

5

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

10

(CORAM: TUMWESIGYE, KISAAYE, JJ.SC; ODOKI,  
TSEKOOKO, AND KITUMBA AG. JJ.SC)

CIVIL APPEAL NO. 06 OF 2013

BETWEEN

15

MS FANG MIN:..... APPELLANT

AND

BELEX TOURS AND TRAVEL LIMITED :.....RESPONDENT

20

CONSOLIDATED WITH

CIVIL APPEAL NO 01 OF 2014

BETWEEN

25

CRANE BANK LIMITED:.....APPELLANT

AND

BELEX TOURS AND TRAVEL LIMITED:.....RESPONDENT

30

*[Appeal from the decision of the Court of Appeal at Kampala  
(Mwondha, Kakuru, and Kiryabwire JJ.A) delivered on 24<sup>th</sup> October 2013  
in Civil Appeal No. 71 of 2009]*

35

JUDGMENT OF DR ODOKI, AG JSC

These two appeals, Ms Fang Min Vs. Belex Tours and Travel Limited, Civil Appeal No. 06 of 2013 and Crane Bank Limited Vs. Belex Tours and Travel Limited, Civil Appeal No. 01 of 2014, filed

5 in this Court separately, were consolidated at their hearing, with the  
consent of the parties.

10 The appeals arise from the same High Court Civil Suit No. 576 of  
2003 and the subsequent Court of Appeal Civil Appeal No. 071 of  
2009. The appellants who were the defendants in the High Court  
filed their appeals against the respondent who was one of the  
15 plaintiffs in the High Court. The respondent lost the suit in the High  
Court and appealed to the Court of Appeal which allowed the  
appeal. The appellants were dissatisfied with the decision of the  
Court of Appeal. Hence, these two appeals.

20 For ease of reference, I shall refer to the appellants by their names,  
namely Ms Fang Min, in Civil Appeal No. 06 of 2003, and Crane  
Bank Ltd., in Civil Appeal No. 01 of 2014. I shall refer to Belex  
Tours and Travel Ltd., as the respondent in both appeals.

25

### **Background to the Appeals**

The respondent and another filed a suit in the High Court claiming  
against the appellants jointly and severally the following reliefs:

30

- a) Special damages of Shs.194,313,000/= plus US\$5,899.
- b) Interest on the US dollars at 36% per annum on weekly rests  
35 and on the Ug. Shs. at 25% per annum, from 14<sup>th</sup> May 1999  
till payment in full.
- c) General damages.

- 5 d) Interest on (c) from the date of judgment till payment in full.  
e) Any other and such relief as the Court may deem fit.

10 The facts as found by the lower Courts were that the respondent was a customer of Crane Bank Ltd. The respondent company obtained credit facilities from the Bank over a period of time between 1997 and 1999.

15 As security for the credit facilities, the respondent executed a mortgage in favour of the Bank in respect of property comprised in Leasehold Register Volume 2490 Folio 4, Plot 9, Ssezibwa Road, Kampala. At that time, the respondent was operating a hotel  
20 business from the said property. The hotel was known as Holiday Hotel (U) Ltd.

In addition to the mortgage, the respondent later executed two  
25 further charges in form of debentures in favour of the Bank.

The respondent defaulted in repaying the loan. As at May 15, 1999, the amount due to the Bank from the respondent had  
30 accumulated to US\$704,829.00, which the respondent conceded it had failed to pay. On 21<sup>st</sup> May 1999, the Bank and the respondent entered into an Agreement of Sale of Landed Property and Hotel Business. The Bank foreclosed on the suit property and evicted the  
35 respondent and seized its assets. The Bank sold the property to Ms Fang Min at US\$745,000 to recover the outstanding amount of US\$739,000, on the loan leaving a balance of US\$5,800 on the account, which the Bank did not pass over to the respondent.

5 On the same day, 21<sup>st</sup> May 1999, a deed of transfer in respect of the mortgage property was executed by the Bank in favour of Ms Fang Min, for the said consideration.

10 Having realized US\$745,000 from the sale, the Bank, with the consent of the respondent, applied the money to recover the loan of US\$704,820, together with legal charges and auctioneers fees which was agreed at 5% thereof, making a total of US\$739,200 with  
15 a balance of US\$5,800. However, the Bank did not pay the respondent US\$5,800 which the respondent was claiming as balance from the proceeds of the sale. In addition, the respondent was claiming movable property or the value amounting to  
20 UG.Shs.194,313,000/=, that was in the Hotel at the time of sale, including furniture, equipment and other movable property.

The Bank did not comply with the said demands and as a result, the  
25 respondent together with Holiday Hotels (U) Ltd, sued the Bank and Ms Fang Min, claiming the balance on the purchase price of the mortgage property, and the return of movable property or their value. The Bank denied the respondent's claim and pleaded that  
30 the respondent defaulted in repaying the loan and after several correspondences, voluntarily handed over the fixed and movable assets of Holiday Hotel to the Bank for further management, in accordance with the terms of the mortgage and debenture  
35 agreements.

The Bank claimed that it lawfully sold the assets to Ms Fang Min with the consent of the respondent, and that the respondent is still

5 indebted to the Bank because the sale proceeds were insufficient to  
cover the due debt plus other expenses. The Bank therefore,  
counter-claimed US\$5,112.27, being outstanding balance on the  
loan.

10

Ms Fang Min, who was in possession of the movable property, was  
sued for conversion in respect of the said property as she had  
taken over the Hotel together with all the movable property. Ms  
15 Fang Min denied the claim against her and pleaded that she  
purchased the property in good faith for value in a sale carried out  
by the Bank. She also contended that the suit disclosed no cause  
of action against her.

20

At the trial in the High Court, the issues which were framed were as  
follows:

- 25
1. Whether the US\$745,000 also included the proceeds of  
movable assets or it was the price for land only.
  2. If so, whether the plaintiffs are entitled to the reliefs sought
  3. If so, from whom?

30

The trial judge dismissed both the suit and the counter claim, with  
costs.

35 The respondent appealed to the Court of Appeal on two grounds  
only, namely:

5                    ***“1. The learned trial judge erred in law and in fact and did not properly evaluate the evidence holding that US\$745,000 paid included land and movables thereby dismissing the appellant’s claim of Shs.194,313,000/- with interest.***

10                   ***2. The learned trial judge erred in law and in fact and did not properly evaluate the evidence in dismissing the appellant’s claim of US\$5,800 with interest.”***

15                   The Court of Appeal allowed the appeal and set aside the judgment of the High Court, which it substituted with the following orders:

20                   a)    The Registrar of Titles shall forthwith cancel the registration of the 2<sup>nd</sup> respondent Fang Min as proprietor of Leasehold Register Volume 2490 Folio 4 Plot 9 Ssezibwa Road, Kampala and reinstate the appellant Belex Tours and Travel Ltd. As the proprietor.

25                   b)    The Registrar of Titles Lands cancels all encumbrances if any, now existing on the title for leasehold Register Volume 2490 Folio 4 Plot 9 Ssezibwa Road, Kampala.

30                   c)    The 2<sup>nd</sup> respondent Fang Min immediately hands over vacant possession of the property comprised in Leasehold Register Volume 2490 Folio 4 Plot 9 Ssezibwa Road, Kampala to the appellant Belex Tours and Travel Ltd or in the event that the  
35                   time of delivering this judgment the said property has been transferred to an innocent purchaser for value without notice, the 2<sup>nd</sup> respondent shall pay to the appellant US\$745,000 (seven hundred forty five thousand) or its equivalent in

- 5 Uganda Shillings with interest at 11% per annum from the date of judgment till payment in full.
- 10 d) The 1<sup>st</sup> respondent Crane Bank Ltd and 2<sup>nd</sup> respondent Fang Min, jointly and/or severally pay to the appellant Shs.194,313,000/= (one hundred ninety four million, three hundred thirteen thousand) only with interest at 17% per annum from the date of this judgment and thereafter at 8% per annum from the date of this judgment till payment in full.
- 15 e) The 1<sup>st</sup> respondent Crane Bank Ltd pays to the appellant Belex Tours and Travel Ltd US\$5,800 (five thousand eight hundred) only with interest at 6% per annum from 15<sup>th</sup> May, 20 1999 till payment in full.
- 25 f) The 1<sup>st</sup> respondent Crane Bank Ltd and the 2<sup>nd</sup> respondent Fang Min pay to the appellant Belex Tours and Travel Ltd general damages for conversion of movable property amounting to Shs.20,000,000/= (twenty million) with interest at court rate from the date of judgment till payment in full.
- 30 g) The 1<sup>st</sup> respondent Crane Bank Ltd pays to the appellant Belex Tours and Travel Ltd general damages for loss of business and loss of use of its property from 15<sup>th</sup> May, 1999 to date equivalent to US\$704,829 (seven hundred four thousand eight hundred twenty nine) which was the 35 outstanding loan at 15<sup>th</sup> May, 1999 together with interest at the commercial lending rate from the date of this judgment which general damages shall be such that they completely

