

REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE CJ, ARACH-AMOKO, JSC, TSEKOOKO, OKELLO AND  
KITUMBA, AG.JJSC)

CIVIL APPEAL NO: 03 OF 2014

BETWEEN

1. SINBA (K) LTD
2. HABA GROUP (U) LTD
3. DEO & SONS PROPERTIES LTD
4. TWINAMATSIKO GORDON T/A TROPICAL GENERAL APPELLANTS  
AUCTIONEERS
5. MARGARET MUHANGA MUGISA

AND

UGANDA BROADCASTING CORPORATION;.....; RESPONDENT

***[Appeal from the decision of the Court of Appeal at Kampala (Rubby Opio Aweri,  
Faith Mwendha and Kenneth Kakuru JJA) delivered on the 27<sup>th</sup> March,  
2014 in Civil Application No.12 of 2014]***

JUDGMENT OF M.S.ARACH-AMOKO JSC

This is an appeal against the decision of the Court of Appeal (Rubby Opio Aweri, Faith Mwendha and Kenneth Kakuru JJA) delivered on the 27<sup>th</sup> March, 2014 in Civil Application No. 12 of 2014 whereby the Court ordered the cancellation of the 5<sup>th</sup> Appellant's name from the title of land comprised in Freehold Register Volume 211 Folio 18,

Plots 8-10; 12-16 and 18-20 Faraday Road, Kampala (hereinafter referred to as “the suit property”) and the reinstatement of the Respondent thereon.

The history behind the appeal may be summarized as follows:

By an agreement dated 14<sup>th</sup> February 2011, the Respondent sold to the Haba Group (U) Ltd (the 2<sup>nd</sup> Appellant) the suit property located at Bugolobi in Kampala for 11.5 billion shs. (Eleven point five billion shillings). Three months later, the 2<sup>nd</sup> Appellant sold the said property to Deo & Sons, (the 3<sup>rd</sup> Appellant) under a sale agreement dated 16<sup>th</sup> May, 2011 for 22 billion shs. (twenty two billion 15 shillings). The 3<sup>rd</sup> Appellant was registered on the title on the 31<sup>st</sup> May, 2011.

Subsequently, the Respondent’s Managing Director, then Mr. Paul Kihika, wrote a letter terminating the sale agreement between the Respondent and the 2<sup>nd</sup> Appellant and instructed the Commissioner for Land Registration to de-register the 3<sup>rd</sup> Appellant from the title to the suit land and to reinstate the Respondent.

As a result, the 3<sup>rd</sup> Appellant instituted HCCS No. 326 of 2011 in the Land Division of the High Court against the Respondent and its Managing Director for general and exemplary damages for wrongfully terminating the sale agreement and interference with its investment.

The Respondent and its Managing Director resisted the claim and raised a counterclaim that the sale of the suit property to the 2<sup>nd</sup>

Appellant was in contravention of the UBC Act and thus illegal. They prayed for dismissal of the suit with costs and judgment on the counterclaim with orders for cancellation of all entries on the certificate of title of the suit property and reinstatement of the Respondent there on.

At the commencement of the hearing before Murangira J, Counsel for the Respondent raised the said points of law and made the same prayers. The learned judge upheld the objection and dismissed the suit with costs to the Respondent. He then entered judgment for the Respondent on the counterclaim and ordered the cancellation of the 3<sup>rd</sup> Appellant’s name from the title and reinstatement of the Respondent thereon.

The two Appellants were dissatisfied with the decision of the High Court and lodged an appeal vide **Court of Appeal Civil Appeal No. 107 of 2012**. However, before the determination of the appeal, the parties signed a Consent Judgment dated 16<sup>th</sup> April, 2013 in effect settling the appeal amicably by reversing the orders of the High Court.

On the 17<sup>th</sup> of June 2013 the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants executed a Deed of Assignment with SINBA (K) Ltd, the 1<sup>st</sup> Appellant under which they assigned the Consent judgment/ Decree to the said company. Subsequently, the 1<sup>st</sup> Appellant applied for execution of the Consent Decree and a warrant of attachment was issued to the 4<sup>th</sup> Appellant, who proceeded to attach and sell the suit property to the 5<sup>th</sup> Appellant on the 30<sup>th</sup> December, 2013. The 5<sup>th</sup> Appellant was thereafter registered on the certificate of title on the 10<sup>th</sup> January 2014.

The Respondent was aggrieved by the actions of the Appellants and in a bid to recover its land, challenged the execution and sale of the suit property by instituting **Court of Appeal Misc. Application No 12 of 2014** on the ground that they were illegal and therefore null and void. As stated earlier in this judgment, the Court of Appeal by a majority of 2 to 1 ruled in favour of the Respondent and made the order that has given rise to this appeal. There are ten grounds set out in the Memorandum of Appeal.

### ***Representation***

At the hearing, Mr. John Mary Mugisha, Mr. Caleb Alaka, Mr. Obed Mwebesa and Mr. Joseph Kyazze represented the Appellants while Mr. Kiwanuka Kiryowa represented the Respondent.

### ***Submissions***

Mr. Mugisha gave a brief overview of the appeal, and then Mr. Alaka argued grounds 1 and 2 of the appeal separately, followed by grounds 3, 6, 7, and 8 together and grounds 4 and 5 separately. Mr. Kyazze argued grounds 9 and 10 of the appeal. Mr. Kiryowa adopted the same order in his response to the submissions by the Appellants' counsel. Thereafter, Mr. Kyazze made a rejoinder on all the grounds of appeal on behalf of the Appellants.

## ***Consideration of the grounds of appeal***

I will follow the same order in considering the appeal.

***Ground 1: The majority of the Justices of the Court of Appeal erred in law and fact when they granted orders for cancellation of the 5<sup>th</sup> Appellant from the title to the suit property, which orders were neither sought nor pleaded in the application, thereby occasioning a miscarriage of Justice.***

The criticism in this ground is that the order cancelling the name of the 5<sup>th</sup> Applicant from the title to the suit property was neither sought nor pleaded or proved in the application. It was Mr. Alaka's contention that a court cannot grant such an order, according to the law laid down under **Order 6 rules 1 and 7; and Order 7 rules 1(g) and 7 of the Civil Procedure Rules** and the decisions by this Court in the cases of **Goustar Enterprises Ltd v Kocas Owumu,**

**SCCS No.8 of 2003; Kabu Auctioneers and Court Bailiffs v FK Motors Ltd, SCCA No. 19 of 2009 and Interfreight Forwarders Uganda Ltd v EADB, SCCA No. 33 of 1992.** It was therefore an error on the part of the learned Justices of the Court of Appeal to issue this order which occasioned a miscarriage of justice.

In his reply, Mr. Kiryowa contended that the order complained of was among the remedies sought by the Respondent in the application where it prayed that execution of the consent decree in Civil Appeal No. 107 of 2012 be annulled, cancelled and or set aside

and the second prayer was that the purported attachment and sale of the Applicant's property comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala, measuring 23.1 acres in execution of the consent decree in Civil Appeal No. 107 of 2012 be declared null and void, cancelled, reversed and/or set aside.

He further contended that the Court of Appeal, having granted the setting aside of the execution, the cancellation order just followed as a consequential order since the court could not set aside the sale and not order a cancellation of the certificate. Counsel further contended that the authorities cited by Mr. Alaka are in respect of plaintiffs and are, therefore inapplicable, to this case. He prayed that this Court should not fault the learned Justices of Appeal for making the said order for these reasons.

In his rejoinder, Mr. Kyazze argued vehemently that: (i) it was conceded by Mr. Kiryowa that no specific prayer was made for cancellation of the 5<sup>th</sup> Appellant's title; (ii) in the context of the application, there was no longer a sale to be reversed since the title had already been transferred into the name of the 5<sup>th</sup> Appellant. The title could only be cancelled on the grounds specified under section 176 of the Registration of Titles Act. This position is fortified by the decision of this Court in **Hannington Wasswa and Anor v Maria Onyango Ochola and Ors SCCA No. 22 OF 1993**; (iii) relief in Court matters is not an entitlement but must be pleaded and justified before it can be granted. A court cannot legally move itself

to grant a remedy in the course of its ruling when parties did not address it on such remedies. The Court of Appeal could not move itself to grant an order that was never sought.

