

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
[CORAM: KATUREEBE; CJ, TUMWESIGYE; KISAAKYE; ARACH-AMOKO; &
MWANGUSYA, JJ.S.C.]

5 **CIVIL APPLICATION NO. 04 OF 2015**

BETWEEN

BITAMISI NAMUDDU:::] APPLICANT

AND

RWABUGANDA GODFREY:::] RESPONDENT

10 *[An Application for leave to appeal against the decision of the Court of Appeal (Buteera, Kakuru, & Tibatemwa, JJA) in Civil Appeal No. 087 of 2010 dated 26th February 2014]*

RULING OF THE COURT

Bitamisi Namuddu, hereinafter referred to as the applicant, filed this application seeking leave of this Court to appeal against the decision of the Court of Appeal in Civil Appeal No. 087 of 2010.

15 The application was brought under section 6(2) of the Judicature Act and Rule 39 (1) (b) of the *Judicature (Supreme Court) Rules*. The application is supported by an affidavit sworn by the applicant on 27th May 2015 and another affidavit of Katungulu John Matovu deponed on 22nd May 2015.

20 This application has got a checkered history which we shall not fully delve into. Rather we shall only give that background which we think is relevant to this application.

On 4th August 2004, the applicant was granted letters of administration by the High Court in respect of her late father's estate, the late Muswangali Musa. After receiving the grant, she carried on a search in the land office at Mityana Land Office to establish the assets belonging to her late father's estate. The search revealed that part of her late father's land had been irregularly registered in the
25 names of Rwabuganda Godfrey, hereinafter referred to as the respondent.

On 12th November 2004, the applicant filed a claim with Kiboga District Land Tribunal No. KBG/DLT/23/2004 against both the respondent and the Registrar of Titles. She alleged conversion and trespass against the respondent. She also alleged wrongful and/or fraudulent entries on the Register of Titles, for which she sought cancellation for the entries and the rectification of the
30 Register.

On the same day of lodging the claim, she took out summons against both the respondent and the Registrar of Titles and subsequently gave them to a duly registered process server to effect service. The process server successfully served the Registrar of Titles. He was however unable to serve the respondent because he failed to locate him at his last known residence. The process server left a copy

of the summons with the LC 1 Chairperson of the village who acknowledged receipt of the same. On 27th December 2004, the process server deponed an Affidavit of service of summons in respect of KBG/DLT/23/2004.

5 On 2nd February 2005, when the matter came up for hearing before the Kiboga District Land Tribunal, both the respondent and the Registrar of Titles were absent. The Tribunal adjourned the hearing and directed: (a) the applicant's advocate to verify with the LC 1 Chairperson whether the respondent was traced for service of summons to file a defence; (b) that fresh service be made on the Registrar of Titles as well; (c) that a hearing date be fixed; and (d) that the summons to file a defence should be served and returned to the tribunal by 16th February 2005.

10 The applicant's case came up for hearing again on 22nd February 2005 before the Kiboga District Land Tribunal but it was adjourned again to 25th May 2005. On 25th May 2005, neither party appeared. The Tribunal adjourned the case *sine die* and directed that the parties were to fix a hearing date when they appeared at the Tribunal Registry.

15 On 21st June 2005, the applicant filed an application for substituted service. The Tribunal granted the application and directed the applicant to extract summons to be published in the newspaper within 10 days from the date of delivery of the Ruling. The case was adjourned to 14th September 2005.

20 On 24th August 2005, an advertisement appeared in the New Vision newspaper titled "Summons/Hearing Notice." It was addressed to the respondent and informed him that the Tribunal had received an application from the applicant in respect of land located in Nakatakuli, Butemba Kiboga District. The "Summons/Hearing Notice" also directed him to attend the hearing of the matter on 14th September 2005.

25 On 14th September 2005, there was no hearing because the respondent and the Registrar of Titles did not turn up. The Record further shows that on that same day, the Tribunal did not constitute and the hearing of the case was adjourned to 28th September 2005. On 28th September 2005, the Tribunal did not sit because it was constituted past 5 p.m. As a result the hearing was adjourned to 26th October 2005. The Record does not show whether the Tribunal sat on the 26th October 2005.