- 5           4.    The learned Justices of Appeal erred in law and failed to properly reevaluate the evidence on record and thereby came to a wrong conclusion that the appellant fraudulently acquired the property.
- 10
5.    The learned Justices of Appeal erred in law and failed to properly reevaluate the evidence on record and thereby came to a wrong conclusion that the acquisition of the suit property by the appellant was illegal.
- 15
6.    The learned Justices of Appeal erred in law and failed to properly reevaluate the evidence on record and thereby came to a wrong conclusion that the sale of the suit property by the mortgage and its acquisition by the appellant did not include the chattels therein.
- 20
7.    The learned Justices of Appeal erred in law and in fact and misconstrued the law on cancellation of the title of a registered proprietor on grounds of fraud, thereby occasioning miscarriage of justice.
- 25
8.    The learned Justices of Appeal misdirected themselves on the law governing the sale and transfer of property by a mortgagee and debenture holder and thereby occasioned a miscarriage of justice.
- 30
9.    The learned Justices of Appeal misdirected themselves on the law governing cancellation of a legal mortgage and thereby occasioned a miscarriage of justice.
- 35



5 On the other hand, Crane Bank Ltd lodged a memorandum of appeal containing seven grounds of appeal which were formulated as follows:

10 1. The learned Justices of Appeal erred in law and in fact in deciding the appeal on an entirely new basis and not on the basis of the two (2) grounds of appeal before them being whether the chattels claimed by the appellant were included  
15 within the US\$745,000 purchase price and/or whether the excess of US\$5,800 recovered on the sale of LRV 2490 Folio 4 Plot 9 Ssezibwa road (“the Suit property”) is due from the appellant to the respondent those also being the sole issues  
20 framed at trial.

2. The learned Justices of Appeal erred in law and in fact in considering the entirely new questions upon which their  
25 decision was based namely:

a) Whether the suit property was sold fraudulently/  
unlawfully;

30 b) Whether the mortgage by the respondent in favour of the appellant was validly executed;

35 c) Whether the transfer of the suit property by the appellant to Ms Fang Min was valid and/or validly executed;

d) Whether the payment by Ms Fang Min for the suit

5 property was valid and lawful, without allowing the  
appellant to submit and/or lead evidence on any of  
these matters.

10 3. The learned Justices of Appeal erred in law and in fact in  
introducing new unpleaded issues which did not form part of  
the issues at the trial nor in the Memorandum of Appeal  
fourteen (14) years after the sale of the suit property has  
15 been concluded and outside the limitation period in law in  
which such matters could be raised.

20 4. The learned Justices of Appeal erred in law and in fact in  
awarding the respondent general damages of an un-  
quantified sum but calculated to ensure that they extinguished  
the US\$704,829 loan sum with interest that would be owed by  
the respondent to the appellant upon the mortgage sale of the  
25 suit property being held to be invalid.

30 5. The learned Justices of Appeal erred in law and in fact in  
holding that the US\$745,000 purchase price paid by Ms Fang  
Min did not include both the suit property and the movables  
therein.

35 6. The learned Justices of Appeal erred in law and in fact in  
reversing the dismissal of the claim by the respondent for  
US\$5,800.

7. The learned Justices of Appeal erred in law and in fact in  
awarding the respondent Ug.Shs.194,313,000/= special

5 damages with interest and Ug.Shs.20,000,000/= as general  
damages with interest.

**Representation of the Parties**

10 Mr. Edwin Karugire represented Ms Fang Min and Mr. Masembe  
Kanyerezi represented Crane Bank. On the other hand, Mr. John  
Mary Mugisha and Mr. Joseph Kyazze appeared for the  
respondent.

15 **Arguments of Counsel for Ms Fang Min**

Arguing grounds one and two together, Mr. Karugire, for Ms Fang  
Min, submitted that the respondent sued Ms Fang Min in the High  
20 Court for willful conversion of chattels. The High Court dismissed  
the suit but the respondent appealed to the Court of Appeal which  
allowed the appeal not only on the sole issue of conversion of  
chattels but went ahead and cancelled Ms Fang Min's Certificate of  
25 Title on the suit property.

Counsel argued that the Court of Appeal determined the appeal on  
issues or grounds that had not been pleaded, proved or argued in  
30 the submissions of the parties either in the High Court or the Court  
of Appeal. As a result, Ms Fang Min's title to the suit property was  
cancelled for fraud which had not been pleaded, proved or argued  
before the two Courts.

35 Mr. Karugire referred to the plaint where the respondent had stated  
that the plaintiff's claim against the defendants jointly and  
separately is for general, special damages, interest, and costs

5 arising from willful conversion and trespass to the plaintiff's chattel.  
"Counsel submitted that what the respondent sought were special  
damages of 194 million shillings being the value of the chattels and  
US\$5,800 being extra money received from the foreclosure.

10

Learned Counsel also referred to the written statement of defence  
of Ms Fang Min as fraud or recovery of land had not been pleaded.  
In consequence thereof, Counsel for Ms Fang Min applied to the  
15 trial judge to have Ms Fang Min discharged from the case as no  
cause of action had been disclosed against her.

Mr. Mugisha, Counsel for the respondent, conceded that the suit  
20 was not in respect of land but in respect of movable property. The  
trial judge ruled that Ms Fang Min should remain in the suit in  
respect of the allegations of conversion.

25 Mr. Karugire submitted that among the three issues which were  
framed, there was no issue regarding the sale of land as the  
respondent had conceded in the High Court. The respondent was  
merely complaining of willful conversion of its chattels. Counsel  
30 further submitted that even when the respondent appealed to the  
Court of Appeal, the two grounds of appeal never complained about  
recovery of land, but recovery of the sums of money being the  
value of the alleged converted chattels.

35

In support of his arguments, Mr. Karugire cited several authorities  
which included **Interfreight Forwarders U Ltd Vs. East African  
Development Bank** Civil App. No. 33 of 1992(SC) where it was

5 held that pleadings are necessary to define matters in controversy  
to enable the parties prepare their cases.

Counsel also referred to the case of **Oriental Insurance Brokers**  
10 **Vs. Transocean**, SCCA No. 55/95 where it was held that where a  
judge raises an issue while writing his judgment, it is necessary to  
give the parties an opportunity to address the Court or adduce  
evidence on the amended issues, before his judgment is delivered.

15

Learned Counsel also cited the case of **Makula International Vs.**  
**Cardinal Emmanuel Nsubuga & Others**, Civil Appeal No. 4 of  
1981 (CA) where it was held that a Court cannot sanction what is  
20 illegal and once an illegality is brought to the attention of the Court,  
it overrides all questions of pleadings including admissions.  
However, Counsel submitted that the provisions of Rule 102 of the  
Court of Appeal Rules provide that the Court shall not allow an  
25 appeal or cross-appeal on any ground not set forth or implicit in the  
memorandum of appeal or notice of cross-appeal, without affording  
the respondent or any person an opportunity to be heard in relation  
to that ground. It was Counsel's contention that the said provision  
30 is mandatory on the authority of the case of **Mohammed**  
**Mohammed Hamid Vs. Roko Ltd.**, Civil Appeal No. 01 of 2013  
(SC). Mr. Karugire distinguished the case of **Makula International**  
(supra) from the present case in that when the illegality was brought  
35 to the attention of the Court, the parties were given an opportunity  
to be heard on the issue before the Court determined the case,  
whereas this was not done in the present case. Secondly, learned  
Counsel submitted, Article 28 of the Constitution requires Court to

5 give parties a fair hearing before their rights and obligations are  
determined, whereas in the present case, Ms Fang Min was  
deprived of the suit property which was granted to the respondent  
without any form of hearing regarding the matter.

10

Mr. Karugire next argued together grounds 3, 4, 5, 7, and 8 which  
deal with the findings of fraud, illegality and cancellation of Ms Fang  
Min's certificate of title. Learned Counsel submitted that the Court  
15 of Appeal did not discharge its duty as a first appellate Court to  
subject the evidence in the High Court to a fresh and exhaustive  
scrutiny in order to come to its own conclusions and that had it  
done so, it would have found that there was no evidence on record  
20 to support the finding of fraud and illegality. Counsel contended  
that in many instances, the Court of Appeal relied on its own  
reasoning and conjecture instead of relying on evidence. He cited  
the case of **Frederick Zaabwe Vs. Orient Bank**, Civil Suit No. 4 of  
25 2006 (SC) for the definition of fraud and the need for the allegation  
of fraud to be carefully inquired into. He submitted that in this case,  
there was neither an allegation of fraud as required by the **Zaabwe**  
case (supra), neither was there any form of inquiry.

30

Learned Counsel criticized the Court of Appeal for holding that the  
appellants lied about the sale of the suit property by public auction  
and that it never took place. He submitted that the Mortgage Deed  
35 and the debentures authorized the mortgagee to sell by public  
auction or private treaty, and that the exercise of either option to  
dispose of the property could not constitute fraud. He contended  
that the evidence on record showed that the sale was by public

5 auction after due advertisement to which Ms Fang Min had responded and turned out to be the successful bidder.

