hajjati Fatuma Namusoke (PW1), one of the widows of the late Sulaiti Jaggwe, she and her late husband moved into one of the purchased houses. However,

shortly after they moved into the house, her husband was arrested and, following that arrest, Fatuma Namusoke vacated the same house. It appears that following his arrest, Sulaiti Jaggwe disappeared and has never been seen again. Following the disappearance of Jaggwe, Kasifa Namusisi, the first appellant in this appeal appears to have obtained a management order and later, letters of administration in relation to the estate of Sulaiti Jaggwe. After the grant of the letters of administration, the suit property was transferred into the names of the appellants as joint administrators of the estate of Sulaiti Jaggwe. In 1986, the respondent commenced claims of ownership of the suit property. It was for the purposes of stopping the respondent from making those claims of ownership that the appellants filed a suit in the High Court from which this appeal originates.

In his statement of defence in the High Court, the respondent contended that Sulaiti Jaggwe was a money lender who told the respondent that in order for Jagwe to render the respondent financial assistance, he, the respondent had to transfer his property, the suit property, into the names of Sulaiti Jaggwe, presumably by way of security for the moneys he would be receiving from time to time from Jagwe. The respondent stated that the payments on Jaggwe's account No. 297-664 at Grindlays bank were simply installment repayments to clear the loan and should not be seen in any way as recognition of sale to Sulait Jagwe. The respondent further contended in the statement of defence and counter claim that he continued to collect rent from tenants of the suit property notwithstanding the purported transfer of the same property to Sulaiti Jaggwe.

In his counter claim, the respondent averred that the purported transfer to Sulaiti Jaggwe was intended to be a deposit of security

to enable Jagwe to give him bank facilities and it was not evidence of an outright sale. He prayed court to order the appellants who were the plaintiffs in the High Court to transfer the suit properties back into his names.

At the trial, five issues were framed for determination. They were:

1. *Whether the defendant sold the suit property to the plaintiff's husband and whether the full purchase price was paid.*
2. *Whether the land was transferred to the deceased as security for a loan.*
3. *Whether the defendant lawfully lodged a caveat on the titles of the suit property.*
4. *Whether the defendant lawfully collected rents from tenants after the transfer in 1986, and*
5. *Whether the plaintiffs are entitled to rent and mense profits in the plaint.*

After hearing and evaluating the evidence, the learned trial judge found in favour of the appellants. The present respondent appealed to the Court of Appeal which allowed the appeal. Hence this appeal.

The memorandum of appeal to this court contains four grounds framed as follows:-

1. *The learned Justice and Lady Justices of Appeal erred in law and fact in that they*

a) *misdirected themselves on the legal nature of consideration; and*

b) *failed to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny, thereby coming to a wrong*

conclusion that the suit agreements were not supported by any consideration and wrongly accepting the respondent's 'version'.

2. *The learned Justice and Lady Justices of Appeal erred in law and fact, in that they wrongly imposed the burden of proof of ownership of the suit property on the appellants. Alternatively, their Lordships wrongly failed to find that the burden of proof of ownership of the suit properties had been duly discharged by the appellants, and wrongly held that the appellants were not entitled to the suit property.*
3. *The learned Justice and Lady Justices of Appeal erred in law and fact, in that they wrongly went behind the fact of registration of the appellants' title, thereby wrongly ordering cancellation of the appellants' title and consequent restoration of the respondent's name as proprietor of the suit properties.*
4. *The learned Justice and Lady Justices of Appeal erred in law and fact when they altered ground 1 of the appeal before them suo motu after the hearing of the appeal had been closed, thereby denying the appellants a hearing on the altered ground.*

The appellants prayed for several orders including a declaration that they were entitled to the suit property and consequential orders to such declaration.

Messrs Tibaijuka & Co. Advocates, counsel for the appellants filed

written submissions under Rule 93 of the Rules of this Court on 10th, March, 2005, and in reply, Messrs Nyanzi, Kiboneka and Mbabazi Advocates, did likewise.

In their written submissions, counsel for the appellants first dealt with ground 1 of the appeal; counsel contended that the Justices of Appeal misdirected themselves when they held that the onus of proving that the purchase price mentioned in the sale agreement was actually paid and received by the appellant who is the respondent in this appeal. Counsel further contended that the Court of Appeal erred in holding that the sale agreements relating to the suit property were not supported by any consideration. In counsel's opinion, by their reasoning, the Justices of Appeal were equating consideration with execution of the sale agreement.