On 15th November 2005, the applicant filed an application for an interlocutory Judgment in KBG/DLT/23/2004. The Tribunal entered an interlocutory Judgment against the respondent and the Registrar of Titles and allowed the applicant to proceed *ex parte*.

30 On 24th May 2006, the Tribunal delivered its Judgment in KBG/DLT/23/2004 and found the applicant to be the rightful administratrix and a beneficiary of the estate of the late Musa Muswangali, including the suit land. The Tribunal also found that it did not have powers to cancel all entries and rectify the record. So the Tribunal referred the matter to the High Court, in accordance with Section 31(d) of the Land (Amendment) Act 2005 (now Section 76(3) of the Land Act) for the necessary
35 consequential orders.

On 20th October 2006, the applicant also filed High Court Misc. Cause No. 44 of 2006 for consequential orders before the High Court, Kampala. On the 11th July 2007, the respondent filed Misc. Application No 335 of 2007 for extension of time within which to appeal against the Judgment of the Kiboga District Land Tribunal in the High Court at Nakawa. On 13th September 2007, Opio-
5 Aweri, J. (as he then was) granted the application for consequential orders.

On 11th December 2007, Magezi, J. granted the respondent's application for extension of time and ordered the respondent to lodge an appeal within 30 days from the date of her Ruling.

However, the Record of Appeal does not show whether the respondent ever lodged an appeal. It is also not clear from the Record whether Opio-Aweri, J. (as he then was) was aware of Misc.
10 Application No. 335 of 2007 at the time of delivering his Ruling. However, Magezi, J. in her Ruling was aware of the Ruling of Opio-Aweri, J. but nevertheless went ahead to grant the respondent leave to appeal out of time.

On 14th December 2007, the respondent filed Misc. Application No. 44 of 2007 in Kiboga Chief Magistrate's Court to set aside the ex parte Judgment in KBG/DLT/23/2004, and the decree made
15 thereunder. He also filed Misc. Application No. 45 of 2007 for an interim order for stay of execution of the orders of the Tribunal in KBG/DLT/23/2004. Despite protests from the respondent's advocate, the Kiboga Grade 1 Magistrate heard both applications concurrently and dismissed both applications on 10th March 2008.

On 28th October 2008, the respondent filed High Court Land Appeal No. 28 of 2008 in the High
20 Court at Nakawa, against the decision of the Kiboga Grade 1 Magistrate refusing to set aside the ex parte Judgment of the Tribunal.

On 22nd October 2009, the High Court dismissed the appeal and upheld the Judgment of the Kiboga Grade 1 Magistrate. A year later, (on 29th October 2010) the respondent filed a second appeal, Civil
25 Appeal No. 087 of 2010 in the Court of Appeal. From the Record of proceedings of the Court of Appeal, the appeal was adjourned several times due to non appearance by the applicant's Advocate.

On 11th February 2014, the Court of Appeal eventually heard Civil Appeal No. 087 of 2010 ex parte and delivered its Judgment in Civil Appeal No. 087 of 2010 on 26th February 2014. The Court set aside the decision of the High Court refusing to set aside the Judgment of the Kiboga Grade 1 Magistrate.

30 On 6th March 2014, the applicant filed Misc. Application No. 79 of 2014 in the Court of Appeal to have Civil Appeal No. 087 of 2010 reheard interparty. The Court of Appeal dismissed the application on 7th April 2014.

Dissatisfied with the Judgment of the Court of Appeal in Civil Appeal No. 087 of 2010 the applicant filed a Notice of Appeal on 10th March 2014. The applicant also filed Misc. Application No. 89 of
35 2014 in the Court of Appeal the next day on 11th March 2014, for leave to appeal to the Supreme

Court. The Court of Appeal dismissed her application on grounds that the issues raised in the application did not raise points of law of considerable public or general importance. She subsequently filed a Memorandum of Appeal in this Court on 22nd May 2014.

5 On 16th February 2015, the applicant filed this application for leave to appeal against the decision of the Court of Appeal in Civil Appeal No. 087 of 2010. Her application is based on the grounds and supporting Affidavits which are reproduced and referred to later in this Ruling.