10 Mr. Karugire also criticized the Court of Appeal's finding that Ms Fang Min was not the successful bidder because she had no money to purchase the property. He submitted that Ms Fang Min admitted that she borrowed US\$600,000 from Crane Bank to purchase the property and therefore, this was not an underhand  
15 dealing as there was no law preventing her from borrowing the money. If evidence was needed to prove when she got the loan, it should have been requested for by the Court. Moreover, the loan was to be repaid with interest and therefore, it was wrong for the  
20 Court of Appeal to hold that Ms Fang Min got property for free.

Regarding the finding by the Court of Appeal that the appellants filed false transfer forms on 14<sup>th</sup> May 1999, Mr. Karugire submitted  
25 that the transfer forms show that they were dated 21<sup>st</sup> May 1999 as the revenue stamp shows, and therefore this finding of fraud had no basis.

30 Learned Counsel also referred to the finding by the Court of Appeal that the Bank frustrated the respondent's efforts to repay the loan, and used this as a ground for cancellation of Ms Fang Min's certificate of title. Counsel submitted that numerous demands for  
35 payment of the loan had been made by the Bank, and numerous promises to pay made by the respondent, but in vain. Mr. Karugire further contended that the Court of Appeal erred in finding that writing a letter on Sunday by Counsel for the Bank constituted fraud

5 because he was replying to a letter written by the respondent on Saturday, and the parties had previously held meetings on a Sunday when the respondent had asked for more concessions.

10 Learned Counsel for Ms Fang Min also argued that the Court of Appeal was wrong to find fraud in the fact that both the Sale Agreement and the Transfer Deed were executed on the same day, and because the Sale Agreement included land and chattels.  
15 Counsel submitted that these transactions did not amount to fraud as defined in the case of **Kampala Bottlers Ltd. Vs. Damanico**, Civil Appeal No. 22 of 1992 (SC) which defines fraud as actual fraud, or some sort of dishonesty, and not constructive fraud. He  
20 contended that under Section 176 of the Registration of Titles Act, no action lies against a registered proprietor except on the ground of fraud, proved, against the transferee. It was Counsel's submission that in this case, fraud was not proved but was merely  
25 presumed or based on conjecture. Counsel relied on the cases of **George Kanarusasi vs. Uganda** (1988- 1996) HCB9 and **Oketh Okale Vs. Uganda** (1965) EA 555 in support of his submission that it is improper for a Court to indulge in conjecture but to act only on  
30 the evidence.

With regard to ground 6, Mr. Karugire submitted that the Court of Appeal was wrong to find that the chattels were not sold together  
35 with the land on the ground that the Memorandum of Understanding between the Bank and the respondent did not include immovable property. Counsel contended that this was a misconception by the Court of Appeal as the chattels were sold under the debenture for



5 recovery of the loan. He maintained that the inclusion of chattels in  
the transfer deed was an error caused by the advocate who  
prepared the documents case by transplanting the consideration in  
the sale agreement to the transfer deed, whose explanation was  
10 believed by the trial Court, but rejected by the Court of Appeal  
without any sound reason.

### **Arguments of Counsel for Crane Bank**

15 Mr. Masembe Kanyerezi, learned Counsel for Crane Bank, argued  
grounds 1 and 2 together, then grounds 3 and 4 separately, and  
finally grounds 5, 6 and 7 together.

20 Submitting on the first two grounds of appeal, learned Counsel  
contended that what the parties were in disagreement with was  
whether the US\$745,000 sale price paid by MS Fang Min to Crane  
Bank was the price for the land only or it included the movable  
25 assets as well, which constituted the first issue at the trial. Counsel  
submitted that this is why the respondent sought general damages  
for conversion of the chattels, amounting to Shs.194,313,000/=.  
Counsel clarified that the claim for \$5,800 was based on the  
30 difference between the amount paid by Ms Fang Min and the  
outstanding debt owed by the respondent which the respondent  
claimed should have been paid to it.

35 Mr. Kanyerezi supported the finding of the trial judge that the said  
sale price included both the land and chattels as it was evidenced  
by the sale itself which was headed an “**Agreement of Sale of  
landed property and hotel business**” and made it clear that the

5 sale included business undertakings, assets, goodwill and any  
property in the hotel.

10 Counsel submitted that the agreement stated that the premises had  
been inspected and inventory of all assets, fixtures, movable and  
immovable property, furniture, etc, which constituted the property  
brought by Ms Fang Min. Mr. Kanyerezi also addressed the issue  
15 of including the total price in the transfer deed and submitted that  
the advocate explained the error as an oversight when he extracted  
the amount which was in the Sale Agreement and transplanted it to  
the Transfer Deed, and the trial judge accepted his evidence.

20 Learned Counsel argued that there was no discussion in the trial  
Court or invitation to address the issue of impropriety in the sale of  
land by the Court of Appeal which went ahead and cancelled Ms  
Fang Min's certificate of title for fraud without affording the appellant  
25 an opportunity to be heard. The Court of Appeal also held that the  
respondent had no obligation to pay the Bank's loan, which issue  
had not been addressed in the Courts. Mr. Kanyerezi relied on  
several authorities to support his arguments which included Rule  
30 102 of the Rules of the Court of Appeal, **Mohammed Mohammed  
Hamid Vs. Roko Ltd.** (supra) and **Makula International Vs.  
Cardinal Emmanuel Nsubuga** (supra).

35 Counsel submitted that in this case, not only was the issue of fraud  
of illegality raised for the first time on appeal, without giving the  
appellants opportunity to put forward their explanation or evidence  
against the allegation, but there was insufficient evidence on the

5 record to enable the Court of Appeal to arrive at a just decision  
because the issue had not been canvassed at the trial or on appeal.  
He maintained that the appellants' right to a fair hearing was  
violated because they were not given an opportunity to cross-  
10 examine witnesses before judgment was rendered. He submitted  
that the right to a fair hearing was non-derogable under Article 44 of  
the Constitution. Counsel cited the case of **NSSF Vs. Alcon  
International** (supra) and argued that in that case the  
15 memorandum of appeal was amended to allow the ground of  
illegality or fraud to be addressed by both parties, which was not  
done in this case.

20 Furthermore, Counsel contended that the respondent could not  
bring an action to recover land on grounds of fraud after 12 years  
because the action was barred by the Limitation Act. In this case,  
the issue was raised in Court after 15 years.

25  
With regard to ground 4, Mr. Kanyerezi challenged the order of the  
Court of Appeal in paragraph (g) which ordered Crane Bank to pay  
the respondent general damages for loss of business and loss of  
30 use of its property from 15<sup>th</sup> May 1999 to date equivalent to  
US\$704,829 which was the outstanding loan at 15<sup>th</sup> May 1999  
together with interest at the commercial lending rate from the date  
of the judgment, which general damages shall be such that they  
35 offset the loan. Counsel submitted that it was erroneous for the  
Court of Appeal to cancel the mortgage merely because the  
subsequent transfer was fraudulent because the Bank still had to  
recover its loan which was not disputed. Secondly, Counsel argued

5 that this was the largest sum of general damages he had come  
across. Thirdly, he submitted that the award of interest on general  
damages could only have been made from the date of judgment,  
not date which the cause of action accrued. He relied on the case  
10 of **Masembe Vs. Sugar Corporation**, Civil Appeal No. 22/99 to  
support his submission on interest.

Arguing grounds 5, 6 and 7 together, Mr. Kanyerezi submitted that  
15 the Court of Appeal erred in holding that the US\$745,000 did not  
cover both immovables and movables, and in reversing the award  
of US\$5,800 to the Bank with interest, and in awarding separate  
value for chattels. Counsel submitted that these were unframed  
20 and unsubstantiated issues and therefore, this Court could ignore  
them and base its decision on grounds 1 and 2.

However, Mr. Kanyerezi contended that the Sale Agreement and  
25 the transfer deed were made on the same day, i.e., 21<sup>st</sup> May, 1999  
and contained the same consideration of US\$745,000. Advocate  
Guma explained and apologized for using the same figure for both  
documents instead of subtracting the cost of chattels from the  
30 consideration in the transfer deed. Counsel supported the trial  
judge's decision to accept the advocate's explanation and relied on  
the Sale Agreement as the basis for her decision that the suit  
property consisted of both land and chattels. Therefore, there was  
35 no basis for the Court of Appeal to award Shs.194,313,000/= as the  
value of the chattels.

5 With regard to ground 6, Mr. Kanyerezi submitted that the trial  
Court and the Court of Appeal erred in dismissing the Bank's  
counter-claim for US\$5,800 which was the outstanding amount for  
subsequent expenses of electricity, water and security guards.

10

### **Arguments of Counsel for the Respondent**

Mr. Kyazze, learned Counsel for the respondent, referred to the  
four new issues which Counsel for the appellants contended that  
15 the Court of Appeal erred in addressing them, and submitted that a  
first appellate Court had a duty to re-evaluate the evidence afresh  
and draw its own conclusions on facts and the law. Counsel  
contended that the Court of Appeal considered the evidence  
20 relating to the sequence of events that led to the filing of the suit in  
the High Court and arrived at a decision based on the evidence on  
record. He referred to the Court's consideration of the various  
documents and correspondences relating to the mortgage and  
25 debentures as exhibited in Court and came to the conclusion that  
the evidence pointed to the fact that the two appellants committed a  
series of illegalities and fraud. Counsel then sought to demonstrate  
from the record how fraud was proved. He referred to the manner  
30 in which the property was sold and the mode of payment by Ms  
Fang Min. It was Counsel's submission that the conduct of Crane  
Bank by rejecting the offer from the respondent was intended to  
defeat the respondent's attempts to redeem its property. Counsel  
35 raised other issues which he conceded he did not include in the  
pleadings but argued that the Court of Appeal was entitled to  
consider them even if they arose for the first time on appeal.