In order to determine this ground, it is necessary to set out the orders that were sought and those that were granted by the Court of Appeal.

The record of appeal indicates that **Misc. Application No. 12 of 2012** out of which this appeal arose was brought under section 34 of the Civil Procedure Act and the orders sought were that:

**1. “The execution of the consent decree in Civil Appeal No. 107 of 2012 be annulled, cancelled and or set aside.**

**2. The purported attachment and sale of the applicant’s property comprised in freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approximately 23.1 acres in execution of the consent decree in Civil Appeal No. 107 of 2012 be declared null and void, cancelled, reversed and or set aside.**

**3. Costs of the application be provided for. ”**

The main grounds for that application as set out in the Notice of Motion and expounded in the supporting affidavit of Mr. Kihika

were that the execution and purported sale of the suit property were based on illegalities.

After hearing the application and examining its history, the learned Justices of the Court of Appeal ruled in favour of the Respondent by a majority of two to one. Kakuru JA ordered that:

***“1. The decree of the High Court signed and sealed by the Deputy Registrar of that Court on the 19<sup>th</sup> March 2012 is***

***hereby set aside and substitute with the decree filed in that Court on 1<sup>st</sup> March 2012 which appears at page 773 of the record of appeal in the main appeal herein (Court of Appeal Civil Appeal No. 107 of 2012).***

***2. The consent judgment filed in this court and signed and sealed by the Registrar of this Court on the 19<sup>th</sup> April 2012 is hereby struck out.***

***3. The sale of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road, Kampala to the 4<sup>th</sup> Respondent is hereby set aside.***

***4. The Commissioner for Land Registration is hereby ordered to cancel the registration of the 4<sup>th</sup> respondent as the proprietor of the land set out in para. 3 above and to reinstate as the proprietor, Uganda Broadcasting Corporation. No order is made as to costs.”***

Opio Aweri JA also made similar orders except for orders number 1 and 2 while Mwendha, JA disagreed.

It is clear from the above that there was no specific prayer for cancellation of the 5<sup>th</sup> Appellant's certificate in the application directly. The orders specifically sought for in the application were for cancellation, nullification and setting aside of the execution and the attachment and sale of the suit property. It is my finding,

therefore, that the order of cancellation of the 5<sup>th</sup> Appellant's title was a consequential order which the two learned Justices rightfully gave as a direct consequence of their orders nullifying and setting aside not only the decree of the High Court and the Consent judgment on which it was based, but the execution and the sale of the suit property as well. In my view, and on the basis of their findings and orders which I shall address in details later on in this judgment, they could not leave the matter hanging.

Further, the case of **Odd Jobbs v Mubia,[1970] EA 476**, is to the effect that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to ***“arrive at a correct decision in the case and to finally determine the controversy between the parties*** In the instant case, the record shows that all the parties not only led evidence by way of affidavits in support of their respective positions in the application but their lawyers addressed court on all the issues raised in the pleadings and by the court during the course of hearing the application as well. On top of that, the learned Justices of Appeal had before them; the Record of Appeal in CACA No. 107 of 2012 which included the record of proceedings right from the High Court to the Court of Appeal pertaining to all the transactions that had led to the sale of the suit property to the 5<sup>th</sup> Appellant.

It follows, therefore, that notwithstanding the finding that there was no pleading or prayer for the cancellation of the 5<sup>th</sup> Appellant's certificate of title, since the evidence before the court had disclosed that the whole transaction leading to the sale of the property to the 5<sup>th</sup> Appellant was based on an illegal consent judgment and thus null and void, the court was obliged to make that order, after establishing that fact, in line with the authority of **Odd Jobs** (supra). The authorities cited by Appellants' counsel are good law but are inapplicable to this appeal.

Lastly on this ground, I find the rest of the submissions by Mr. Kyazze in respect to section 176 of the Registration of Titles Act, misplaced because the issue raised in this ground is whether the prayer for cancellation was among the orders sought and I have indicated clearly that it was not specifically prayed for, but it was a consequential order. I shall later address the issue of the



validity of the cancellation order in this judgment.

In the premises, this ground fails.

***Ground 2: The majority of the Justices of the Court of Appeal erred in law and fact when they ordered for Cancellation of the 5<sup>th</sup> Appellant from title to the suit property in such proceedings before them, thereby occasioning a miscarriage of justice.***

Counsel for the Appellant contended that the procedure under which the title of the 5<sup>th</sup> respondent was challenged and ultimately cancelled was wrong. That this Court has held that once property has been transferred in the names of the auction purchaser, it becomes an exception to section 34 of the Civil Procedure Act. That the correct procedure should have been by way of an ordinary suit in which contentious issues would have been resolved after adducing evidence and cross-examination and not by a Notice of Motion. In support of this proposition, Mr. Alaka cited the cases of **Hannington Wasswa v Maria Onyango Ochola, SCCA No. 22 of 1993; Francis Omucho v R. Mawanda CACA No. 15 of 2008** and **Kampala Bottlers v Damaniko, SCCA No. 22 of 1992**. He prayed that this Court finds that the procedure adopted was inappropriate and that the appeal should be allowed.

Mr. Kiryowa, Counsel for the Respondent submitted that there was absolutely nothing wrong with the procedure adopted. That section 2(x) of the Civil Procedure Act defines a suit to include a Notice of Motion. That it is not necessarily true that oral evidence is required in order to be heard. Even in a suit commenced by Notice of Motion, a party is free to bring evidence if he feels that he needs more evidence. He argued that according to section 34 of the Civil Procedure Act, the correct procedure for challenging execution is in fact, within the same suit and not a separate suit. In support of his submissions on this point, he cited the cases of **Habre International & Ors v Ibrahim Alakaria HCCS No. 191 of 1992** reported in [1996] KALR 656, (no.2); **Hassan Bassajabalaba v Bank**

**of Uganda HCMA No. 566 of 2008; Francois Mukyo v Rebecca Mawanda & Anor, CA CA No. 15 of 2008; Francis Micah v Nuwa Walakira SCCA No.24 of 1994** reported in (1995) KALR 360 and **Lawrence Mwangi v Stephen Kyeyune, SCCA No. 12 of 2001.**

Mr. Kyazze in his rejoinder contended that a Notice of Motion can only be justified under section 34 of the Civil Procedure Act where the claim only relates to setting aside execution before the transfer has been effected under the provisions of the Registration of Titles Act. He invited Court to distinguish the authorities of **Habre International & Ors v Ibrahim Alakaria; Francis Micah v Nuwa Walakira and Lawrence Muwangi v Kyeyune** (supra) from the one of **Hannington Wasswa v Maria Onyango Ochola** (supra), where title had already passed.

He further submitted that the Court of Appeal has no power to cancel a sale under section 91 of the Land Act. It is only the High Court which has such jurisdiction and the procedure is by an ordinary plaint.

The issue raised under this ground is basically that the Respondent adopted a wrong procedure in lodging **CA Misc. Application No. 12 of 2014.**

First of all, I am of the considered view that this point should have been raised by counsel at the commencement of the hearing of the application as a preliminary objection, not on appeal before this Court. The learned Justices of the Court of Appeal cannot for that reason be blamed for a matter that was never raised before them.

Secondly, it is not in dispute that the application before the Court of Appeal was brought by way of a Notice of Motion under section 34 of the Civil Procedure Act. It is headed:

***“34. Questions to be determined by the court executing the decree.***

Section 34(1) reads as follows;

***“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”***

It is also not disputed that the application was questioning the manner of execution and sale of the Respondent's property arising from the execution of the consent judgment/ decree in **Court of Appeal Civil Appeal No. 107 of 2013**. The point of departure is the application of Section 34 to cases where transfer has been effected such as the instant one. Counsel for the Appellants argued that section 34 of the Civil Procedure Act does not apply to cases where transfer has been effected under the provisions of the Registration of Titles Act such as the instant one. According to them, the procedure should have been by an ordinary suit where parties are able to adduce oral evidence and be subjected to cross-examination

so as to resolve contentious issues such as fraud. They relied on the authority of **Hannington Wasswa v Maria Onyango Ochola(Supra)**. Counsel for the Respondent has the contrary view.