The applicant was represented by Jonathan Abaine, while Yesse Mugenyi represented the respondent. Both parties made oral submissions.

Applicant's Submissions

10 Counsel for the applicant contended that the intended appeal raises a question of great public importance that warrants consideration of this Court. The question of great public importance, according to counsel was whether substituted service was not effective service as the Court of Appeal held in its decision from which the intended appeal arises from.

15 Counsel submitted that the Court of Appeal relied on the decision of this Court in **Geoffrey Gatete & anor v. William Kyobe, Supreme Court Civil Appeal No. 07 of 2005**. Counsel contended that the law on substituted service has never changed, that it was still good law and furthermore that it is still on our Statute Books.

20 Counsel further contended that the appeal was an opportunity for this Court to review its decision in **Gatete** (supra) and set the record straight on the issue of substituted service. Counsel also submitted that the issue of substituted service had a bearing not only on the applicant but on other Court users as well.

Without prejudice to his submission, counsel for the applicant further contended that the decision of **Gatete** was distinguishable from the present case since the Court in **Gatete** was dealing with service on partners, which was not the case in the intended appeal.

25 Regarding the justice of the case, counsel for the applicant contended that there were so many legal processes that took place after the Judgment by the Tribunal and the High Court. In counsel's view, a reversal of all these processes as ordered by the Court of Appeal would cause a lot of hardship and injustice to the applicant. Relying on the decision of this Court in **Farook Aziz (Administrator of Estate of Salma Kabasingo) v. Abdalla Abdu Makuru, Supreme Court Civil Appeal No. 04 of 2002**,
30 counsel urged this Court to grant the application and hear the applicant's appeal to enable the Court to look at the justice of the case. Counsel prayed for Court to grant the applicant leave to appeal.

Respondent's Submissions

Counsel for the respondent refuted the applicant's submissions. He contended that the position of the Supreme Court regarding third appeals was reflected in the case of **Farook Aziz** (supra).

Furthermore, he contended that if the Court was to grant leave, it was the duty of the Court to ensure that justice was done to all parties.

Counsel for the respondent also contended that when the applicant sought for a Certificate of public importance at the Court of Appeal, the Court had ample time and made a very exhaustive ruling and found that there was no question of public importance on which they could grant the Certificate.

On the issue of substituted service, counsel for the respondent refuted the applicant's contentions and submitted that if the applicant's advocate had addressed himself properly to the Court of Appeal Judgment, he would have discovered that the Court of Appeal never made any pronouncement that substituted service was no longer effective service. Rather, he contended that the Ruling of the Court was that when it reappraised the evidence, it discovered the summons had actually expired. Furthermore, counsel submitted that looking at the Record of Appeal, the issue was not about substituted service since what was advertised in the newspaper was not a summons to file a defence.

Counsel also contended that the gist of the appeal was that court process was never served on the respondent. That upon investigation by the Court of Appeal, the Court found that no court process had been served on the respondent and that it consequently held that subsequent proceedings were a nullity.

With regard to justice of the case, counsel for the respondent contended that the right to be heard the applicant was clamoring for, was the same right that was denied to the respondent in the lower Court.

In rejoinder, counsel for the applicant reiterated his submissions and further contended that the issue of substituted service was an issue which was still in controversy in the lower Courts and therefore warranted consideration of this Court in order to provide guidance on the matter. He further contended that the lower Courts were in a dilemma on whether or not to follow *Geoffrey Gatete & anor v. William Kyobe, Supreme Court Civil Appeal No. 07 of 2005* with some following it and others declining to follow it.

Counsel further submitted that the question of the effectiveness of substituted service was not addressed by the Court of Appeal. This matter in counsel's view was exacerbated by the fact that the applicant was not heard during the hearing of the appeal. This, in counsel's view, further warranted this Court to look at the justice of the case. Counsel reiterated his prayer that leave be granted to the applicant to file her appeal in this Court.