Counsel for the appellants contended that in this case, consideration was clearly disclosed on the face of the sale agreements. They submitted that it is incredible that the respondent having on the one hand, claimed to have transferred his first property as security for loans totalling Shs. 4,500,000 but having failed to receive the full amount, should subsequently willingly stake more of his land for another Shs. 940,000. Counsel cited a number of authorities including ***G.M. Combined (U) Ltd Vs A. K. Detergent Ltd and Others; (1999) E.A. 84, The Evidence Act, (Cap. 6), Biteremo Vs Damascus Munyanda, S.C.C.A. No. 15 of 1991, Bogere Moses & Anor Vs Uganda, SC Criminal Appeal No. 1 of 1997, Joseph Mulula Vs Sylvano Katama, S.C.C.A No. 3 of 1999***, in support of their written submissions.

Messrs Nyanzi, Kiboneka and Mbabazi in their written submissions in support of the respondent's case, denied that there was ever any land sale agreement between the parties, or any consideration given for the transfer of the suit property.

Counsel for the respondent contended that the only relationship that was created and which existed between Sulaiti Jaggwe and the respondent was one of a money lender and borrower. Counsel further contended that the only arrangements made between the parties were such that the late Sulaiti Jaggwe would lend certain sums of money to the respondent provided the latter deposited certain titles of his land with the deceased. Apparently, the arrangements also meant that once the respondent had repaid the loans, presumably with interest thereon, the deceased or his successors in title would return the suit property to the respondent.

Counsel further contended that it was incumbent upon the appellants to prove and adduce evidence showing that the purchase price was paid and in counsel's opinion, they failed to do so in this particular case. Finally on this ground, counsel for the respondent submitted that the reason why the purported sale agreements were not supported by any consideration was because they were, in reality not land sale agreements but instruments for deposit of security to obtain loans from Sulaiti Jaggwe and his company.

Counsel contended that the process of transfer of land which the learned trial judge rejected in his judgment was material in reaching a just decision which the Court of Appeal correctly did. Counsel cited the cases of ***Hajji Musa Sebirumbi Vs Uganda, Criminal Appeal No. 10 of 1989 (S.C.), General Industries Ltd Vs Npart, S.C.C.A No. 5 of 1998, Re Duke of Malborough, Davis Vs Whitehead, (1894) 2 CH 133*** and the ***Evidence Act*** in support of their submissions.

I will now consider the issues raised in this appeal. In their detailed

and lengthy written submissions, both counsel concentrate on such issues as the intention of parties, general principles of contract, such as consideration and execution, evidence and burden of proof in legal proceedings. In my opinion, there is failure on the part of counsel to appreciate that the suit property became the subject of an entirely different law, namely, the Moneylenders Act, Cap.273 and this appeal succeeds or fails on the basis of whether or not the provisions of that Act were complied with. In my view, both the decisions of the trial court and of the Court of Appeal are decisions *per incurium*. However, the perusal of the record of proceedings, Counsel's written submissions and their subsequent arguments requested by this court on the application of the Moneylenders Act, raise other matters which this court must resolve. They may be summarized as follows:

1. *The purported sale of the first group of properties were to Uganda Hardworking Transport and Trading Company Ltd, of P.O Box Kibuye, Kampala, yet the purported transfers were to the late Sulaiti Jaggwe.*

2. *The objects of the company did not allow it to purchase land but they allowed it to lend and borrow money.*

3. *The agreement which was between the company and the respondent indicates that;*

"(a)the vendor referred to above has handed over the said building/house to the purchaser together with all the keys to be the property of the purchaser from the date of signing this agreement of sale.

(b) *that the titles certificates of the said land were deposited with*

the above company for a loan and shall be handed over to the purchaser as soon as payment for the loan has been made by the purchaser".

Both statements cannot be correct. This court must reconcile them. (See Exhib. 'A' on P.234 and Exhib 'D1' on p.277 in the record of proceedings).

4. *There is clear evidence that the late Sulaiti Jaggwe and the company were actually in the business of money-lending.*

5. *The agreement on some other property between the parties shows that the land and concrete blocks and buildings on it consisting of 8 rooms and 2 bathrooms together with the boys' quarters of 2 rooms, 4 stores and 2 baths were being purchased for less than one million shillings of which shillings 380,000 was still unpaid. Yet, the agreement proceeds to provide that notwithstanding the balance, the vendor was happy to hand over the said property together with all the keys to the purchaser and that such handover (of physical premises) automatically and effectively transfers the land certificate to the purchaser even though those certificates were still at Barclays Bank as security for the loan. This needs to be resolved.*

6. *The appellants are the administrators of the estate of the late Sulaiti Jaggwe, their locus to represent the directors of the car-dealer company, which actually purportedly bought the property needs to be established*.