In my judgment, counsel for the Respondent is right. Section 34 is the correct procedure for determining issues arising out of execution of decrees between parties to a suit. Section 34(2) actually empowers court to treat proceedings under the section as a suit. It reads:

***“(2) the court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit....”***

This view is supported by the language of the section itself and the numerous authorities including the ones cited by counsel above. For instance, in the case of **Habre International & Ors v Ibrahim Alakaria** (supra) it was held that:

***“1, S.3S (1) (now section 34) of the Civil Procedure Act requires that any question arising between the parties concerning execution be decided by the court executing the decree and not by a separate suit. Therefore the application was properly before the court.”***

The procedure was by Notice of Motion accompanied by affidavit. In the above cited case the learned judge observed as follows:

***”... in my view the rule does not prevent the court from permitting oral evidence to be given by persons other than the deponents in special circumstances. ”***

The position is even clearer in the judgment of Tsekokoko JSC, as he then was, in **Francis Micah v Nuwa Walakira** (supra), in the following observation:

***“In my opinion section 35(2) indicates how the court can exercise its discretion when carrying out investigations: In my view, the procedure under section 35 definitely saves time and expenses; A party does not need to open a fresh suit with all attendant consequences for purposes of enforcing execution or querying a ma.nn.er of execution. Witnesses to be called for purposes of explaining points related to execution proceedings.”***

The learned Justice went on to consider the relevant explanations on the scope, object and applicability of section 35 using the comments by the learned author of **Rao’s All India Reporter Commentaries on the Indian Code of Civil Procedure at pages 583** volume 1 (10th Edition) on section 47 of the Code (which is similar to our section 34 of the Civil Procedure Act) and I find the 25 following comments very instructive where the learned author stated thus: “The object of the section being to save unnecessary expense and delay and to afford relief to the parties finally, cheaply, and speedily without the necessity of a fresh suit: it must be construed as liberally as the language would reasonably admit. It embraces all matters connected with the execution of an existing decree between the parties or their representatives, and covers all questions relating to the execution, discharge or satisfaction of the decree, It does not matter whether such questions arise before or after the decree has been executed and the fact that an alternative remedy by suit is provided in certain circumstances or that the application was made under a different provision of the code, does not prevent the section from being applied for the decision of the questions falling within its scope”(the underlining is added for emphasis)

The Learned Justice in his concluding remarks on this point said:

“The executing court finally disposes of the question by granting appropriate relief and not by asking the applicant to file a separate suit.

...

To hold that parties to a suit cannot have questions between them relating to execution discharge or

satisfaction of the decree investigated under section 35 ***(1) would undermine the clear provisions of the section itself Parties to a suit or their representatives have a statutory right to have their legitimate complaints investigated by the executing court or else the right is barred by the section itself***

Applying the principle in the above authorities to the instant case, it is clear that this ground cannot succeed. The questions that arose in the application before the Court of Appeal were between the parties to the consent judgment and it concerned the execution of the consent decree of the parties to Civil Appeal No. 107 of 2013. It arose after the execution of the decree. The Court of Appeal was the executing Court. Section 34 of the Civil Procedure Act provides that the procedure for challenging execution is within the same suit not a separate action. The Respondent adopted the correct procedure in my judgment.

Further, in my view, the Appellants could have applied to court to treat the application as a suit under section 34(2) of the Civil Procedure Act and to be allowed to adduce oral evidence and to cross examine the Respondent's witnesses on the supporting affidavit if they so wished. They failed to do so, consequently, they **25** cannot blame the Court. The cases relied on by the Appellants' counsel are in that respect, distinguishable.

Again the submissions by Mr. Kyazze regarding the jurisdiction of the Court of Appeal under section 91 of the Land Act are misplaced because the issue here was on the procedure adopted in bringing

the application. However, my view is that Court of Appeal derived the jurisdiction to cancel the said transfer under section 11 of the Judicature Act which is clear. It reads:

***“11. Court of Appeal to have powers of the court of original jurisdiction.***

***For the purpose of hearing and determining an appeal,***

***the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal emanated.”***

In the premises, I respectfully agree with Kakuru JA that the Court of Appeal has powers just like the High Court to order for the cancellation of a sale once the court finds that it was illegal or fraudulent as it did in the instant case. Moreover, there is a dearth of authorities to the effect that

a court cannot ignore an illegality once it is brought to its attention.

Further, and most importantly, as Kakuru JA, rightly stated, in my opinion, even if he had found that the 5<sup>th</sup> Appellant was a bona fide purchaser for value without notice, he would still have ordered for the cancellation of the transfer to her names. This is because the consent judgment and decree having been annulled on account of illegality, there was no property to transfer. As was held in *Kanoonya David v Kivumbi & 2 Others* HCCS No. 616 of 2003 (unreported):



***“An illegality vitiates the transfer of title with the result that the sold property remains the property of its owner. In this case the property cannot vest in the owner and at the same time vest in the purchaser the second defendant.”***

This ground also fails for that reason.

**Grounds 3, 6, 7 and 8:**

***3. The majority of the Justices of the Court of Appeal erred in law and fact when in such proceedings before them, they held that the 5<sup>th</sup> Appellant was not a bona fide purchaser for value without notice, and was part and parcel of the purported fraud and illegality.***

***4...***

***5. •.***

***6. The majority of the Justices of the Court of Appeal erred in law and fact when they held that the assignment of the decree was illegal and fraudulent.***

***7. The majority of the Justices of the Court of Appeal erred in law and fact when they held that the execution and sale of the suit property was null and void.***

***8. The majority of the Justices of the Court of Appeal erred in law and fact when they held that the suit property, then still registered in the name of Deo and***

***Sons Limited could not be a subject of lawful attachment and sale in execution.***

As Mr. Alaka stated and I respectfully agree with him, this is the gist of their appeal and the complaint under these grounds is that the majority of the learned Justices of the Court of Appeal did not base themselves on evidence but on suspicion and fanciful reasoning when they held:(i) that the 5<sup>th</sup> Respondent was not a bona fide purchaser for value without Notice but was part and parcel of the purported fraud and illegality; (ii)that the assignment of the decree was illegal and fraudulent; (iii) that the execution and is sale of the suit property was null and void; and (iv) that the suit property, then still registered in the names of Deo & Sons could not be a subject of lawful attachment and sale in execution. If their decision is upheld, the public will doubt auction purchases.

Regarding the question of bona fide purchaser, Mr. Alaka insisted that the 5<sup>th</sup> Appellant was a bona fide purchaser for value without notice in that she saw an advertisement in the newspaper, bidded and emerged the highest bidder; and the property was sold to her. She did not need to do more. He further contended that this was not an ordinary sale; it was a sale by auction by order of the second highest court in Uganda, therefore, when the valuation report was attached by the bailiff and at the same time sanctioned by court, there was no need for a valuation by the Government valuer. Lastly on this point, he submitted that the Respondent never came up with an alternative valuation.

On the issue of assignment, Mr. Alaka contended that it was perfectly legal because the Consent Judgment was executed on the 16<sup>th</sup> April, 2013 and the Deed of Assignment was executed on the 19<sup>th</sup> June, 2013. This was after the expiry of 60 days agreed upon in the Consent Judgment within which the Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had to refund the money and at the same time to surrender the certificates of title to the suit property, respectively, not before, as Opio Aweri JA found.

Counsel further contended that the assignment was not for the suit property as well as the money as their Lordships had found, it was for the debt only and what was assigned was actually the decree not the suit property. He further contended that the security referred to in the Deed of Assignment were the certificates of title to the suit property which were just being held by the assignees which the assignors had just given to the assignee. It was not a transfer nor did it confer ownership on the assignee. Lastly on this point, Mr. Alaka contended that the assignment was not used to hide the interest of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants nor was it a scam as found by their Lordships.

Another error, according to Mr. Alaka, is when their lordships found that the property which was attached by the bailiff belonged to Deo & Sons at the material time and not to the Respondent and could not be a subject of lawful attachment. This was erroneous because by that time, there was a decree of the High Court that the suit land belonged to the Respondent although the title was still in the name of Deo & Sons. He added that even the letters from the lawyers of UBC and the Minister of Lands on record described the property as that of the Respondent. Therefore, even though the High Court decree had not been formalised by cancelling the entries thereon, the suit property was already the property of the Respondent and it was amenable to attachment. That is why the framers of section 44 of the Civil Procedure Act talk of property “*belonging*” not property “*registered*” in the name of the judgment debtor.