30 Consideration of the Application.

We will now proceed to the merits of the application. We have carefully perused the record of the application and the submissions of both parties. We have also read the Ruling of the Court of Appeal declining to grant the leave. In our view, the main question for determination is whether or not the applicant has or has not raised such matters as are contemplated by Section 6 (2) of the Judicature Act

or Rule 39(1) (b) of the **Judicature (Supreme Court) Rules** upon which we can say that we want justice to be done in the case from which her application emanates.

This application was brought under Section 6(2) of the Judicature Act and Rule 39(1) (b) of the **Judicature (Supreme Court) Rules**.

5 Section 6(2) of the Judicature Act provides as follows:

10 ***“Where an appeal emanates from a Judgment or Order of a chief magistrate or a magistrate grade I in the exercise of his or her original jurisdiction, but not including an interlocutory matter, a party aggrieved may lodge a third appeal to the Supreme Court on the certificate of the Court of Appeal that the appeal concerns a matter of law of great public or general importance, or if the Supreme Court considers, in its overall duty to see that justice is done, that the appeal should be heard.”***

On the other hand, Rule 39(1) (b) of the **Judicature (Supreme Court) Rules** provides a remedy for the applicant whose application for a Certificate has been refused by the Court of Appeal in the following terms:

15 ***“If the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the court within fourteen days after the refusal to grant the certificate by the Court of Appeal for leave to appeal to the court on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the court to review in order to see that justice is done.”***

20

It suffices to note at this stage that in its determination of an application for a certificate to lodge a third appeal to this Court, the Court of Appeal is guided by only two factors namely: (i) whether the intended appeal to the Supreme Court concerns a matter of law of great Public importance and (ii) whether the intended appeal raises a matter of law of general importance.

25 However, this Court is not as restricted as the Court of Appeal to only these two instances. Under Section 6 (2) of the Judicature Act, this Court can also grant leave, if in its overall duty to see that justice is done, it is of the view that the appeal should be heard.

This was emphasized by this Court in the case of **Namuddu Christine v. Uganda, Supreme Court Civil Application No. 03 of 1999** where Wambuzi, CJ observed as follows:

30 ***“Under subsection (5) of S.6, this Court will grant leave if the court, in its overall duty to see that justice is done, considers that the appeal should be heard. In other words, this court is not bound by the restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied: (a) that the matter raises a question or questions of law of great public importance; or (b) that the matter raises a question or questions of law of general importance.***

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On the other hand, this Court will grant leave if it considers that in order to do justice, the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.

40

It appears to us that in deciding whether or not to grant leave we are not restricted to questions of law like the Court of Appeal.”

Similarly, in *Farook Aziz* (supra), Odoki, CJ also observed as follows with regard to section 7(2) of the then Judicature Statute [now section 6(2) of the Judicature Act already cited above].

5 ***“The purpose of this provision is to limit the right to lodge a third appeal to only cases where questions of great public or general importance which have far reaching consequences on the society and the general development of the law are involved. It is not sufficient that the grounds of objection raise questions of law, or that the parties have consented to the granting of certificate to the appellant to leave to appeal. The appellant***
10 ***must state the matter of great public or general importance.”***

Turning to the present application, the Court of Appeal, while dismissing the applicant’s prayer for a Certificate to lodge a third appeal to this Court, held as follows:

15 ***“... in order for this Court to grant the Certificate applied for, the applicant has to show to this Court the points of law of considerable public or general importance and of some novelty. The applicant in the instant case before us has not demonstrated that the instant case before us meets the required standard and is a proper case that warrants the grant of a Certificate that the appeal concerns a question of great public or general importance. The application is therefore dismissed with costs.”***

The applicant based her application to this Court on the following six grounds:

- 20 ***(i) In order to do justice, the appeal ought to be heard.***
- (ii) There are questions of great public and general importance that warrant a decision of this Honourable Court in relation to final answers to questions as to whether substituted service is not an effective service as per the rules in Order V Rule 18 of the Civil***
25 ***Procedure Rules.***
- (iii) That the points of law on substituted service raised at the lower Court once not resolved by this honourable Court would have a significant bearing on the public interest.***
- 30 ***(iv) That the applicant filed an application for leave to appeal against the judgment but it was denied by the Court of Appeal.***
- (v) That the applicant intends to have final answers on questions as to whether an appellate Court has powers to grant orders of ownership of land arising from an application to set***
35 ***aside an ex parte judgment.***
- (vi) It would be fair and in the interest of justice if Court granted this application.***

We shall proceed to consider ground (v) of the application first. Under this ground, the applicant contends that she is seeking leave to file an appeal because she intends to have final answers on
40 whether an appellate Court hearing an appeal originating from an application to set aside an ex parte Judgment has powers to grant orders of ownership of land in such an appeal.