On ground 1, I find the evidence of payment of a consideration for the sale of three valuable city properties to be unclearly stated. The amounts shown as consideration are grossly inadequate even by the property evaluations of the 1980^{S}. They are however, compatible with moneys lent on the basis of land titles being given in as security for the loans. I agree with Byamugisha, J.A; the learned Justice who gave the lead judgment in the Court of Appeal when she observes that;

> ***"Most importantly, the consideration that was stated in both instruments was less than what the witness had claimed was paid for the suit properties."***

Incidentally, no transfer titles were produced in court. The appellants only produced transfer forms, all of which do not comply with section 92 of the **Registration of Titles Act (Cap. 230).** In my opinion, where it is shown that the purchase price is grossly inadequate as in this case, and it is alleged that the transaction was actually not a sale of land but a moneylending transaction, the court is put on notice and must enquire and resolve the matter. In

this case, the appellants on one hand plead that their predecessor, Sulaiti Jaggwe was not in the business of moneylending but was a purchaser of land. The record of proceedings and the respondent on the other, show that in fact both Sulaiti Jaggwe and the company of which he was chairman were actually in the business of moneylending governed by the provisions of the Moneylenders Act *(Supra)*. The evidence further shows that the land titles of the suit property were actually deposited for the purposes of a loan. I would therefore hold that the purported consideration for the sale of the suit property was grossly inadequate but may easily be explained if the money was a loan. I am persuaded by the respondent's submissions that the money had been advanced as a loan. For these reasons, I would dismiss ground 1 of the appeal.

I now turn to ground 2. The memorandum and articles of association of the Uganda Hardworking Transport and Trading Company Limited under which the appellants claim title contained an omnibus list of objects for which it was formed. Although the company appears to have been founded mainly for motor transport, its (**z)** article provides:

> ***"To advance, deposit or lend moneys, securities and property to or with such persons and particularly the customers of the company on such terms as may seem expedient and to draw, make, accept, endorse, discount, execute and issue cheques, promissory notes, bills of exchange, bills of lending, warrants, debentures and***

other negotiable instruments."

There is no evidence that Mr. Jaggwe or the other directors of the company to which the transfers of the suit property titles should have been made or the company itself were licensed Moneylenders. Nor did they obtain a Moneylenders' licence as required by section 2 of the Act. During the trial, no attempt was made to establish whether or not the deceased or the company had a moneylender's licence as required by the Moneylenders Act.

Nevertheless, on 13th November 1980, Mr. Jaggwe as managing director of the Uganda Hardworking Transport and Trading Company Limited and Dr. F.M.K. Ntabazi, the respondent and owner of the suit property signed an agreement purported to be a sale agreement of the suit property but which in reality was a loan agreement with the suit property as security. This fact is borne out by what are described in that agreement as **other terms;** where it was further provided as follows:

(b) ***That the title certificates of the said land were deposited with the above mentioned company for loan and shall be handed over to the purchaser as soon as payment for loan has been made by the purchaser as per para (b) payment hereof.***

(d) ***That in default of either party to comply with the terms and conditions as stated hereinabove, such default shall be referred to court of law.***

Evidently, there was no resort to court before the purported

transfers of the suit property.

In order to show that Sulaiti Jaggwe was a “moneylender”, the respondent produced another document in Luganda and translated in English, marked **exhibit D1**. The document was not successfully challenged in the courts below. That document contained a loan agreement. It showed that on the 17th November, 1996, a Mr. Samuel.K. Ntege and Mr. Sulaiti Jaggwe entered into a similar agreement which was witnessed by J.F. Kityo Advocates and provided as follows:

> ***“I Samuel K. Ntege has agreed with Mr. Sulaiti Jaggwe to borrow money amount to 100,000/= using his Bank account No. 297-664 (G.R. Bank). He has given me the said sum and he has proceeded ahead to process this loan. I Samuel K. Ntege, has transferred Land Block 11 Plot 349, with a house on it into the names of Sulaiti Jaggwe. Mr. Sulaiti Jaggwe has also agreed to retransfer the Land Block 11 Plot 349 together with the house into the names of Samuel K. Ntege after this money has been paid back to him so that he deposits it into the Bank after one year.”***

It is thus clear that Sulaiti Jaggwe was in the practice of lending money against land titles as security on the basis that if the borrowers repaid the loans their property would be returned. In any event, even if there had been a court action and transfers of the suit property, all would have been in vain because of the

apparent failure to comply with the provisions of the Moneylenders Act. Section 2 of that Act provides that;

"If any person

(a) ***---------***

(b) ***carries on business as a moneylender without having in force a proper moneylenders' licence authorizing him or her so to do, or being licensed as a moneylender, carries on business as such in any name other than his or her authorised name, or at any place other than his or her authorised address or addresses or***

(c) ***enters into any agreement in the course of his or her business as a Moneylender with respect to the advance or repayment of money, or takes any security for money in the course of his or her business as a Moneylender, otherwise, their in his or her authorised name, he or she contravenes this Act and for each offence, is liable on conviction to a penalty."***

Section 18 of the same Act prohibits certain transactions by providing that:

"Any agreement between a moneylender and a borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal."