5 He relied on the decisions of this Court in the case of **National Social Security Fund Vs. Alcon** and **Mohammed Mohammed Hamid Vs. Roko Limited** (supra). He submitted that a Court cannot close its eyes to an illegality once it is brought to its  
10 attention. Mr. Kyazze conceded that on the authority of **Mohammed Mohammed Hamid's** case, where a Court finds an illegality or fraud, it should give the parties an opportunity to address it. Counsel however argued that there are exceptional  
15 circumstances where illegality is so evident that no amount of explanation from the other side will cure the illegality. Counsel sought to rely on the decision of this Court in **National Social Security Fund Vs. Alcon International** (supra)

20  
With regard to grounds 5, 6 and 7, Mr. Kyazze submitted that the payment made by Ms Fang Min did not include chattels, because both the application for consent made on 14<sup>th</sup> May 1999 and the  
25 transfer of land deed executed on 21<sup>st</sup> May 1999 included the entire sum of money. Counsel contended that it is inconceivable that the transfer of land could include money for chairs, desks and fridge, because they were not part of the land.

30  
Counsel wondered how Mr. Guma, Counsel for the Bank could make the same error twice and submitted that the Court of Appeal was correct in rejecting his explanation as false. It was Counsel's  
35 submission that there was no payment for the chattels and therefore, there was sufficient proof of conversion.

5 On the issue of damages, Mr. Kyazze submitted that this Court will  
not normally interfere with the award or assessment of damages by  
the first appellate Court unless there is material evidence that the  
lower Court followed wrong principles of law, but none if this had  
10 been demonstrated by the appellants.

Winding up arguments, on behalf of the respondent, Mr. Mugisha  
submitted that the Court of Appeal properly discharged its duty in  
15 re-evaluating the evidence afresh and coming to its own  
conclusions. He relied on the cases of **Interfreight Forwarders  
Vs. East African Development Bank** (supra), **Makula  
International Vs. Cardinal Emmanuel Nsubuga** (supra),  
20 **Mohammed Mohammed Hamid Vs. Roko Ltd** (supra), **Kato  
Margaret Vs. Nulu Nalwoga** Civil Appeal No. 8 of 1998. He  
contended that the parties negotiated a sale and this could not  
happen at a public auction. He argued that the Court of Appeal  
25 was entitled to take judicial notice of this fact under Section 55 and  
56 of the Evidence Act.

He argued that the principle of fair hearing was not violated as there  
30 was evidence available on record to support the Court of Appeal's  
findings, and therefore, there was no prejudice occasioned to the  
appellants.

35 He further submitted that the Court has discretion to award  
damages, and the appellants have not demonstrated that the Court  
of Appeal was not alive to the principles governing award of  
damages on appeal.

5           **Consideration of the Law and Arguments**

10           The two appellants lodged separate memoranda of appeal, but in my view the memoranda raise more or less similar or related grounds of appeal. I have therefore, found it more convenient to identify the issues raised in both memoranda and consider them jointly.

15           The first substantial issue raised in the grounds of appeal is whether the Court of Appeal decided the appeal on a new basis or grounds not raised at the trial or in the Court of Appeal, and if so if it erred in not doing so. The first sub-issue is whether the Court of Appeal erred in setting aside the sale of the suit property by Crane Bank to Ms Fang Min on the grounds of fraud or illegality. The second sub-issue is whether the Court of Appeal erred in cancelling the certificate of title of Ms Fang Min without giving her an opportunity to be heard on the matter.

25           It is common ground that the respondent sued the two appellants for recovery of special damages of Shs.194,313,000/= plus US\$5,899 with interest and general damages. The special damages were for the alleged conversion, by the appellants, the respondent's movable property consisting mainly of furniture when the suit property was sold by Crane Bank to Ms Fang Min, and the balance on the purchase price for the property which had not been paid to the respondent by the Bank. The Bank argued that the purchase price of US\$745,000 included both the suit property which was a hotel and furniture therein, while the respondent maintained that the furniture was excluded from the purchase price.



5           Consequently, at the hearing of the suit in the High Court, the only  
three issues framed were:

- 10                   **“1) Whether the US\$745,000 also included the price of  
movable assets or it was the price of land only.**
- 2) If so, whether the plaintiff is entitled to the reliefs  
sought.**
- 3) If so, from whom?”**

15           In her judgment, the trial judge answered the first issue in the  
affirmative, holding that the US\$745,000 also included movable  
assets. Therefore, the second and third issues did not arise.

20           The respondent appealed to the Court of Appeal on two grounds  
which are stated at the beginning of this judgment. Basically, the  
respondent was complaining in the Court of Appeal that the trial  
25           judge erred in holding that the US\$745,000 included movables,  
thus dismissing the respondent’s claim of Shs.194,313,000/=, and  
also in dismissing the respondent’s claim for US\$5,800.

30           In the Court of Appeal, only the said two grounds of appeal were  
argued. However, the Court of Appeal in its judgment raised  
several issues which had not been raised at the trial or on appeal.  
These issues included:

- 35           a) Whether the suit property was sold fraudulently or unlawfully;
- b) Whether the mortgage executed by the Bank in favour of the

5                   respondent was validly executed;

c)   Whether the transfer of the suit property by the Bank to Ms Fang Min was valid or validly executed;

10                   d)   Whether the payment by Fang Min in the suit property was valid and lawful; and

e)   Whether Ms Fang Min was a bona fide purchaser for value.

15

During the hearing of the appeal in Court of Appeal, it was conceded by Counsel for the respondent that the respondent was not complaining about the sale of land but was claiming the cost of furniture which was in the suit property when it was sold to Ms Fang Min. Therefore, the above issues were not addressed in the submissions of both Counsels in the Court of Appeal. It is surprising that the Court of Appeal went out of its way to consider the above three issues and other related issues in its judgment, allegedly on the ground that it had discovered fraud or illegality while writing the judgment.

30                   This Court has on several occasions emphasized the need for pleadings in civil proceedings to describe the respective cases for the parties and to define the issues in dispute for resolution by the Court. In **Interfreight Forwarders (U) Ltd Vs. East African Development Bank**, Civil Appeal No. 33 of 1992, Oder JSC said,

35

*“The system of pleading is necessary in litigation. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon*

5            *which they can prepare and present their respective*  
              *cases and upon which the Court will be called upon to*  
              *adjudicate between them. It thus serves the double*  
              *purpose of informing each party what is the case of the*  
              *opposite party which will govern the interlocutory*  
10            *proceedings before the trial and when the Court will have*  
              *to determine at the trial. See Bullen & Leake and Jacobs*  
              *Precedents of Pleading, 12<sup>th</sup> Edition page 3. Thus, issues*  
              *are framed on the case of the parties so disclosed in the*  
              *pleadings and evidence is directed at the trial to the proof*  
              *of the case so set and covered by the issues framed*  
              *therein. A party is expected and bound to prove the case*  
15            *as alleged by him and as covered in the issues framed.*  
              *He will not be allowed to succeed on a case not set up by*  
              *him and be allowed at the trial to change his case or set*  
              *up a case inconsistent with what he alleged in his*  
              *pleadings except by way of amendment of the*  
              *pleadings.”*

20  
In **Interfreight Forwarders** case (supra), the cause of action was based on negligence which was denied by the appellant in the written statement of defence. There was no claim based on liability  
25 of a common carrier and consequently, there was no defence to that claim. The issue of liability for a common carrier was first raised by counsel for the respondent during his submissions at the close of the case in the lower Court to the effect that the appellant  
30 was not liable in negligence, but it was liable as a common carrier, apparently having agreed to transport the respondent's vehicle. The learned trial judge found in effect that the appellant was a common carrier and was accordingly guilty of strict liability for the  
35 loss at common law.

In his judgment, Wambuzi CJ said:

5            *“In the case before us, the cause of action pleaded was negligence, the issues were framed and the trial proceeded on that basis. I think it was a misdirection in law on the part of the learned Principal Judge to base his judgment on a cause of action, not pleaded and not being part of the issues upon which the parties brought the suit. I think the first ground of appeal must, therefore succeed.”*

10

In the present case, it is clear that the Court of Appeal erred in basing its judgment on a cause of action which was neither pleaded nor argued before the Court or the High Court. The Court of Appeal also granted reliefs which were not prayed for in the plaint without any amendment of the plaint. The respondent never claimed for the recovery of the suit land, for cancellation of the certificate of title of Ms Fang Min, for cancellation of the outstanding amount of the loan owed by the respondent and for Mesne profits from the suit property as ordered by the Court of Appeal. The respondent had only claimed against the two appellants jointly and severally special damages of Shs.194,313,000/= plus US\$5,899 and interest thereon, and general damages for conversion.