In his reply, Mr. Kiryowa supported the reasons and conclusions of the two Justices in respect to these grounds arguing that there was ample evidence on the court record to support their findings complained about in the appeal.

Regarding the first complaint, he submitted that the 5<sup>th</sup> Appellant was the one who had pleaded that she was a bona fide purchaser for value without notice. That she adduced evidence and her counsel also submitted on it. The Respondent’s case was, on the other hand, that the sale was illegally and irregularly concluded. Therefore, the court had no option but to pronounce itself on

the issue.

Counsel further submitted that the burden of proof is on the one who pleads *bonafide* purchaser for value without notice. The 5<sup>th</sup> Appellant did not prove it. Therefore the Court of Appeal was right to hold that a *bonafide* purchaser would ' have carried out a search because there was a red flag raised: the property had a checkered history; it was registered in the name of Deo & Sons and yet execution was being done by Haba. Therefore the Court rightfully found that she was not a bonafide purchaser for value without notice. Counsel cited the judgment of Odoki JA, as he then was, in the case of Sejjaka Nalima Namusoke v Rebecca Musoke. CA No 12 of 1983 (1992) V KALR 132 in support of his submissions on this point, Mr. Kiryowa also supported the findings of their Lordships that the assignment covered the property as well as the shs. 11.5 billion, on the ground that the evidence was clear.

Counsel further contended that the sale was contrary to section 48 of the Civil Procedure Act because the certificates were not deposited in court as required by law.

Mr. Kyazze in his rejoinder submitted very strongly against the decision of the Court of Appeal. He argued that the 5<sup>th</sup> Respondent was dragged to Court because she had purchased the suit property from a court ordered sale. In her affidavit, she only demonstrated how she had purchased the said property. The burden in the premises could only lie on her to prove that she is a bona fide purchaser for value without notice where those claiming against her had pleaded and led evidence of fraud against her. In this case, no such pleadings or evidence was on record. He contended that the areas that Kakuru JA had pointed out in his ruling such as the manner of transfer and payment were never areas that were canvassed at the hearing. That those were his observations in passing yet he went ahead to rely on them saying that they raised a red flag.

He further submitted that the proof of fraud is higher than on the balance of probabilities. He cited the cases of *Orient Bank v Fredrick Zaabwe* SCCA No. 4 of 2006 and *Kampala Bottlers v Damaniko* (supra) for the proposition that it is a requirement that a person relying on fraud must specifically plead it, particularize it and lead evidence on it. He submitted that in the instant case, there was no proof to the required standard. Mere suspicion is not sufficient to constitute fraud. He contended that the case of *Odd Jobs v Mubia* (supra) is distinguishable. That in that case, the parties had led evidence on an issue that had not been pleaded and is had left it to court to make a decision. In the instant case, on the other hand, the points relied on by their Lordships appear in their ruling but not in the proceedings.

Counsel further contended that this Court had provided guidance in the case of *Mohammed v Roko Construction* (supra) to the effect that where fraud or illegality was not pleaded, the court should not proceed to decide it unless it has given the parties an opportunity to address it on the perceived acts of illegality or fraud. The decision of the Learned Justices of Appeal was therefore, prejudicial because it led to the cancellation of the 5<sup>th</sup> Appellant's title on matters which she had no opportunity to address court on.

Counsel further submitted that this Court has interpreted section 44 of the Civil Procedure Act that the section does not require registration because it says, where the property "**belongs**" to the judgment debtor, not where property is "**registered**" in the name of the judgment debtor. Counsel relied on the case of *Imelda Nansanga v Stanbic Bank & Anor* SCCA No. 10 of 2005 in support of his submissions.

Regarding the failure by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to deposit the certificate of title in accordance with the Consent judgment,

Counsel contended that section 48 of the Civil Procedure Act only applies where the title is in possession of the judgment debtor. Counsel explained that the title was not deposited in court because it was not in possession of the Respondent. It would have been superfluous, therefore, to order the Respondent to deposit the title which was not in its possession. He emphasised that in any case, in the case of *Rosemary B. Karamagi v Angelina Mahimood* (supra), the judge stated that the execution was irregular not illegal or fraudulent.

Lastly on this point, counsel contended that the 5<sup>th</sup> Appellant had purchased the suit property from the 2<sup>nd</sup> highest Court in the land; therefore, irregularities within the court system should not affect her title after paying such a huge sum of money. He submitted that even if there may

have been irregularities, they did not constitute illegalities or fraud so as to impeach the title of the 5<sup>th</sup> Appellant.

Counsel prayed that this ground should be allowed.

I have carefully considered the submissions by counsel on the above grounds of appeal. The first issue is whether the learned Justices of Appeal based their decision on suspicion and fanciful reasoning as alleged by counsel for the appellants. I have perused the record of appeal in its entirety and the rulings of the two learned justices. I find that they based their decision on the material which had been availed to court in the record of appeal. Kakuru, JA was alive to the checkered history of the application, he, therefore, stated at the very beginning of his ruling that, contrary to the practice of the court of summarizing only the facts giving rise to an appeal, he was compelled to reproduce the pleadings. For that reason, he then stated the following:

***“I have listened to the submissions of all counsel and 15 taken into account all the matters raised herein. I have also carefully perused the pleadings in this application and in other applications arising from the same appeal namely Court of Appeal Civil Appeal No. 107 of 2012 and Civil Application No. 298 of 2013. I have also perused the record of appeal from which this Civil application arises, that is Court of Appeal Civil Appeal No 107 of 2012.***

***I have kept all the above in my mind as I resolve the issues before me in this application.”***

After setting out the issues, he went on to state as follows:

***“For the proper determination of this application I am constrained to give it a detailed background. This entails looking into and discussing the ruling and decree of the High Court from which it actually emanates. I am very***

***well alive to the fact that I am not determining the appeal itself as it is not before this court.***

***I am only giving a background to this application and showing how the High Court decree affects the result of this application”.***

Opio JA also followed the same order after setting out the brief facts which in his view formed the background of the application from HCCS No 381 of 2012 in the High Court up to the execution and sale of the suit property to the 5<sup>th</sup> Appellant before coming to a conclusion.

Kakuru JA identified the following issues:

***“1. Whether sufficient cause has been shown for annulment, cancellation and or setting aside the execution of the consent decree in Court, of Appeal Civil Appeal No. 107 of 2012.***

***2. Whether sufficient cause has been shown to declare null and void the attachment and sale of the suit property.***

***3. Whether the Court of Appeal had jurisdiction to grant the orders sought.***

Regarding issue no. 1, the learned Justice noted that:

***i) The application sought to set aside execution and sale of the suit property therein.***

*ii) The said sale and subsequent transfer of the suit property followed a judicial sale.*

*iii) The judicial sale was in execution of a warrant of attachment and sale issued by the Registrar of the Court of Appeal which was carried out by the 3<sup>rd</sup> Respondent a duly appointed*

*bailiff of the High Court.*

*iv) The warrant of attachment arose from a consent decree, entered into by the applicants, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the assignee and sealed by the Court.*

*v) The consent decree arose out of Court of Appeal Civil Appeal No. 107 of 2012 instituted by the 1<sup>st</sup> respondent,*

*Haba Group (U) Ltd and Deo and Sons Properties Ltd the 2<sup>nd</sup> respondent (herein as appellants) and Uganda Broadcasting Corporation the 1<sup>st</sup> respondent and Mr. Paul Kihika the 2<sup>nd</sup> respondent.*

*vi) The record of appeal was filed on the 24<sup>th</sup> August 2012. The appeal arose out of a ruling by the Hon. Mr. Justice Joseph Murangira of the High Court (Land Division) dated 24<sup>th</sup> February 2012.*

*vii) When the suit first came for hearing before the learned judge, counsel Kiwanuka Kiryowa raised a preliminary objection*

*which appears in the judgment of Hon. Murangira as:*

*“Validity of the contract of sale between Uganda Broadcasting Corporation (UBC) and Haba Group (U) Ltd.*