Having found that Court process was not served on the respondent, the Court of Appeal set aside the Judgment of the High Court which had upheld the Judgment of the Grade 1 Magistrate’s Court at

Kiboga. The Grade 1 Magistrate's Judgment in turn had upheld the ex parte Judgment of the Kiboga District Land Tribunal. The Court of Appeal also made the following orders in its ex parte Judgment.

5 **i) *The Judgment of the High Court is hereby set aside and substituted with this Judgment dismissing the suit for non compliance with Order 5 Rule (2) of the Civil Procedure Rules.***

ii) *The Consequential orders made by the High Court on 20th September are hereby set aside.*

10 **iii) *The Commissioner for Land Registration is hereby ordered to cancel the respondent's name on LHR Volume 645 Folio 9 Singo Block 783 Plot 3 and reinstate thereon the name of the appellant.***

iv) *The respondent is hereby ordered to vacate the suit land described in paragraph 3 above immediately, and to hand over vacant possession to the appellant.*

15 **v) *The respondent is hereby ordered to pay costs in this appeal, in the High Court, in the Magistrate's Court and in the Land Tribunal.***

It should be noted that the Court of Appeal heard the appeal ex parte. The appeal arose out of the decision of the High Court, which upheld the Judgment of the Kiboga Grade 1 Magistrate refusing to set aside the ex parte Judgment of the Kiboga District Land Tribunal. The application before the
20 Kiboga Grade 1 Magistrate was about setting aside the ex parte Judgment of the Kiboga District Land Tribunal on grounds that the respondent, (Rwabuganda) had not been properly served. It was not to hear the land dispute on its merits.

It therefore follows that the Court of Appeal did not and could not have considered the merits of the original land dispute between the parties, since none of the parties canvassed any matters relating to
25 the issue of ownership of the suit property. Rather, the Court of Appeal only analyzed the evidence of service of Court process, where it found that the respondent had not been properly served. Hence, it reversed the Judgment of the High Court and set aside the ex parte Judgment of the Kiboga District Land Tribunal.

The purpose of setting aside an ex parte Judgment is to have the matter to be heard afresh inter
30 parties. This means that the defendant (the respondent) would file his defence so that the original land suit from where the ex parte Judgment arose is determined interparty. It therefore follows that a Court setting aside the ex parte Judgment cannot in the same Judgment go ahead to determine and dispose of the same case on its merits, ex parte.

In the circumstances, we are of the view that the applicant's 3rd appeal raises an issue of great public
35 importance in as far as it will give this Court an opportunity to correct this error made by the Court of Appeal in exceeding the jurisdiction in the appeal it was seized with. If this error is not corrected, the decision of the Court of Appeal will remain part of the law of Uganda and binding on the lower Courts.

We now turn to grounds (i) and (vi) of the application. These two grounds relate to the need to hear the applicant's intended 3rd appeal in the interests of justice.

Under this ground we shall consider briefly (i) the holding of the Court of Appeal that the Tribunal erred in issuing a hearing notice and not fresh summons when the application of substituted service
5 was granted; and (ii) 3rd party interests on the suit land.

We note from the onset that this application is not dealing with the merits of the intended third appeal and therefore we shall not go into analyzing whether fresh summons were properly issued or not or whether what was issued were summons or a hearing notice.