15

20

25

It is now well established that a party cannot be granted relief which it has not claimed in the plaint or claim. See:

30

**Attorney General Vs. Paul Ssemogerere & Zachary Olum**, Constitutional Appeal No. 3 of 2004 (SC) and **Julius Rwabinumi Vs. Hope Bahimbisimwe**, Civil Appeal No. 10 of 2009. (SC); Civil Appeal No. 10 of 2009. (SC); **Hotel International Ltd. Vs. the Administrator of the Estate of Robert Kavuma**, SCA No. 37/95

35

5 and **Standard Chartered Bank (U) Ltd Vs. Grand Imperial Hotel Ltd.**

10 In **Julius Rwabinumi Vs. Hope Bahimbisimwe**, (supra),  
Katureebe JSC, observed,

15 *“I only wish to add by way of emphasis that the Court of Appeal should have restricted its decision to matters that were pleaded by the parties in their respective petitions. The parties sought intervention of the Court in respect of specific properties where there was alleged contribution by either party. They did not ask Court to pronounce itself on all their properties generally. This Court has had occasion to pronounce itself that a Court should not base its decisions on unpleaded matter.”*

20

The learned Justice of the Supreme Court continued,

25 *“In the case of Attorney General Vs. Paul Ssemogerere & Zachary Olum, Constitutional Appeal No. 3 of 2004 (SC), Mulenga JSC stated as follows:*

30 *“It is a cardinal principle in our judicial process that in adjudicating a suit, the trial Court must base its decision and orders on the pleadings and the issues contested before it. Founding a Court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law.”*

The learned Justice concluded:

35 *“Likewise on appeal, matters that were not raised and decided on in the trial Court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court.”*

5 It is clear, therefore, that the Court of Appeal erred in granting reliefs which were not sought by the respondent in its plaint.

10 It was, however, argued by the respondent that the rules and case law allow the Courts to depart from pleadings and agreed issues and consider and decide such matters where fraud is brought to the attention of the Court on appeal. The respondent relied on the cases of **Makula International Ltd Vs. Cardinal Emmanuel Nsubuga & Others**, Civil Appeal No. 4 of 1981(CA) and **National Social Security Fund Vs. Alcon International**, (supra)

20 In **NSSF & Others Vs. Alcon International** (supra) I had this to say,

25 *“One of the principles of law stated in Makula International (supra) is that as long as there is an illegality, it can be raised at any time as “a Court of law cannot sanction that which is illegal.” Counsel for the appellant maintains that the arbitral award was procured by fraudulent means which is an illegality which this Court must act upon. I do agree, and hold that due to the fact that fraud was discovered on appeal, the appellants were not barred from raising it in this Court. The Alcon Managers and Directors knew this fact which is why they concealed it. This conduct cannot be anything but deliberate concealment of pertinent information.”*

35 However, the facts in both **NSSF Vs. Alcon International** (supra) and **Makula International** (supra) are distinguishable from the instant case. In **Makula International**, the issue of illegality concerned non payment of stamp duty which was raised on appeal. The Court of Appeal allowed the parties to address the matter

5 before coming to its decision.

Similarly, in **NSSF Vs. Alcon International** (supra), Counsel for the  
appellant argued that the facts revealing fraud and illegality came to  
10 the knowledge of the National Social Security Fund after the Court  
of Appeal had made a judgment and it was late in the proceedings  
in 2008 that these facts came to light. Therefore, there was no  
opportunity for this challenge to be made in the lower Court. It was  
15 for this reason that this Court allowed the ground of illegality to be  
added on the amended grounds of appeal.

Therefore, the correct position of the law is that while an issue or  
20 ground of illegality or fraud not raised in the lower Court, may be  
raised on appeal, the parties must be given an opportunity to  
address Court on it before the Court makes a decision. Even  
where a judge wishes to consider an issue after the hearing has  
25 been concluded, the judge must give the parties opportunity to  
address the Court on the issue.

The principle I have stated is supported by Rule 102(c) of the Rules  
30 of the Court of Appeal which provides:

***“102(c). The Court shall not allow an appeal or cross  
35 appeal on any ground not set forth or implicit in the  
memorandum of appeal or notice of cross appeal,  
without affording the respondent or any person who in  
relation to that ground should have been made a  
respondent, or the appellant, as the case may be, an  
opportunity of being heard on that ground.”***

5 This rule was considered in the case of **Mohammed Mohammed Hamid Vs. Roko Construction Ltd**, Civil Appeal No. 1/03 where this Court stated:

10 *“Further we have perused the eight grounds of appeal which were lodged in the Court of Appeal on behalf of the present respondent. None of those eight grounds of appeal in the memorandum complains about illegalities upon which the learned Justices of Appeal decided the appeal. In our considered view, and with great respect,*  
15 *the decision of the Court of Appeal contravened Rule 102(c) of the Rules of the Court of Appeal.”*

The Court held that the provisions of Rule 102(c) of the Court of Appeal Rules are mandatory. The Court referred to the case of **H Singh Vs. SS Dhiman (1951) 18EACA 75**, and then stated:

20 *“In that case, the East African Court of Appeal held that although it is the right and duty of the Court of Appeal to consider illegality at any stage yet, when it has not been pleaded and not raised in the Court below, or at best only raised at the late stage, an appellate Court must be cautious and must consider whether the alleged illegality is sufficiently proved and must be satisfied that if there are matters of suspicion in the plaintiff’s case, an opportunity was given for explanation and defence.”*  
25  
30

The Court concluded:

35 *“There is no doubt that all authorities cited by Counsel for the appellant emphasize the need to hear both sides on a crucial point in case before deciding the case one way or the other. And this is properly emphasized by clause (1) of Article 28 of our Constitution which provides for fair hearing.”*



5 The right to a fair hearing is a non-derogable constituti  
it must be observed even where an illegality or fraud  
on appeal. Therefore, the Court of Appeal erred when it held  
the mortgage and transfer executed by the Bank in favour of Ms  
10 Fang Min were invalid, and that the certificate of title in favour of  
Ms. Fang Min should be cancelled, without giving the Bank and Ms  
Fang Min an opportunity to be heard on these matters.

15 It was also argued for the respondent that there was sufficient  
evidence to support the Court of Appeal's finding that the appellants  
were guilty of fraud or had committed a series of illegalities. These  
included:

20 (a) Writing a letter on a Sunday by the Bank's advocate rejecting  
the respondent's extension of the time when to repay the  
loan.

25 (b) Ms Fang Min obtaining a loan from the Bank to purchase the  
suit property held by the Bank as a mortgage contrary to  
Section 37 of the Financial Institutions Act.

30 (c) Failure to affix stamp duty on the agreement for sale of land  
and movables.

35 (d) Executing a mortgage deed between the Bank and the  
respondent in 1997 without each party signing it in Latin  
characters but merely scribbling their names, contrary to  
Section 148 of the RTA.

5 (e) Including the same amount of money in the agreement for sale of land and movables, as in the transfer of land deed.

10 (f) Filing false transfer form purporting to show that the sale of the property had been completed on 14<sup>th</sup> May 1999 whereas it was completed on 21<sup>st</sup> May 1999.

15 Most of these findings were not based on evidence but on conjecture and attractive reasoning. Writing a letter by an advocate on Sunday cannot be held to be evidence of fraud when he was replying to a letter written by the respondent on a Saturday, and the respondent had defaulted for over six months in repaying the loan. The error of transplanting the same figure of the purchase price in the two documents was explained by the advocate who prepared the two documents, and the trial judge believed the advocate.

20 In holding that the sale of the suit property contravened the Financial Institutions Act, the Court of Appeal relied on Section 37(a) of the Act which provides that a financial institution shall not engage directly or indirectly, for its own account, alone or with others in trade, commerce, industry, insurance, or agriculture, except in the course of the satisfaction of debts due to it in which case all such activities and interests shall be disposed of at the earliest reasonable opportunity. The Court then observed:

35 ***“It is thus questionable whether the sale of the suit property by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent could still be said to be in the course of satisfaction of the debt of the appellant due to the 1<sup>st</sup> respondent. It should further be recalled that the core business of the***

5            ***1<sup>st</sup> respondent as a financial institution is to take deposit  
and give advances and innovative transactions such as  
these could turn out to be in violation of the Financial  
Institutions Act and should be avoided.”***

10            With respect, I think it is clear from the evidence in this case that  
the Bank, in the course of its legitimate business, advanced a loan  
to the respondent which faulted on its repayment, and the Bank  
sold the suit property to Ms Fang Min in satisfaction of the debt of  
15            the respondent due to the Bank and therefore the transaction was  
valid.

20            The validity of the mortgage entered into by the Bank and the  
respondent was never questioned by the parties, and there was  
insufficient evidence to prove that it was not validly executed. The  
fact that the transfer forms bore an earlier date than the date when  
the transfer was effected in the land office does not prove fraud.