**viii)** *In his ruling dated 24<sup>th</sup> February, 2012, following a detailed submissions by counsel for all the parties, the learned judge upheld the objection on the following grounds:*

*“1. Section 6(a.) of the UBC Act stipulates that UBC could only sale or otherwise dispose of property subject to ‘prior approval of the Minister.’”*

*2. That the suit land was purportedly sold by UBC to Haba Group the plaintiff in that suit on the 14<sup>th</sup> Jan 2011, the Minister's consent was obtained on the 8<sup>th</sup> April 2011, by which time the sale of the suit land had already been completed and its implementation substantially carried out*

*3. The agreement of sale of the suit property was therefore illegal, null, and void as it was in contravention of express provisions of the law and on the authorities of Broadway Construction Co. versus Kasule & Others 119721 EA 76; Kyagulanyi Coffee Ltd versus Francis Sembuya.. Civil Appeal No. 41 of2006: Shell (U) Ltd versus Rock Petroleum (U) Ltd. HCCS No. 645 of 2010: Active Automobile Spares Ltd versus Crane Bank Ltd & Rajesh Prakesh. SCCA No.of201. no court could enforce an illegal contract.*

*4. The documents that incorporated the terms of the contract of sale were not executed in compliance with the UBC Act.*

**5. That a court cannot sanction an illegality and he relied on Makula International Ltd versus Cardinal Nsubuga, SCCA No. 4 of 1981 and Kisugu Quarries Ltd versus Administrator General (1999) 1 EA 162. (SC)**

**The learned judge concluded and ordered as follows:**

**“In the result for the reasons given hereinabove, all three questions of law raised have merits. They are accordingly upheld. The three questions of law have disposed of the main suit and the counterclaim. Accordingly the plaintiffs suit is as a result dismissed with costs to the defendants.**

**Further, the counterclaim is allowed with costs in the following orders that:**

**a) The cancellation of the agreement of sale of land comprised in in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx.23.1 acres was lawful.**

**b) The transfers to Haba Group (u) Ltd and Deo & Son Properties Limited of the land comprised in Freehold**

**Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20**

**Faraday Road Kampala measuring approx.23.1 acres are null and void.**

*c) The Commissioner Land Registration is hereby ordered to cancel the entries in the register book transferring the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx. 23.1 acres to Haba Group (U) Ltd and Deo & Sons Properties Limited.*

*d) The Commissioner Land Registration is hereby ordered to re-instate Uganda Broadcasting Corporation (UBC) as the registered proprietor of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx. 23.1 acres.*

*e) Costs of the suit.”*

*Following the above ruling Kiwanuka & Karugire Advocates extracted a decree and filed it in court on the 1<sup>st</sup> March, 2012 It appeared on page 773 of the record of appeal from which the application arose and the relevant part read as follows:*

***“IT IS HEREBY ORDERED and DECREED that:***

***1. a) The plaintiffs suit is dismissed.***

***b) Costs to the defendant***

***c) The counterclaim is allowed with the following orders:***

***i. The cancellation of the agreement of sale of land comprised in Freehold Register Volume 211 Folio 18 Plots***

**8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx. 23.1 acres was lawful.**

**ii. The transfers to Haba (U) Ltd and Deo & Sons Properties Limited of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring a.pprox.23.1 acres are null and void.**

**iii) The Commissioner land registration cancels the entries in the register book transferring the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx.23.1 acres to Haba Group (U) Ltd and to Deo & Sons Properties Limited.**

**iv. The Commissioner Land Registration reinstates Uganda Broadcasting Corporation (UBC) as the registered proprietor of the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx.23.1 acres.**

**GIVEN under my hand and seal of Honourable Court...the day 2012.**

**Deputy Registrar**

**EXTRACTED BY:**

**KIWANUKA & KARUGIRE ADVOCATES**

**PLOT 5A2 ACACIA AVENUE**

**KOLOLO**

**P.O.BOX 6061**

**KAMPALA.”**

*The appellants appealed to the Court of Appeal vide Court of Appeal Civil Appeal No. 107 of 2012 against that ruling. Before the appeal could be heard, the appellants sought and obtained an order staying the High Court decree pending determination of the appeal.*

As the appeal was pending, the parties entered a “**Consent Judgment**” seeking to settle the matter and filed it in court, on the following terms:

**“Consent Judgment\***

**“By consent of both parties it is agreed that this appeal be settled and the judgment is hereby entered by consent in the following terms:**

- 1. That the 1<sup>st</sup> Respondent pays to the 1<sup>st</sup> Appellant the sum of UGX 11, 500,000,000/= (Uganda Shillings Eleven Billion Five Hundred Million only) less the taxed costs in**

*HCCS No. 326 of 2011 within 60 days from the date hereof*

**2.** *The Appellants shall jointly and/or severally surrender all interests in the suit property and hand over the certificate(s) of title to the entire suit property i.e. the land comprised in Freehold Register Volume 211 Folio 18 Plots 8-10, 12-16 and 18-20 Faraday Road Kampala measuring approx.23.1 acres to the 1<sup>st</sup> respondent within a period of 60 days from the date hereof*

**3.** *The Appellants hereby withdraw the above appeal.*

**4.** *Each party to this settlement shall bear its own costs of the appeal.*

**5.** *This consent judgment settles the entire dispute between the parties.*

*Dated at Kampala this 16<sup>th</sup> day of April 2013.”*

The consent judgment indicates that it was signed by all parties to the appeal and their counsel on the 16<sup>th</sup> March, 2013 and was sealed by the Registrar Court of Appeal on the 19<sup>th</sup> March, 2013

As far as the consent judgment is concerned, Kakuru, JA noted that:

***i) Although it purported to be a judgment of the Court of Appeal, the terms set out there in bore no relation to the grounds of appeal in the memorandum of appeal***

***ii) The consent judgment stipulated in item 3 that:-***

***“3. The Appellants hereby withdraw the above appeal***

***iii) That having withdrawn the appeal, which admittedly the appellants had a right to upon complying with the Rules of the Court, the parties could not make the orders under 1, 2, and 3 as they would have no basis of doing so.***

According to the learned Justice, the parties were simply looking for a way of amicably settling the decree of the High Court in the Court of Appeal without having the appeal heard. But then he noted that neither the orders of the learned judge nor the said decree contained any order directing UBC to pay or refund the 11.5 billion Shs.

His view was that the statement made by the judge in his ruling regarding refund on which the refund clause was based was merely an observation made in passing which the learned judge never included among the final orders of court. According to his lordship, the learned judge was merely observing that the money was recoverable, probably under a separate cause of action as money had and received since the consideration had failed under the

principle of unjust enrichment. However that principle cannot apply in the instant case where the judge had held that the contract was illegal, null and void **ab initio**. See: *Fribosa Spolka Akajjina vs Fairbarn Lawsan Combe Barbour Ltd* ( 1943) AC 32.

Secondly, the learned Justice noted that the issue of refund was never included in the initial decree filed in court on the 1<sup>st</sup> March 2012, which is an indication that the parties had agreed that no such order had been made by the learned judge. Thirdly, and most importantly, the learned Justice noted that the judge, having found that the contract upon which the suit was founded was illegal, is could not thereafter have enforced the same contract with an order directing that a party to an illegal contract be paid the money stipulated above. Based on the foregoing and the authorities which the learned trial judge had relied upon in his ruling set out above, Kakuru, JA found that the learned judge could not make an order for refund. He added that the learned judge could not in fact make any orders against any party to that contract as there was no contract to enforce. He quoted the learned judge's ruling where he had stated the position of the law as follows:

***“No court can enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal once the illegality is duly brought to the attention of the court.”***



Kakuru, JA further noted that the learned judge had relied on the Supreme Court case of Active Automobile Spares versus Rajesh Prakesh (supra) in which the Supreme Court held that courts of law will not enforce an illegal contract. In that case, the Supreme Court went on to hold that, where a person invoking the aid of the court is implicated in the illegality, courts of law would not come to his assistance and that it matters not whether the defendant has pleaded the illegality or not. If the plaintiff proves an illegality, the court ought not to assist him. Therefore, the judge having found that the contract was illegal, had no power to enforce it by making an order of refund or otherwise.