Regarding the issue of what was issued after the application for substituted service, we note that the
10 Tribunal issued a "Summons/Hearing Notice". This summons/hearing notice was directed to the respondent to appear on 14th September 2005 at the Tribunal Chamber at 9 o'clock. This, in our view, was in accordance with the provisions of Order 5 rule 18 (3) of the Civil Procedure Rules S.I. 71-1 which provides as follows:

15 ***"Where the court makes an order for substituted service, it shall fix such time for the appearance of the defendant as the case may require."***

It is clear from the above that upon making an order for substituted service, the Court is required to fix the time for the appearance of the defendant. It is after such an appearance that the defendant can make any prayers, including seeking an adjournment to enable him or her to prepare his or her defence.

20 It was therefore erroneous for the Court of Appeal to hold that the Tribunal erred in issuing a hearing notice. We are therefore of the view that we need to hear the applicant's third appeal in order to correct this error made by the Court of Appeal, since this decision will remain binding on the lower Courts.

Secondly, we are also of the view that it was not right for the Court of Appeal to hold the applicant
25 liable for whatever mistakes it believed had been made in the nature of the summons, that were issued by the Tribunal officials. Although the "Summons/Hearing Notice" were issued after her application for substituted service, the summons originated from the Land Tribunal. Therefore, even if it was an error, it was not the applicant's fault.

We note that the respondent, in his Affidavit in support of his application to set aside the Judgment of
30 the Tribunal which he deponed on 13th December 2007, did not show how or when he came to know about the suit in the Tribunal. This is evident in paragraph 3 thereof where he deponed as follows:

"That I discovered recently that the respondent had filed a suit against me in the Kiboga Land Tribunal and obtained Judgment and further that she has caused the cancellation of my name from my land comprised in Mailo Register Singo Block 783 Plot 3"

Be that as it may, it is clear from the record that the respondent became aware of the matter, however belatedly. As a result, he was able to file all these applications right from Kiboga Grade 1 Magistrates Court, the High Court and the Court of Appeal.

Regarding 3rd party interests in the suit land, according to the supporting affidavits of the applicant and one Katungulu, there are 3rd party interests on the suit land. We note that these 3rd parties were directly affected by the orders of the Court of Appeal, yet they were never parties to the appeal or to the litigation processes in the Courts below. These 3rd party interests arose as a result of transactions on parts of the contested land subsequent to the grant of the consequential orders by the High Court, which culminated into the applicant being registered as the rightful owner.

10 In paragraphs 4 and 5 of her Affidavit in Support of this application, the applicant deponed as follows:

“4. *That I sold part of the suit land to Fred Mukalazi who in turn sold it to Katungulu John Matovu and developed it into a farmland with a permanent building...*

15 5. *That the sale of the suit land to other persons was done lawfully when the same had been given to me vide consequential orders of the High Court.”*

Similarly, Katungulu John Matovu in paragraphs 2-10 of his Affidavit in Support of the application, deponed as follows:

“2. *That I am the registered proprietor of land located at Singo Block 783 plot 10 at Nakatakuli estate...*

20 3. *That the land originally formed part of a bigger plot located at Singo Block 783 plot 3 at Nakatakuli estate belonging to the applicant...*

4. *That I bought land from Mukalazi Fred who had originally bought it from Bitamisi Namuddu, the applicant...*

25 5. *That after completing the payments to Mukalazi Fred, he introduced me to the applicant who signed mutation and transfer forms in my favour...*

6. *That I carried out search in land office, Mityana and confirmed that the land belonged to the applicant.*

7. ...

30 8. *That ... by the decision the Court of Appeal under Civil Appeal No. 087 of 2010 ... it was ordered that the particulars relating to the applicant’s name be cancelled from the certificate of title of the suit land and instead the respondent be registered which is against my ownership interest as a bonafide purchaser for value without any encumbrance by the respondent.*

35 9. *That I was disturbed by the respondent trying to evict me from my property as a bonafide purchaser and due to that process, I filed my application in the Court of Appeal vide Court of Appeal Misc. Application No. 174 of 2014 which was dismissed.*

10. That I have been in physical possession of the land since 2008, after having constructed a residential house and a farm thereon...”

The deponents attached on their affidavits the various sale agreements and Certificates of Title in support of their averments. This evidence was not rebutted by the respondent in his reply or by his advocate during his submissions.