25            It is well settled that fraud means actual fraud or some act of  
dishonesty, not constructive fraud. The burden of proof lies on the  
party alleging it and the standard of proof is higher than in an  
ordinary civil suit. Given the fact that the appellants were not given  
30            an opportunity to respond to these allegations of fraud, it cannot be  
held that the burden of proof was discharged. On the other hand,  
the trial judge had the opportunity to hear and see the witnesses of  
the parties and accepted the evidence of the appellants on the  
35            above issues which were relevant to this case. Therefore, I find  
that the Court of Appeal erred in making findings on new issues  
raised without giving the appellant an opportunity to address them,

5 when in fact there was insufficient evidence to establish tr  
raised by the Court of Appeal.

10 The above consideration disposes of most grounds of appeal which  
in my view should succeed leaving grounds dealing with the second  
substantial issue, namely, whether the learned Justices of Appeal  
erred in law and in fact in holding that the US\$745,000 purchase  
price paid by Ms Fang Min to the Bank, did not include both the suit  
15 property and the movables therein. This issue covers ground 6 on  
Ms Fang Min's Memorandum of appeal and ground 5 of the  
Memorandum of appeal by Crane Bank.

20 It should be recalled that the main issue framed at the trial was:

***“Whether the US\$745,000 also included the price of  
movable assets or it was the price of the land only.”***

25 The respondent claimed that the said sum of money did not include  
the value of his movable property in the form of furniture which was  
valued at Ug.Shs.194,313,000/= which the respondent alleged had  
been unlawfully converted by the appellants. The respondent also  
30 claimed US\$5,800 as alleged balance due to him from the  
purchase price.

35 In her judgment, the trial judge based her decision mainly on the  
**“Agreement for Sale of Landed Property and Hotel Business”**  
signed by the Bank and Ms Fang Min on 21<sup>st</sup> May 1999. The  
agreement was made under the powers of sale by the Bank as the

5 mortgagee under the mortgage deed in accordance with the Mortgage Decree 1975, in the event of default by the mortgagor in the repayment of the loan.

10 The Bank was also exercising its powers under the Debenture Deeds executed in favour of the respondent. Under the debentures, **“all the current assets, business undertaking, goodwill, uncalled capital, and property of whatever**  
15 **description belonging to Ms Belex Tours and Travel Ltd. including a hotel operating and known as Holiday Hotel situated on the above described land”** were charged in favour of the Bank.

20 According to the sale agreement, the respondent as the mortgagor, had defaulted on its obligations to the mortgagee and the mortgagee had exercised its powers under the mortgage and debentures deeds, **“to sell all the landed property, the**  
25 **businesses, assets, goodwill and all the properties of the said Belex Tours and Travel Ltd. including Holiday Hotel”** and the buyer who was Ms Fang Min had agreed to buy the above  
30 **“described land property undertaking and business of Holiday Hotel.”**

The agreement stated that **“the total consideration shall be**  
35 **US\$745,000 (Seven hundred and forty five thousand United States Dollars) excluding VAT and any Government taxes.”**

The agreement also stated that the premises had been inspected and inventory of all assets, fixtures, movable and immovable

---

for all the properties and paid for them as a package. She stated:

***“The terms of the sale are therefore, contained in the sale agreement. The sale agreement talked of US\$745,00 as the total consideration. This is in line with the evidence***

5            *of Ms Fang Min that she bided for everything and paid for*  
*it as a package. The application for consent to transfer*  
*was only in respect of the land and so was the transfer*  
*(Ext p.5 and 6). They could not include the chattels since*  
*the chattels are not covered under the RTA (Registration*  
10 *of Titles Act) or the Mortgage Decree as Mr. Mugisha*  
*rightly pointed out. However, the problem was for the*  
*applicant not to state a different figure in the sale*  
*agreement. Perhaps the best way to handle the*  
*transaction would have been to separate the value of the*  
*land and the assets, and sell them separately. But the 1<sup>st</sup>*  
15 *defendant had the power of sale upon default by the*  
*plaintiff and in accordance with the agreed terms choose*  
*to lump them together hence the difficulty when it came*  
*to applying for consent and transfer in the Land Registry.*  
*Clause 9 of the Debentures gave the Bank unlimited*  
*powers to deal with the said assets on terms it thinks fit,*  
20 *and the Bank made use of those powers and sold off the*  
*land and the business as a going concern to the second*  
*defendant.”*

The learned trial judge concluded:

25            *“The Bank cannot, therefore, be faulted for exercising its*  
*powers under the securities granted to it by the 1<sup>st</sup>*  
*plaintiff.”*

30            In its judgment, the Court of Appeal faulted the trial judge for relying  
on the **“Agreement of Sale of Landed Property and Hotel  
Business”** on the ground that it contained the same purchase price  
as in the mortgage deed which the Court held that it was the real  
agreement of sale. The Court of Appeal had this to say on the Sale  
35 Agreement:

*“The learned trial judge based her judgment almost  
exclusively on interpretation of exhibit p.7 which was*

5            *“The Agreement of Sale of Landed Property and Hotel  
Business.” This agreement of sale also dated 21<sup>st</sup> May  
1998 was made under the RTA in respect of Leasehold  
Register Volume 2490 folio 4 Plot 9 Ssezibwa Road  
Kampala (Holiday Hotel) paragraph 5 thereof covers the  
10            sale of movable properties. It states that the inventory is  
attached. The judge found there was no such inventory  
attached. We agree that an agreement for sale of land  
under RTA could also at the same time have been an  
agreement for sale of chattels, such omnibus agreement  
are not uncommon in commercial transactions, and they  
are legal. However, when such omnibus agreements are  
15            made, they are concluded in different ways. The aspect  
of that agreement that relates to land must end up with  
the registration and transfer of that land under the RTA.  
On the other hand the sale for example of shares ends up  
with registration and transfer at the Company Registry.*

20            *In this particular case, everything ended up at the  
Registry of Titles under the RTA. The full consideration  
of US\$745,000 was reflected as the purchase price for the  
land and stamp duty paid thereon. In our view, therefore,  
although the agreement could have been also related to  
25            the movables all the money was paid only in respect of  
the land.”*

In my view, the above findings by the Court of Appeal were contrary  
to the evidence on record. In the first place, the terms of the sale  
30            agreement speak for themselves. They were clear and  
unambiguous that the Bank was selling to Ms Fang Min **“all the  
landed property, the business assets, goodwill and all the  
properties of the said Belex Tours and Travel Ltd. Including  
Holiday Hotel,”** for a total consideration of US\$745,000. This was  
35            after the suit property had been inspected and inventory of all  
assets, fixtures, movable and immovable properties, furniture, etc  
had been made by both parties. The oral evidence of both parties

---

~~the second reason given by the Court of Appeal for not relying on~~  
the sale agreement was that it was inadmissible in evidence as no  
stamp duty had been paid on it. There was no evidence to support  
this finding as the parties were not given opportunity to address the

5 issue.

10 In my view, therefore, the Court of Appeal erred in holding that the purchase price of US\$745,000 paid by Ms Fang Min to the Bank did not include the value of movables and furniture. Therefore, the respondent was not entitled to recover from the appellants Shs.194,313,000/= as the appellants were not guilty of conversion of the chattels.

15 The remaining issue to consider is whether the respondent is entitled to recover US\$5,800 as the balance due to it on the purchase price paid by Ms Fang Min for the property. According to the evidence on record, the Bank defrayed the purchase price in satisfaction of the outstanding loan amounting to US\$704,829 with interest thereon, payment of the fees and expenses of the advocate and auctioneers, utility bills of water and electricity and security  
20 expenses leaving a short fall of US\$5,112.27 which the Bank counter claimed from the respondent. This evidence was not seriously contested by the respondent, and was accepted by the trial judge.

30 Although the counter-claim was rejected because the amount had been written off by the Bank, the above evidence proved that there was no balance due to the respondent on the purchase price.  
35 Therefore, the Court of Appeal erred in reversing the dismissal of the respondent's claim of US\$5,800 and awarding this sum to the respondent when it was not due to it.



5 **Conclusion**

In conclusion, I am of the view that the Court of Appeal erred in reversing the decision of the trial judge in the High Court dismissing the respondent's suit and substituted it with an order allowing the respondent claims as well as granting the respondent reliefs which were not sought by the respondent and which had no merit. Therefore, the Court of Appeal erred in granting the respondent special and general damages because the respondent was not entitled to them, for the reasons already stated. In the result, I find merit in all the grounds of appeal presented by each of the appellants.

20 Accordingly, I would allow these appeals, set aside the decision and orders made by the Court of Appeal, and substitute them with the decision and orders made by the High Court.

25 I would award to each of the appellants, costs in this Court, and in the Courts below.

Dated at Kampala this ..... Day of ..... 2015.



Dr B J Odoki

**ACTING JUSTICE OF THE SUPREME COURT**

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

(CORAM: TUMWESIGYE; KISAACYE; JJSC; ODOKI; TSEKOOKO; OKELLO; JJSC.)