Kakuru, JA also noted that the learned judge could not, in his view, make an order for refund against the defendant in favour of the plaintiff whose suit he had dismissed entirely.

Kakuru, JA further examined the Decree (Annexure 'A' to Mr Kihika's affidavit) and found that it is impossible that the decree could have been filed in court on the 1<sup>st</sup> March 2012, after which fees were paid, then signed and sealed by the Registrar on the 19<sup>th</sup> March, 2012 and finally approved by the parties on 20<sup>th</sup> March, 2012 as indicated. He observed that under the normal practice, the decree is approved by the parties before being sealed and signed and not afterwards. He suspected that it must have been smuggled into the court record. In that decree, the "refund" clause in the pertinent part, reads as follows:

***"It is hereby ordered and decreed that:-***

**1. The plaintiff's suit is dismissed.**

**2. UBC shall refund the sum of shs. 11.500.000.000 Eleven**

**Billion Five Hundred Million to Haba Group (U) Ltd.”**

He ruled on that basis that the decree was illegal, null and void and of no effect since it was not only smuggled onto the record but did not express the decision of the judge correctly. For that reason the learned Justice set aside the purported orders of the judge purporting to enforce an illegal contract by ordering UBC to refund to Haba Group (U) on the ground that it is null and void and of no effect. He however upheld the orders of the learned judge in respect of the counterclaim since a counterclaim is a separate suit in law.

Regarding the validity of the consent judgment, as a result of the foregoing findings, the learned Justice held that the consent decree executed by the parties was at variance with the judgment and decree of the High Court on which it was based. It effectively

reversed and varied the judgment and decree of the High Court. He noted that general rule is that an appeal cannot be allowed by consent, for that would be reversing the judgment. See: Slaney vs Keane [1970] Ch 243.

Kakuru, JA additionally, found that the consent judgment was also irregular and unlawful in so far as it attempted to have an appeal withdrawn by consent in contravention of Rule 94 of the Court of Appeal Rules.

He concluded that the consent judgment was tainted with illegalities, it was irregular and unlawful and therefore null and void **ab ignitio** and of no effect.

He also found that the purported assignment of the “**decree and judgment debt** and “security” was illegal, unlawful and null and void **ab ignitio**.

Having found as above, he also found that the application for execution resulting from the said consent was irregular, as there was no decree to execute. He further found that the warrant of attachment was a nullity at its inception and was incapable of conferring any rights upon any of the parties. In addition, he found and held that the purported execution and sale was null and void **ab initio** and was of no effect.

The other reasons why Kakuru, JA also found that the execution and sale of the property was irregular and illegal were that:

**i) The Certificate of title of the suit property (Annexure ‘F’ to the affidavit of the respondent) indicated clearly that by the time the warrant of attachment was issued on the 29<sup>th</sup> November, 2013, the property did not belong to the “Judgment Debtor it belonged to Deo & sons Ltd the assignor as well as “judgment Creditor”. This fact was ascertainable from the valuation report of M/S OSI INTERNATIONAL at the request of 3<sup>rd</sup> respondent in the application, Twinamatsiko Gordon as follows:**

**“The grant is freehold one, indicated to be registered in the names of DEO & SONS PROPERTIES LTD of P.O. Box 6714 Kampala”.**

Clearly therefore, the warrant of attachment was issued and executed against a property that did not belong to the “Judgment Debtor”. There was therefore no valid sale and no valid warrant on that account alone.

**ii) The 3<sup>rd</sup> respondent acted unlawfully and fraudulently when he executed a warrant of attachment in respect of a property that he very well knew was not registered in the name of the Judgment Debtor”. The 3<sup>rd</sup> respondent was not executing a lawful warrant, and as such, he was not lawfully executing his duties, when he purportedly sold the suit property.**

Regarding the 5<sup>th</sup> Appellant, Kakuru, JA found that the facts of this case as presented do not in the least support Mr. Kyazze’s arguments that she was a bona fide purchaser in her affidavit, the 4<sup>th</sup> respondent does not mention that she made a search at the land registry to ascertain the proprietorship of the property the subject of sale. She had all the time to do so. The advertisement in the newspaper (annexture “C” to the affidavit of the 3<sup>rd</sup> respondent, the bailiff) stipulated as follows:

**\*Duly instructed by the Registrar of the Court of Appeal, we shall proceed to sale by public auction/private treaty**

**the under mentioned land belonging to the respondents... ”**

The respondents were named in the advertisement as the Uganda Broadcasting Corporation and Paul Kihika. At the time of “sale” there was already available to her a valuation report indicating that 10 the registered proprietor was Deo & Sons Properties Ltd.

The learned Justice stated that she had a duty and obligation to ascertain the proprietor of the property even before attempting to bid for it. Had she done so, she would have found out that the property she was bidding for did not belong to the respondents and that the advert was false and misleading.

According to his Lordship, it appeared to him that she actually was well aware of the fact that the respondent was not the registered proprietor but she went ahead to buy the property anyway. She cannot turn around and contend that she is an innocent purchaser for value without notice. The learned justice observed;

**“Innocent she is not. The ownership of the property was changed from the names of the 2<sup>nd</sup> respondent to the names of Uganda Broadcasting Corporation the 1<sup>st</sup> applicant on 14<sup>th</sup> January 2014 long after she had purportedly bought it. Uganda Broadcasting Corporation the first respondent was reinstated as owner on 10.1.2014 at 2.42 p.m.. At 2.44 p.m on the same day a special certificate of title was issued. At 2.46 pm**

Margaret Muhanga Mugisha the 4<sup>th</sup> respondent was registered as proprietor of the said property.

Clearly in my view all the transaction in respect of the suit property carried out at the Land Registry on 10<sup>th</sup> January 2014 was made at the same time. It is inconvincible that transfer forms could have been prepared, signed and lodged within 2 minutes by the 4<sup>th</sup> respondent. It is not possible that the 4<sup>th</sup> respondent who had the duty to effect transfer of the title into her names could have had the property valued by the Government valuers, given a value, had the stamp duty assessed, paid stamp duty, lodged the receipts at the land Registry, had the transfer forms endorsed, filed them for registration and had the registration completed ALL in a period of two minutes. This may not be a finding of fact but it certainly raises a red flag”.

He found further that it was inconceivable that she could have carried shs. 10,200,000,000/- in cash and paid it to the bailiff at the fall of the hammer as indicated in the 3<sup>rd</sup> respondent’s affidavit. The 3<sup>rd</sup> respondent’s office is on the 6<sup>th</sup> floor, Room 12, Plot 15 Luwum Street Kampala. And thereafter the 3<sup>rd</sup> respondent could have paid that huge amount to SINBA at the same place as annexure “c” to the affidavit of the 4<sup>th</sup> respondent a cash receipt issued to SINBA (K) ltd indicates.

Based on the above his Lordship made the finding complained of in this ground namely, that the 5<sup>th</sup> Appellant was part and parcel of a well-planned fraud, she participated at each and every phase with the clear intention of defrauding the respondents of the property, or at least she was aware of all the illegalities outlined above and took advantage of them. She could not therefore claim to be a bona fide purchaser for value without notice.

I have perused the record of proceedings and I find that the conclusions reached by the learned Justice of Appeal are supported by the evidence on record. Indeed the 5<sup>th</sup> Appellant did not aver anywhere in her affidavit that she made any effort to establish the ownership of the land. Further, the speed with which the transaction was effected particularly at the land Registry definitely raises suspicion of collusion. This is compounded by the fact that the land had a checkered history right from the sale to the 2<sup>nd</sup> Appellant.

It is indeed inconceivable that she could part with such a huge sum of money without ' carrying out a search in the Lands Registry to verify the ownership of the said land. Besides, this was a sale by a court appointed bailiff; it is even more incredible that the 5<sup>th</sup> Appellant had no opportunity of establishing the background suit that had led to the attachment of the said property.

This was not an ordinary sale, as rightly submitted by the Appellants' own counsel. It was the sale of very prime land in the heart of Kampala. The suit property belonged to a Government

body, therefore there was need in my view for a valuation from the Chief Government Valuer. It was a sale arising out of a court case. The 5<sup>th</sup> Appellant had to verify the history of the court case and scrutinize all the relevant documents before parting with the huge sum of money, to avoid being sucked into litigation like she has been.