Section 181 of the Registration of Titles Act Cap 230, Laws of Uganda protects a purchaser of land for value without notice of another’s claim to the property and who is without actual or constructive notice of any defects, claims, or equities against the seller’s title.

In its consideration of the appeal, the Court of Appeal did not address itself to the issue of other known or possible 3rd parties and if they are found to be bonafide purchasers for value, what their redress would be in the event of making the orders that it did. We are therefore of the view that in order to do justice to all parties, it would require us to hear the applicant’s intended third appeal in this Court.

We have also had an opportunity to peruse the ruling of the Court of Appeal in the application referred to in paragraph 9 of Katungulu’s Affidavit. The record does not show when it was filed in the Court of Appeal. Be that as it may, we note that he raised the issue of being a bonafide purchaser for value. However, the Court of Appeal did not address this issue in its Ruling. Rather, the Court dismissed the application, not on its merits but on a technicality that Katungulu was neither a party to Civil Appeal No. 087 of 2010 nor to the Tribunal matter from which this appeal emanated. The Court of Appeal further held that it had already disposed of Civil Appeal No. 087 of 2010 and therefore it could not revisit a decision in a matter that it had finally and conclusively determined.

We further note from the record that the applicant was an administratrix of the Estate of her later father Muswangali Musa. It therefore follows that in filing her claim before the Kiboga District Land Tribunal, she was acting in that capacity, as opposed to her individual capacity. As an administratrix, she cannot be faulted for having acted vigilantly to protect the interest of the estate, including engaging in litigation. We cannot also rule out the possibility that there are other beneficiaries to the estate of the late Muswangali Musa. Thus, just like bonafide purchasers for value without notice, such beneficiaries were affected by the contested orders of the Court of Appeal and stand to be condemned without being heard.

We shall now proceed to consider grounds (ii) and (iii) of the application. The essence of these two grounds is whether substituted service is effective service and whether the obiter dicta of the Court of Appeal on the issue of substituted service has created more uncertainty.

The Court of Appeal by way of *obiter* made some observations at page 11 of its Judgment on substituted service as follows:

“Before we take leave of this matter, we would like to clarify some important issues that were raised in this appeal but did not form the basis of our decision. It was held by the Magistrate and the learned Judge that substituted service was good and effective service. With respect we

5 do not agree whenever Court directs that a party be served with summons by way of substituted service, that service is ‘deemed’ to be effective, if the party does not file a defence. It remains effective as long as it is not challenged. The moment a party challenges the service and contends that indeed he was not aware, then the presumption of service is rebutted. A party to a suit cannot be denied his constitutional right to be heard only on account that summons was effected upon him by way of substituted service. This was the gist of the holding of the Supreme Court decision in the case of *Geoffrey Gatete & Anor v. William Kyobe*, Supreme Court Civil Appeal No. 07 of 2005 (unreported).”

The Court of Appeal went on to conclude as follows:

10 “In this case therefore although there was ‘good service’, it was not effective and the appellant’s application to set aside *ex parte* decree and Judgment ought to have been allowed. We also find that in this particular case although the Land Tribunal made an order for issuance of fresh summons, what was issued and subsequently advertised were not summons but a hearing notice. Accordingly we would still have held that the substituted service in this case was not good service and was also not effective.”

The above holding of the Court of Appeal was the major basis of the applicant’s contention in this application as far as the issue of substituted service was concerned.

20 The Court of Appeal relied on the decision of this Court in *Geoffrey Gatete & Anor v. William Kyobe*, Supreme Court Civil Appeal No. 07 of 2005 (unreported) where Mulenga JSC held as follows:

25 “The Court may order substituted service by way of publishing the summons in the press. While the publication will constitute service, it will not produce the desired effect if it does not come to the defendant’s notice. In my considered view, these are examples of services envisaged in O.36 r.11 as ‘service (that) was not effective. Although the service on the agent or the substituted service would be ‘deemed good service’ on the defendant entitling the plaintiff to a decree under O.36 r.3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is ‘not effective’ within the meaning of O.36 r.11. (See *Pirbhai Lalji v. Hassanali*, (1962) EA 306).