CIVIL APPEAL NO. 06 OF 2013

**BETWEEN**

**MS. FANG MIN** :: **APPELLANT**

**AND**

**BELEX TOURS AND**

**TRAVEL LTD** :: **RESPONDENT**

**CONSOLIDATED WITH**

CIVIL APPEAL NO. 01 OF 2014

**CRANE BANK LTD.** :: **APPELLANT**

**AND**

**BELEX TOURS AND TRAVEL LTD** :: **RESPONDENT**

[Appeal from the decision of the Court of Appeal at Kampala (Mwonda, Kakuru and Kiryabwire, JJA) dated 24<sup>th</sup> October, 2013 in Civil Appeal No. 71 of 2009]

**JUDGMENT OF TUMWESIGYE, JSC**

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Dr. B.J. Odoki, Ag. JSC, and I agree with his conclusion that this appeal should succeed and that the decision of the Court of Appeal should be set aside.

I also agree that the decision of the High Court should be restored.

Since the majority of members of the Court agree, the appeal is allowed with the Orders as proposed by the learned Justice of the Supreme Court.

Delivered at Kampala this ..... day of..... 2015.

**Jotham Tumwesigye**

**JUSTICE OF THE SUPREME COURT**

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TUMWESIGYE, KISAAKYE, JJ.S.C; ODOKI; TSEKOOKO & KITUMBA  
Ag. JJSC)

CIVIL APPEAL NO. 06 OF 2013

BETWEEN

MS FANG MIN ..... APPELLANT

AND

M/S BELEX TOURS & TRAVEL LTD ..... RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 01 OF 2014

BETWEEN

CRANE BANK LIMITED ..... APPELLANT

AND

BELEX TOURS & TRAVEL LTD ..... RESPONDENT

*[An Appeal arising from the Judgment of the Court of Appeal (Mwondha, Kakuru, Kiryabwire, JJ.A) dated 24<sup>th</sup> October, 2013 in Civil Appeal No.71 of 2009.]*

## JUDGMENT OF DR. KISA AKYE, JSC.

The appellants separately appealed to this Court against the decision of the Court of Appeal, where the following Orders were made in favour of the respondent.

- i) An Order directing the Registrar of Titles to cancel the registration of Ms. Fang Min as the registered proprietor of Plot 9 Sezibwa Road, which had been sold and transferred to her by Crane Bank and to reinstate the respondent as the proprietor;
- ii) An Order directing the Registrar of Titles to cancel all encumbrances (if any);
- iii) An Order directing Ms. Fang Min to give vacant possession of Plot 9 to the respondent or to pay US\$ 745,000 or its equivalent in Uganda Shillings if she had already transferred the property to another bonafide purchaser for value without notice, and to pay 11% interest on the amount per annum from the date of the judgment until payment in full.
- iv) Payment of UGS 194,313,000/=, being the value of the respondent's movable assets that Crane Bank sold to Ms. Fang Min and interest thereon at the rate of 17% from 15<sup>th</sup> May 1999 until the date of Judgment in the Court of Appeal and thereafter at 8% till payment in full;
- v) Payment of US\$5,800 being balance of moneys Crane Bank realized from the sale of the respondent's property, with a 6% interest from 15<sup>th</sup> May 1999 until payment in full. .
- vi) general damages of 20,000,000/= for conversion of the respondent's movable property;
- vii) An order directing Crane Bank to pay the respondent general damages of US\$ 704,829 for the respondent's loss of business and loss of use of its

property from 1999 to the time of Judgment, with interest at the commercial lending rate.

viii) Costs in the Court of Appeal and the High Court.

The background to this appeal is set out in the lead Judgment of Odoki, Ag. JSC and I do not need to state it here. Suffice it to say that the respondent jointly with Holiday Hotel Uganda Ltd. filed a Civil Suit against the appellants in the High Court. In the suit, the respondent and Holiday Hotel sought for special damages of UGS 194,313,000/=, being the value of the movable assets they claimed Ms. Fang Min had converted to her use when she purchase Plot 9 Sezibwa Road from Crane Bank. This property had earlier on been mortgaged by the respondent to Crane Bank to secure a credit facility. The respondent also later issued debentures in favour of Crane Bank as further security, which covered the movable property of the respondent in the Holiday Hotel that operated at Plot 9 Sezibwa Road.

The respondent also claimed in the Civil Suit a refund of US\$5,800 from Crane Bank as being the balance of the purchase price Ms. Fang Min paid for the purchase of the respondent's property; general damages, interest and costs. The High dismissed the respondent's suit. However, the respondent successfully appealed to the Court of Appeal.

Being dissatisfied with that decision, the respondent appealed to the Court of Appeal on the following two grounds:

- “1. The learned trial Judge erred in law and fact and did not properly evaluate evidence in holding that the US\$745,000 included land and chattels thereby dismissing the appellant's claim for Shs. 194,313,000/=.*

2. *The learned trial Judge erred in law and fact and did not properly evaluate evidence in dismissing the appellant's claim of US\$5800 with interest."*

The respondent prayed for the appeal to be allowed and for the decree of the High Court to be set aside, with costs in both courts. Holiday Hotel Ltd. did not appeal.

The Court of Appeal ruled in favour of the respondents and gave the orders that were outlined at the beginning of this judgment. The appellants then filed their respective appeals in this Court. The two appeals lodged in this Court were consolidated by this Court because they arose from the same transaction and appeal.

#### **Consideration of the Appeal**

I have had the benefit of reading in draft the Judgment of my brother, Odoki, Ag JSC. I agree with his reasoning and proposed orders with respect to the orders of the Court of Appeal relating to cancellation of the registration of Ms. Fang Min as the registered proprietor of Plot 9 Sezibwa Road; the reinstatement of the respondent as the registered proprietor; and the cancellation of all encumbrances (if any). I further agree with the judgment of Odoki, Ag JSC. setting aside the order directing Ms. Fang Min to give vacant possession of Plot 9 to the respondent or to pay US\$ 745,000 or its equivalent in Uganda Shillings if she had already transferred the property to another bonafide purchaser for value without notice, and to pay 11% interest on the amount per annum from the date of the judgment until payment in full; and lastly the order directing Crane Bank to pay the respondent general damages of US\$ 704,829 for the respondent's loss of business and loss of use of its property.

All the above orders of the Court of Appeal cannot be upheld because they fall outside the appeal that the respondent lodged before the Court and the matters that were never raised or canvassed by the parties at the Court of Appeal. As is evident from the record of appeal, when the respondent's suit was dismissed by the High Court, the respondent filed its appeal based on the two grounds reproduced above. It therefore follows that the learned Justices of Appeal should have granted the reliefs which the respondent had sought from the court.

With respect to the remaining orders of the Court of Appeal, I am of the view that they should not be set aside but be upheld. My discussion and reasons appear in the following section, which will focus on ground 6 of appeal of Ms. Fang Min's appeal and Ground 5 of Crane Bank's Appeal.

There is need, in my view, to distinguish between the two appellants. Ms. Fang Min, as the buyer, should not be faulted for conversion of the respondent's movable property, even where their value was not taken into account by the other appellant, Crane Bank. This is because she did not have any contractual relationship with the respondent. Hence she did not owe any duty to the respondent in relation to the value of the respondent's movable properties.

Secondly, she is protected by the Sale Agreement she executed with Crane Bank. As between the two appellants, Crane Bank and Ms. Fang Min, the price was inclusive of both the land and the movable properties.

It is however my view that the Sale Agreement alone cannot extinguish the rights of the respondent vis a vis Crane Bank.

The record of appeal shows that Crane Bank commissioned Bageine & Company to undertake a valuation of the respondent's property sometime in the course of early 1999. On 15<sup>th</sup> May 1999, Bageine & Company issued their Report and Valuation in respect of the respondents' land, buildings, furniture and equipment at Plot 9, Sezibwa Road. While the values were indicated in Uganda Shillings, the Valuers indicated that they were using a Foreign Exchange rate of US\$1 to

Uganda Shillings 1,600. The Report indicated the Market Value of the land as 1,370,000,000/=, while that of buildings, and equipment, installations and furniture was assessed at 167,688,000/=. Using the foreign exchange rate given above, the total Market Value of both the land and the buildings, equipment, installations and furniture amounted to 1,537,688,000/= Uganda Shillings. This was equivalent to a total of US\$ 961,055, of which US\$104,805 was the value of equipment, installations and furniture in United States Dollars.

On the other hand, the Forced Sale Value of the land was assessed at 1,096,000,000/=, while buildings, furniture and equipment were assessed at 84,844,000/= (US\$53,028). The total Forced Value of the respondent's land, buildings, equipment, installations and furniture was therefore valued by Crane Bank's own valuers at US\$ 737,403, at the time that they were selling off the respondent's property.

Since from my analysis of record of appeal (namely the valuation report commissioned by the Crane Bank as well as the Transfer Deed), the purchase price paid by Ms. Fang Min did not cover the value of the respondent's movable property, the respondent should recover the value of the movable properties from Crane Bank as the mortgagee.

This Court has agreed with the trial judge and with the submissions of the appellants that the Crane Bank used its powers of sale by private treaty under the Mortgage Deed and under the debentures respectively, to make an omnibus sale of the respondent's land and movable property which was covered by the debenture to Ms. Fang Min in satisfaction of the respondent's indebtedness to Crane Bank.