In the premises, I find that the learned Justices were absolutely right to reject the plea of bona fide purchaser for value without notice.

As for the assignment, it is true that the Deed of Assignment was is executed one day after the expiry of the 60 days period. However,

that was not the main reason why Opio Aweri, JA found that it was illegal. He stated in his judgment that:

***“The above transaction would have been lawful had the 1<sup>st</sup> and 2<sup>nd</sup> Respondents returned the title to the applicant before the assignment of the same to SINBA...”***

The Deed of Assignment is clear; it was for both the land and the money. It said:

***“This assignment of Debt and Securities.***

**NOW THEREFORE.....**

***And the certificates of title in respect of ....***



*L...the debit (sic) and monies owing..*

**2.** *The Assignors also assign the security and all the right of title and interest arising thereunder..*

**3.** *The Assignors shall hereinafter have the right to or liability in respect of debt and security.*

**4.** *The assignors shall upon execution of these presents hand over to the assignee*

**(a)** *the decree/consent Judgment*

**(b)** *any other document necessary for recovering the debt....”*

I therefore agree with the findings of the Justices of Appeal that the property could not be a subject of lawful execution. It was still in the names of the Judgment Creditor and the title deeds were in possession of the Assignor. The certificate of title should have been deposited in Court. The execution was therefore contrary to section 48 of the Civil Procedure Act which provides that,

***“(1). The court may order, but shall not proceed further with the sale of any immovable property under a decree of execution until there has been lodged with the court the duplicate certificate of title to the property or the special certificate of title mentioned in subsection(4).***

Subsection 4 refers to a situation where the certificate of title has been lost or destroyed or that the judgment debtor cannot be served with an order under this section or is willfully withholding such certificate.

**(2) The court ordering such sale shall have power to order the Judgment debtor to deliver up the duplicate certificate of title to the property to be sold or to appear and show cause why the certificate of title should not be delivered up.”**

This section was further interpreted by Geoffrey Kiryabwire, J as he is then was in the case of Rosemary Eleanor Karamagi V Angolia Malimoud, HCMA No. 1018 of 2004 where he observed that:

**“It is clear that the law sets out an elaborate procedure for the sale of immoveable property. It would appear to me that the basic procedure where property has been ordered for sale would be for the Registrar of court to order the duplicate certificate to be delivered up to court. This order would have to be put in writing where such a certificate is lost or destroyed the registrar of court can order the Registrar of Titles to issue a special certificate...”**

From the above cited case, I agree that this is the correct position of the law and therefore, the learned Justice cannot be faulted for this finding in the premises.

In conclusion, I find that the learned Justices of Appeal had ample evidence before them from the record of appeal on which they based their findings. They could not ignore or condone an illegality that was glaring from the record before them.

For these reasons grounds 3, 6, 7, and 8 of appeal must fail.

**Ground 4: The majority of the Justices of the Court of**

**Appeal erred in law and fact when they ordered for cancellation of the 5<sup>th</sup> Appellant from the certificate of title on contradictory grounds.**

The complaint in this ground is that the two learned justices of 15 Appeal erred in law and in fact when they ordered the cancellation of the 5<sup>th</sup> Appellant from the certificate on contradictory grounds.

No submission was made on this ground by Mr. Alaka.

Mr. Kiryowa submitted that there is no law that requires that all the Justices on a panel must follow the same reasoning. What is important is the majority decision of the Court.

Mr. Kyazze in his rejoinder contended that this Court has held in Mohamad v Roko Construction (supra) that the Court of Appeal, in as far as it is the highest court in the land, should determine litigant's matters with fairness and openness. He conceded that although it is possible for justices to arrive at the same decision for different reasons, the question here is that one of the findings by Kakuru, JA that the decree of the High Court is invalid, the consent judgment in the Court of Appeal is invalid and the execution arising

Therefrom is therefore invalid, is actually a minority finding since

Opio Aweri and Mwendha,JA disagreed with him .However, the finding impacted on the final order by court.

According to the record, majority of the learned justices agreed on one thing: that the learned High Court judge was right in declaring **10** that the sale of the suit property to the 2<sup>nd</sup> Appellant was null and **void abinitio** for contravening the UBC Act; the orders of the High Court which dismissed the suit by the 3rd Appellant and ordered that the title of the 3<sup>rd</sup> Appellant should be cancelled and the name of the Respondent should be reinstated thereon were also correct. As a result of their finding both of them ordered the cancellation of the 5<sup>th</sup> Appellant's title and reinstatement of the Respondent on the certificate of title.

I note that Opio Aweri, JA only shied away from cancelling the Consent judgment saying that it was not among the prayers sought in the application. In my view, that was, with due respect to the learned justice, an error because the very first prayer sought in the application required the court to investigate the validity of the consent judgment in order to decide whether to cancel or set it aside.

However, I do not agree with counsel's contentions because the learned justices did not base their decision on contradictory grounds.

What happened is that they merely reached the same conclusions using different arguments. In the premises, I

respectfully agree with Mr. Kiryowa that, what matters is the majority decision, not the route taken to arrive at the decision.

This ground fails for that reason.

***Ground 5; The majority of the Justices of the Court of Appeal erred in law and fact when they entertained and adjudicated on issues raised in the main/substantive appeal, which was not before them***

The complaint in this ground is that the majority of the justices of Appeal entertained and adjudicated on issues raised in the main/ substantive appeal, which was not before them. Once again, the record shows that the Appellants' counsel did not submit on this ground. However, as Mr. Kiryowa rightly explained, their Lordships had to and did look at the entire record of the dispute availed to them before reaching their decision. I do not think they can be faulted for that, unless someone had something to hide in those records.

In the premises, I find no merit on this ground and disallow it.

***Ground 9: The majority of the Justices of the Court of Appeal erred in law and fact when in such proceedings they held that the 4<sup>th</sup> Appellant acted unlawfully and fraudulently when he executed a warrant of attachment in respect of the suit property and was not entitled to any immunity under the law.***

The contention in this ground is that the finding by the learned Justice of Appeal that the 4<sup>th</sup> Appellant acted unlawfully and fraudulently in executing the warrant of attachment in respect of the suit property and was not entitled to immunity was incorrect because: (i) the execution arose from an assignment of a decree of the Court of Appeal which assignment was executed lawfully, as already demonstrated; (ii) the assignment which led to the subsequent execution was of a decree which contained an entitlement of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants to receive the proceeds from the Respondent that was lawful. The suit property was never attached; (iii) the interpretation by the learned Justices of Appeal of section 44 of the Civil Procedure Act that the property liable for attachment must be in the names of the Judgment debtor is erroneous. The section is very clear. There is no requirement that it must be registered in the name of the judgment debtor. The property had been decreed by the High Court to belong to UBC, the judgment debtor. UBC as the owner did not contest the attachment and sale of the suit property by applying for a stay of execution.

The 4<sup>th</sup> Appellant therefore acted lawfully on the basis of a lawful order issued by the Court of Appeal which indicated that the property attached belonged to UBC. It would have been otherwise if he had said that it was registered in the name of the Respondent. In support of this argument, counsel relied on the case of Hannington Wasswa & Anor v Maria Onyango Ochola &Ors and Paul Kalule Kagodo v Caroline Kyagaza (supra).

Mr. Kiryowa supported the findings of the learned Justices. He contended that the 4<sup>th</sup> Appellant carried out the execution when he very well knew that from the evaluation report the said property was registered in the name of Deo & Sons, not UBC, the judgment debtor. The findings by their lordships could not be faulted in the premises.

As summarised earlier on in this judgment, Kakuru, JA stated in his judgment as follows:

**“I find that the 3<sup>rd</sup> respondent was acting unlawfully and fraudulently when he executed a warrant of attachment in respect of a property which he very well knew was not registered in the name of the “judgment debtor. The 3<sup>rd</sup> respondent was not executing a lawful warrant; as such he was not lawfully executing his duties when he purportedly sold the suit property. “**

The evidence was on record. The valuation report made by M/S Osi International described the proprietorship of the property as follows:

**“The grant is freehold one, indicated to be registered in the name of Deo & Sons Properties Ltd of P.O Box 6714Kampala”**

Clearly from the foregoing report, the 4<sup>th</sup> Appellant knew that the warrant of attachment he was executing was against property that did not belong to the judgment debtor. Since he executed an

Kakuru, JA not delved into determination of an appeal which was not before him, he would not have possibly set aside the consent. In his view that action impacted on the final orders of the court.