30 The word ‘deemed’ is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. In *St. Aubyn (LM) vs. A.G.* (1951) 2 All ER 473, at p. 498 Lord Radcliffe describes the various purposes for which the word is used where, he says-

35 “The word ‘deemed’ is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

40 In my view, the expression ‘service that is deemed to be good service’ is so broad that it includes service that might not produce the intended result, which therefore is not effective.”

This Court’s holding in *Gatete* (supra) appears to be at variance with the provisions of Order 5 rule 18 of the Civil Procedure Rules, S.I. 71-1, which provides for substituted service as follows:

5 “(1) *Where the court is satisfied that for any reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy of it in some conspicuous place in the courthouse, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.*

(2) *Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.*

10 (3) *Where the court makes an order for substituted service, it shall fix such time for the appearance of the defendant as the case may require.”*

It therefore follows that while Order 5 rule 18(2) of the Civil Procedure Rules makes substituted service under an order of Court as effective as service on the party personally, the decision of this Court in **Gatete** says otherwise.

15 The Court of Appeal based its *obiter* on the decision of this Court in **Gatete** where this Court cast doubt on the effectiveness of substituted service as a form of service of court process. We are aware that *obiter* remarks of the Court are not binding. However, these *obiter* observations of the Court of Appeal represent the view of the Court of Appeal on the issue of substituted service, which is backed up by our decision in **Gatete**.

20 The applicant’s intended third appeal will therefore give an opportunity to this Court to revisit its decision in **Gatete** regarding the issue of substituted service vis-à-vis the provisions of Order 5 rule 18 of the Civil Procedure Rules.

25 In his submissions, counsel for the applicant contended that the lower Courts are at crossroads on what the position is on the issue of substituted service. He posed the question whether the current position is that service is effective once it is made the way it is directed to be made by the Court and as provided for under Order 5 rule 18 of the Civil Procedure Rules or whether it is only effective when the intended recipient gets to know about the service, by whatever mode as ordered by Court?

30 We therefore agree with counsel for the applicant that these questions raise issues of great public importance with regard to the issue of substituted service, which will only be resolved if we allowed the applicant to lodge her intended third appeal and argue it on its merits, to enable the Court to resolve them.

Giving the applicant leave to appeal to this Court would give this Court an opportunity to clarify its position on Order 5 rule 18 in the **Gatete** case. We shall therefore have to entertain the applicant’s intended third appeal and consider this issue of substituted service comprehensively in order to clarify this gray area of the law.

35 In conclusion, we note that issues of land justice are pertinent in our society. It is therefore important that we allow the applicant to lodge her intended third appeal to enable us to determine whether there was any judicial error owing to procedural irregularities or otherwise and the consequences thereof,

not only on the parties to the proceedings in the lower Courts, but also to 3rd parties that had subsequently derived interests in the suit land.

As we already noted, section 6(2) of the Judicature Act grants us power to hear a third appeal if the Court considers, in its overall duty to see that justice is done, that the appeal should be heard.

5 However the applicant has a duty to demonstrate that she deserves to be heard. We are satisfied that the applicant’s intended appeal raises important issues of law of public importance as already pointed out in this Ruling.

We are also satisfied that in order to do justice to all the parties as well as other 3rd parties with vested interest in the suit property, leave should be granted for this third appeal to be lodged in this Court
10 and to be heard on its merits.

We accordingly allow the application and make the following orders:

- (i) Leave is hereby granted to the applicant to file her third appeal in this Court, in accordance with the Rules of this Court.
- (ii) Costs will abide the determination of the appeal.

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Dated at Kampala this ...16th ... day ofJune.... 2017.

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20 **JUSTICE BART M. KATUREEBE,**
CHIEF JUSTICE.

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25 **JUSTICE JOTHAM TUMWESIGYE,**
JUSTICE OF THE SUPREME COURT.

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30 **JUSTICE DR. ESTHER KISAAKYE,**
JUSTICE OF THE SUPREME COURT.

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35 **JUSTICE STELLA ARACH-AMOKO,**
JUSTICE OF THE SUPREME COURT.

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40 **JUSTICE ELDAD MWANGUSYA,**
JUSTICE OF THE SUPREME COURT.