The majority members of the Coram have further rejected the respondent's claim relying on the Agreement of Sale that was executed between Crane Bank and Ms. Fang Min. On the basis of this holding, they have found no merit in the



respondent's arguments that the value of his movable assets which were covered by the debenture was not included in the purchase price of US\$ 745,000 that Ms. Fang Min paid.

It is undisputable that the Mortgage Deed that was executed between Crane Bank and the respondent provided for the right to sale by private treaty. Crane Bank had a right to invoke its powers and to indeed to sell off the respondent's property in the event of failure by the respondent to repay the loan that it owed to the Bank. However, in my view, neither the Mortgage Deed nor the Debenture Deeds gave Crane Bank the right to determine, as it did in this case, that the moment the respondent became unable to pay its loan, the value of ALL the securities (i.e. land and all the property which was covered by the debentures) became equivalent to the loan that was due to it from the respondent. The value should have been determined by persons/firms with competence to do a professional valuation.

It is a well known legal principle that the powers of Crane Bank as mortgagee were not unfettered and that Crane Bank could do as it pleased with respect to the respondent's property. In *Cuckmere Brick Co. v. Mutual Finance [1971] 2 All ER 642, 643*, it was held that, "in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it."

Again in *McHugh v. Union Bank of Canada [1913] AC 299,311*, Lord Moulton as noted as follows:

*"It is well selected law that it is the duty of a mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold."*

*Cross LJ* in *Cuckmere Brick Co. v. Mutual Finance* [1971] 2 All ER 642, 646 also held as follows:

*“A mortgagee exercising a power of sale is ...not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power.”*

*“...the sale must be a genuine sale by the mortgagee to an independent purchaser at a price honestly arrived at.”*

At page 649, His Lordship further observed as follows:

*“...a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking possession of it and the date of sale...”* 649

A mortgagee is accordingly required to not act not only in good faith but also with reasonable care. As Salmon LJ. observed in *Cuckmere Brick Co.* (*supra*) at page 643 as follows:

*“...it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor...the mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could be scarcely closer. Surely, they are ‘neighbours’.”*

I find these English authorities persuasive and consistent with the provisions and spirit of section 10 of the Mortgage Act which require the consent of the mortgagor before the mortgagee exercises the right to sale by private treaty.

I am also of the firm view that the question as to whether the US\$745,000 price included the respondent's movable assets at Plot 9 Ssezibwa Road should not depend on whether the Crane Bank had a right to sale by private treaty under the Mortgage Deed and the various Debentures, or what agreement it executed with the eventual buyers (Ms. Fang Min). It is my view that the determination of this question should depend on three factors: the value of the land and movable assets that Crane Bank held as security for the respondent's loan; how much the respondent owed to Crane Bank, and lastly on the legal principles governing sale of mortgaged property and property under a debenture deed.

I therefore wish to respectfully differ from my colleagues and would hold that the value of the respondent's movable assets should not have been lumped together with the value of the land and developments. Crane Bank failed in its duty to the respondents and should be ordered to pay the value of the movable assets as claimed and the balance that remained on the purchase price of US\$5,800.

### Costs

Both appellants, Crane Bank and Ms. Fang Min prayed for the costs of this appeal and the courts below. Although both appellants have been partially successful in their respective appeals in this Court, I would not award them costs they prayed for.

In the course of dealing with the respondents' appeal, the learned Justices of Appeal discovered and documented many anomalies in the way the Crane Bank conducted itself with respect to the sale of the properties the respondent had mortgaged to it and with respect to the several debentures.

I fully subscribe to the reasoning and concerns of the learned Justices of Appeal with regard to the need for us to ensure that Courts of law are not used to endorse illegalities and/or fraudulent transactions. Although these questionable

transactions between the appellants with respect to the sale of the mortgaged property and debentures were out of reach for this Court and the Court of Appeal due to the fact that the respondent chose not to litigate them. However, these anomalies are evident on record and clearly show that both appellants did not act in good faith in dealing with the respondent's property. This Court should not proceed to reward this conduct with an order for costs in their favour. I would instead order that Crane Bank pay the costs of the respondent in this court and the two courts below.

### **Conclusion**

I would allow this appeal partially and set aside the following orders of the Court of Appeal.

1. The Order directing the Registrar of Titles to cancel the registration of Ms. Fang Min as the registered proprietor of Plot 9 Sezibwa Road, which had been sold and transferred to her by Crane Bank and to reinstate the respondent as the proprietor;
2. The Order directing the Registrar of Titles to cancel all encumbrances (if any);
3. An Order directing Ms. Fang Min to give vacant possession of Plot 9 to the respondent or to pay US\$ 745,000 or its equivalent in Uganda Shillings if she had already transferred the property to another bonafide purchaser for value without notice, and to pay 11% interest on the amount per annum from the date of the judgment until payment in full.
4. The order directing Crane Bank to pay the respondent general damages of US\$ 704,829 for the respondent's loss of business and loss of use of its property from 1999 to the time of Judgment, with interest at the commercial lending rate.

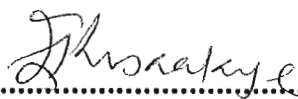
I would however partially dismiss this appeal and uphold the following Orders of the Court of Appeal with slight modifications where necessary.

1. That Crane Bank pay the respondent UGS 194,313,000/=, being the value of the respondent's movable assets that Crane Bank wrongly surrendered to Ms. Fang Min and interest thereon at the rate of 17% from 15<sup>th</sup> May 1999 until the date of Judgment in the Court of Appeal and thereafter at 8% till payment in full.
2. That Crane Bank pay US\$5,800 to the respondent being balance of moneys Crane Bank realized from the sale of the respondent's property, with a 6% interest from 15<sup>th</sup> May 1999 until payment in full.
3. That Crane Bank pay the respondent general damages of 20,000,000/= for conversion of the respondent's movable property.

With regard to costs, I would order that:

- a) Crane Bank should pay the respondent's costs in this court and the courts below.
- b) Both appellants meet their own costs in this Court and the courts below.

Dated at Kampala this 8<sup>th</sup> day of July 2015.

  
.....

**HON. DR. ESTHER KISAAKYE**  
**JUSTICE OF THE SUPREME COURT**

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

(CORAM: TUMWESIGYE, KISAAKYE, JJ.SC; ODOKI, TSEKOOKO, AND  
KITUMBA AG.JJ.SC)

CIVIL APPEAL NO 06 OF 2013

BETWEEN

MS FANG MIN:.....APPELLANT

AND

BELEX TOURS AND TRAVEL LIMITED :.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO 01 OF 2014

BETWEEN

CRANE BANK LIMITED:.....APPELLANT

AND

BELEX TOURS AND TRAVEL LIMITED:.....RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Mwodha, Kakuru,  
and Kiryabwire JJ.A) delivered on 24<sup>th</sup> October 2013 in Civil Appal No.71 of 2009]*

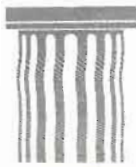
**JUDGMENT OF KITUMBA, JSC.**

I have had the advantage of reading in draft the lead judgment of my  
brother Odoki Ag. JSC. I concur with it and the orders proposed therein.

Dated at Kampala, this 8<sup>th</sup> day of July 2015

*C.N.B. Kitumba*  
C.N.B. KITUMBA

AG. JUSTICE OF THE SUPREME COURT



Ref: Lt/768/ak/KA/15

8<sup>th</sup> July, 2015

Masembe, Makubuya, Adriko, Karugaba & Se  
(MMAKS ADVOCATES)  
3<sup>RD</sup> Floor Diamond Trust Center,  
Plot 17/19 Kampala Road,  
P.O. Box 7166,  
Kampala.

Attn: Ms. Doreen Nawaali

Dear Madam,

**RE: UNLAWFUL TERMINATION OF LYDIA GLADYS KIWANUKA**

Reference is made to the captioned matter, our letter dated 4<sup>th</sup> May, 2015, your emails and reply dated 25<sup>th</sup> May, 2015 referenced DN/M1435-0001.

We acknowledge receipt of your letter which we shared with our client and wish to advise that from the emails availed to us by our client between her and Ms. Jennifer Stockert, the decision to put our client on performance Improvement Plan (PIP) arose when she requested for compensation following the fatal accident she was involved in while traveling from the Busheyi Office.

In respect to the email dated 31<sup>st</sup> March, 2015, our client took her annual leave on the 7<sup>th</sup> April, 2015 as scheduled and agreed to by her line manager Ms. Stockert and only received an email in her private email (kiwanukalydia@yahoo.com) notifying her of the termination and forbidding her from returning to office. Your client instead of affording our client the opportunity to return from her annual leave entitlement chose to terminate her services by email and without according her an opportunity to be heard.

In respect to injuries which you described as a cut on her face, it is not true that it was a simple/minor cut as per your letter, your client has all the information and reports regarding the injuries and we implore you to get the documentation and reports from your client. Our client has carried out tests as to extent of injury and the same has been assessed at a 20% incapacitation hence qualifying for compensation as demanded in our earlier notice of intention

Elthen

Kindly scan  
and send  
to me.  
Thanks  
Doreen