I have dealt with this ground when discussing the earlier grounds particularly 3, 4,6,7,8 and 9. I shall not repeat my findings here, suffice it to say that unlike in the case of Mohammed Hamid v Roko Construction (supra), the record of proceedings clearly shows that the decision in this case was reached after the parties were given an opportunity to address the Court on all the pertinent issues. That case is accordingly distinguishable from the instant one. Besides, I have reproduced earlier on in the judgment, the paragraph where Kakuru, JA explained that he was not determining the appeal and I have indeed not found anywhere in his judgment where he purported to determine the appeal. Most importantly, the learned Justices of Appeal were not right in making the orders complained of since the parties nor did their lawyers have the power to reverse a court order using a consent Judgment as they purported to do. The complaint, therefore, lacks merit. Like the rest, this ground also fails for the same reasons I have given in this judgment.

Perhaps I should also mention in this judgment another abortive attempt by the parties to reverse the orders of the High Court and the Court of Appeal by registering yet another “CONSENT JUDGMENT” before this Court in similar terms to the one nullified by the Court of Appeal. Fortunately, the Justices of this Court, led



unlawful warrant with full knowledge, he is not protected by immunity in the premises.

Most importantly, since the learned Justices had found that the transactions which had led to the attachment and sale were illegal, null and void *ab initio*, the 4<sup>th</sup> Appellant could not hide behind immunity. Consequently, their decision on this point cannot be faulted.

This ground fails as well for that reason.

***Ground 10: The orders granted by the majority of the justices of the Court of Appeal were injudicious, unfair and inequitable and constituted a miscarriage of justice.***

The criticism in this ground is general. It is to the effect that the orders by their Lordships were injudicious, unfair, and inequitable and constituted a miscarriage of justice in that the orders were arrived at in the course of their ruling without giving the parties an opportunity to address their concerns. Mr. Kyazze contended that this was contrary to the guidelines given by this Court in the case of Mohammed Hamid v Roko Construction (supra).

Mr. Kirwoya's response was that this ground actually offends the rules of appeal in that it does not indicate how the orders are injudicious or unfair and how they constitute a miscarriage of justice. It should be disallowed, in the premises.

Mr. Kyazze's rejoinder is that the orders are injudicious because of the consequences on the 5<sup>th</sup> Appellant. He argued that, had

by his lordship the Chief Justice considering the history of the case, properly declined to approve the document, and ordered the appeal to be heard on merit, hence this judgment.

In the result, this appeal is dismissed and the orders of the Court of Appeal are upheld. The Respondent is not entitled to costs due to collusion by its representatives with the Appellants in the scam.

Delivered at Kampala this 29<sup>th</sup> day of October 2015

S.ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

2015.

**REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KATUREEBE CJ, ARACH-AMOKO, JSC, TSEKOOKO, OKELLO AND KITUMBA,

AG.JJSC)

CIVIL APPEAL NO: 03 OF 2014 BETWEEN

1. SINBA (K) LTD
2. HABA GROUP (U) LTD
3. DEO & SONS PROPERTIES LTD
4. TWINAMATSIKO GORDON T/A TROPICAL GENERAL AUCTIONEERS
5. MARGARET MUHANGA MUGISA.....APPELLANTS

AND

UGANDA BROADCASTING CORPORATION.RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Rubby Opio Aweri, Faith Mwendha and Kenneth Kakuru JJA) delivered on the 27<sup>th</sup> March, 2014 in Civil Application No. 12 of 2014]*

JUDGMENT OF KATUREEBE. CJ

I have had the advantage of reading in draft the judgment prepared by my learned sister, Arach-Amoko, JSC, and I agree with it and the orders she has made.

As the other members of the Court also agree, this appeal is dismissed with no orders as to costs, as proposed by the learned Justice of the Supreme Court.

Dated at Kampala this. 29<sup>TH</sup> . Day of October, 2015.

B.M. Katureebe

**CHIEF JUSTICE**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

*{Coram: Katureebe, CJ, Arach-Amoko, JSC. & Tsekooko, Okello & Kitumba, Ag.  
JJSC}*

**CIVL Appal No. 03 of 2014**

1. SINBA(K)LTD.

2. HABA GROUP (U) LTD.

3. DEO & SONS PROPERTIES LTD.

4. Twinamatsiko Gordon T/A TROPICAL GENERAL AUCTIONEERS

5. MARGRET

MUHANGA

MUGISA=====APPELLANTS

VERSES

UGANDA BROADCASTING CORPORATION ===== RESPONDENT

*{Appeal from ruling of the Court of Appeal at Kampala. (Opio Aweri, Faith Mwendha & Kakuru, JJA), dated 27<sup>TH</sup> March, 2014 in Miscellaneous Application No. 12 of 2015 dated 27<sup>h</sup> March, 2014}*

JUDGMENT OF TSEKOOKO. AG.JSC

This appeal arises from the rulings of majority of the Justices of the Court of Appeal where three Justices of Appeal in the Court heard Miscellaneous Application No. 12 of 2014. Each of learned Justices

delivered a separate ruling. Two of the Justices of Appeal dismissed the application without the senior one of them making a final court order to the effect that “by majority decision, the application is dismissed.”

Be that as it may, the appeal to this Court is against the majority decision and it appears to be in line with Section 6 (l) of the Judicature Act.

I have perused in draft the judgment prepared by my learned sister, the Hon. Lady Justice SM. Arach-Amoko, JSC. It is based on the memorandum of appeal which was concerned with the majority decision. I agree with her conclusions that the appeal should be dismissed in the terms proposed by her.

Delivered at Kampala this 29<sup>th</sup> day of October 2015

J.W.N TSEKOOKO

Ag. Justice of the Supreme Court



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

(Coram: Katureebe, CJ, Arach-Amoko, JSC, Tsekooko, Okello  
& Kitumba, Ag. JJSC)

CIVIL APPEAL NO. 03 OF 2014

BETWEEN

1) SINBA (K) Ltd

(2) HABA GROUP (U) Ltd

3) DEO & SONS PROPERTIES Ltd

4. TWINO MATSIKO GORDON T/A TROPICAL GENERAL AUCTIONEERS

5. MARGERET MUHANGA MUGISA=====APPELLANTS

VERSES

UGANDA BROADCASTING CORPORATION.....RESPONDENT

JUDGMENT OF OKELLO, AG. JSC

I have had the benefit of reading in draft the judgment of my  
learned Sister, Arach-Amoko, JSC, and I agree with her reasoning  
and Conclusion. I also concur with the orders she proposed.

Dated at Kampala this 29<sup>th</sup> day of October 2015

G.M.OKELLO

AG.JUSTICE OF THE SUPREME COURT



THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: KA TUREEBE, ARACH-AMOKO, JSC, TSEKOOKO, OKELLO, KITUMBA AG  
JJ.S.C.)

CIVIL APPEAL NO. 03 OF 2014

BETWEEN

1. SINBA (K) LTD
2. HABA GROUP (U) LTD
3. DEO & SONS PROPERTIES
4. TWINAMATSIKO GORDON  
T/A TROPICAL  
AUCTIONEERS
5. MARGARET MUHANGA MUGISA

**RESPONDENTS**

VERSUS

UGANDA BROADCASTING CORPORATION.....APPELLANT

*[Appeal from ruling of Court of Appeal at Kampala (Opio Aweri, Faith Mwendha & Kakuru JJA), dated 27<sup>th</sup> March 2014 in Miscellaneous Application No. 12 of 2015]*

**JUDGMENT OF KITUMBA, AG JSC.**

I have read in draft judgment of my learned sister, Justice Arach-Amoko JSC and I agree with the reasons, the conclusions she has reached in that judgment and the orders proposed therein.

Dated at Kampala, this 29<sup>TH</sup> Day of October 2015

C.N.B. Kitumba

AG. JUSTICE OF SUPREME COURT