Thus, the transaction between the parties was illegal and void.

Although there appears to have been no evidence adduced to prove one way or the other that Sulaiti Jaggwe was a moneylender, the appellants cannot benefit by that omission because the case is dependent on their claim that the respondent sold the suit property to Sulaiti Jaggwe. Thus in their plaint in the High Court they asserted that ***"5-the cause of action arose on the 13/11/1980, when the defendant sold land comprised in Kibuga Block 16 Plots 654 and 692 Ndeeba, and on the 6/5/1981, sold land comprised in Kibuga Block 16 Plot 655 Ndeeba, to the late Sulaiti Jaggwe, as per copies of agreements of sale attached hereto and marked Annextures A and B. That after the said sale, the defendant signed transfers in favour of the said deceased, who became registered proprietor thereof, as per attached copies of certificates of title marked Annextures C, D and E."*** it should be recalled however that it is the same agreement that contains the **"other terms"** of the agreement *(supra).* In my opinion therefore, ground 2 of this appeal ought to fail.

On ground 3, Counsel for the appellants made submissions on the exemptions permitted by the Moneylenders Act, section 21 of Cap. 273 Law of the Republic of Uganda, Rev. Ed. 2000, which reads as follows:

(1) This Act shall not apply -

(a) to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by

execution of a chattels transfer in which the interest provided for is not in excess of 9 percent per year;

(b) to any transaction where a bill of exchange is discounted at a rate of interest not exceeding 9 percent per year;

(c) to any moneylending transaction where the security for repayment of the loan and interest on the loan is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of moneylending upon such mortgage or charge.

(2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a moneylender or not.

(3) Any person who lends money only by means of the type of transactions set out in subsection (1) and by means of no other type of transaction shall be deemed not to be a moneylender for the purpose of this Act.

Section 21 of the Act is a saving clause. The term saving has diverse meanings but in law it may mean a provision which continues in force the repealed law as to existing rights. In this case, the relevant provision is paragraph (c) of sub-section 1. In my opinion, this paragraph does not save the transaction in this case which the appellants claim were not intended to effect execution of a legal or equitable mortgage upon immovable property or a charge or a *bona fide* transaction of moneylending upon such mortgage or charge, but a straight forward execution of

a land sale agreement. It follows therefore that this case does not fall within the exceptions in the Moneylenders Act.

Counsel for the appellants cited a number of authorities including cases of **Coast Brick Tile Vs. P. Raichand (1966) E.A.154, S.N.Shah Vs. C.M.Patel (1961) E.A.397, Buganda Timber Co. Ltd Vs. Mulji Kankji Metha (1961) E.A.477 and D.Jakana Vs. C.Senkaali (HCCS No. 491 of 1984) (1988 – 1990) HCB 167,** which he claimed fall within the exceptions. In my opinion, these authorities are distinguishable from the present case. In the first instance, the appropriate parties in the cases cited were licensed moneylenders who nevertheless breached the statute in areas permitted by the exceptions referred to earlier on. Secondly, they had secured their interests with charges on the land which the present appellants deny was the case with their predecessor in title. Thus, in the case of **Coast Brick Tile** *(supra)*, the decision recognized that the respondent was a licensed moneylender. Ground 3 therefore fails.

In my opinion, the disposal of grounds 1,2 and 3, disposes of the whole appeal.

It is unfortunate that neither party addressed this court on the exact sums of money paid and repaid by the parties in relation to the loan transactions involving the suit property. It was not disclosed to the courts whether or not the deceased moneylender,

Sulaiti Jaggwe or the company had a moneylender's licence, for the court to be able to order that the respondent should be liable to repay the balance on the loans with interest. There is no evidence on record as to what happened to the rest of the shareholders and directors of Uganda Hardworking Company or their successors in title.

I note however, that since the eviction of the respondent from the suit property in 1987 or thereabouts, the appellants should have reoccupied the premises and collected rent. I am inclined to agree with Byamugisha J.A in her lead judgment when she observes that ***"had Sulaiti Jaggwe been the buyer and owner of the suit property, his successors in title, the appellants would have insisted on remaining or placed in possession."***

Consequently, I would confirm the orders of the Court of Appeal that the Registrar of Titles be directed to cancel the registration of the appellants as proprietors. In light of the observations I have made, the persons who are entitled to claim the suit property or compensation thereof are yet to be ascertained.

In light of the facts and circumstances of this case, I would make no orders as to costs.

Dated at Mengo this 17th day of January 2006

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT