IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A., And MDEMU, J.A.)

CIVIL APPLICATION NO. 264/01 OF 2022

1. SAUL HENRY AMON
2. S. H. AMON ENTERPRISES LTD ..... APPLICANTS

VERSUS

1. HAMIS BUSHIRI PAZI
2. HAMIS BUSHIRI PAZI (As Administrator of the Estate of the late NEEMA BUSHIRI PAZI and
3. MWAJUMA BUSHIRI PAZI)
4. STUMAI BUSHIRI PAZI
5. HATUJUANI BUSHIRI PAZI
6. HAMIS KAZUBA
7. KASSIM ALLY OMARI (As Administrator of the Estate of the late TATU BUSHIRI PAZI) ..... **RESPONDENTS**
8. THE ATTORNEY GENERAL .....THIRD PARTY

(Application for Review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Kwariko, Maige and Mwampashi, JJA)

dated the 13th day of April, 2022
in
Civil Appeal No. 166 of 2019

.....

RULING OF THE COURT

21st February & 22nd April, 2024

MWAMBEGELE, J.A.:

In this application, the Court is asked to review its decision in Civil Appeal No. 166 of 2019 dated 13th April, 2022 (Kwariko, Maige and Mwampashi, JJ.A). The application is brought by a notice of motion

predicated on the provisions of section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 read together with rule 66 (1) (a) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit deposed by Julius Kalolo-Bundala, one of the applicants' counsel and resisted by an affidavit in reply deposed by the late Melchisedeck Sangalali Lutema, then counsel for the first to fifth respondents. No affidavit in reply was lodged by the sixth, seventh and the eighth respondent to resist the application.

The context in which the application arises, as gleaned from the notice of motion and the founding affidavit, is as follows: the first to fifth respondents were lawful owners of a house described as House No. 113 standing on Plot No. 4 Block 17, Kariakoo area in Ilala District, in the city of Dar es Salaam comprised in CT No. 57275. The house was inherited from their late father, one Bushiri Pazi. Each of the said respondents had an identifiable share in the property and had leased out to various persons including the sixth respondent. It appears that the seventh respondent had leased to the sixth respondent her share which consisted of a business outlet. The first to fifth respondents, at some stage, agreed that the house should be renovated. The sixth respondent agreed to undertake the proposed

renovation of the premises on agreement that the expenses to be incurred would be deducted from his rent obligations.

The building was renovated. Later, the sixth respondent who was promised to continue with his contract upon completion of the renovation, was informed that he would continue with his lease but under new terms. The sixth respondent was irked by this bizarre twist of things. He thus instituted a suit before the then Regional Housing Tribunal against his landlady, the seventh respondent. The Tribunal decided in his favour. The seventh respondent unsuccessfully appealed to the defunct Housing Appeals Tribunal. Her second appeal to the High Court was barren of fruit as well.

In execution of the decree, the sixth respondent successfully attached the suit property. The first to fifth respondents challenged the attachment by way of objection proceedings to no avail. Subsequently, the suit property was sold in a public auction and the second applicant, acting through the first applicant, was the highest bidder, at a bid price of Tshs 105,000,000/=. Aggrieved, the first to fifth respondents instituted a suit against the applicants before the High Court challenging, among other things, the legality of the sale while they are lawful owners of the suit premises. The High Court had taken the view that, since prior to the case before it, the

plaintiff lodged an application for setting aside the sale under Order XXI rules 87 and 88 of the Civil Procedure Code, Cap. 33 of the laws of Tanzania (the CPC) which was dismissed, and the court confirmed the sale which became absolute in terms of Order XXI rule 90 (1) of the CPC, the court is barred to entertain the same. The respondents were dissatisfied. They successfully appealed to this Court. The Court, in the impugned decision, declared the first to fifth respondents the lawful owners of the property. Convinced that our decision was marred with a manifest error on the face of the record and that it was a nullity, the applicants have come to this Court on review. The notice of motion has four grounds which may be summarized thus; **one**, the decision made by the Court on 13th April,2022 is based on a manifest error on the face of record resulting into miscarriage of justice as it has, without jurisdiction, departed from the well-established principle of the Court in the cases of bonafide purchaser for value; **two**, the decision made by the Court in on 13th April, 2022 is based on a manifest error on the face of record resulting into miscarriage of justice as the applicants in the case at hand are made to suffer the total purchase price plus the huge investment made at the land at issue and allow those claiming 6/7 shares to benefit from the investment made by the applicants without any compensation which is against the rule that a party should not be punished for mistakes done by

the Court itself; **three**, the decision made by the Court on 13th April, 2013 is a nullity for want of jurisdiction; and, **four**, the decision made by the Court on 13th April, 2022 is in total disregard of the party's right to be heard on the legality of joining the Third Party in the proceedings as the Court made a decision on the issue without affording the parties their right of being heard. In the written submissions, the applicants added one more ground: that the nullification of the registered title of the applicants on the grounds of impropriety of the second applicant's registration by the Government (Registrar of Titles) as owner under power of sale, without affording an opportunity to the government (Registrar of Titles) was improper.

At the hearing, Messrs. Julius Kalolo-Bundala, Samson Edward Mbamba and Daniel Haule Ngudungi, learned advocates, joined forces to represent the applicants. The first to fifth respondents were represented by Ms. Dora Simeon Mallaba and Mr. Ashiru Hussein Lugwisa, learned advocates. Ms. Jessica Shengena, learned Principal State Attorney, represented the eighth respondent. The sixth and seventh respondent appeared in person, unrepresented.

The applicants' advocates had earlier on filed written submissions in support of the applications in terms of rule 106 (1) of the Rules by which

they stood at the oral hearing. So did counsel for the first to fifth respondents. Counsel for the parties clarified on some points to supplement the written submissions. We really appreciate the invaluable contributions of the learned counsel for the parties in the written submissions as well as the amplification of some points at the hearing. However, due to the lengthy nature of the submissions, we are afraid, we may not reproduce each and every submission they canvassed. We shall, however, be referring to them in the course of determination of the issues of contention. We think the parties will find no difficulties in bearing with us for this state of affairs, knowing full well that the course of action does not offend anybody and, in our view, it does not leave justice crying.

We are called to decide on whether the circumstances enumerated by the applicants in their Notice of Motion and their written submissions show **one**, a manifest error apparent on the face of the record and if so whether the said error resulted in the miscarriage of justice, and; **two**, whether the impugned judgment is a nullity in terms of, respectively, paragraphs (a) and (c) of subrule (1) of rule 66 of the Rules.

What constitutes a manifest error apparent on the face of the record, is now settled law. Upon a plethora of authorities, a manifest error on the

face of the record has to be such that it is obvious and patent and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinions - see: **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218, **Nguza Vikings @ Babu Seya & Another v. Republic,** Criminal Application No. 5 of 2010 (unreported), **Jayantkumar Chandubhai Patel @ Jeetu Patel & Others v. The Attorney General & Others** (Civil Application No. 160 of 2016) [2019] TZCA 571 (28 May 2019) TanzLII and **Attorney General v. Mwahezi Mohamed & Others** (Civil Application No. 314 of 2020) [2020] TZCA 1828 (22 October 2020) TanzLII, to mention but a few. In **Jayantkumar Chandubhai Patel @ Jeetu Patel**, for instance, the Court examined at some considerable length a number of authorities on the matter, the Court adopted from **Mulla on the Code of Civil Procedure** (14th Ed), the following description of the phrase:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is,* ***an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions*** *.... A mere error of law is not a ground for review*

*under this rule. That a decision is erroneous in law is no ground for ordering review .... **It can be said of an error that it is apparent on the face of the record when it is obvious and self evident and does not require an elaborate argument to be established** ...."* [Emphasis supplied].

The term "miscarriage of justice", is not an ordinary term, it is one of art. As we held in **Nguza Vikings @ Babu Seya** (supra), adopting the definition of the phrase in **Black's Law Dictionary**, 8th Ed. at p. 1019, there is a "miscarriage of justice" if the error leads to a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.

On the above authorities and several others on the same point, the court will not interpret as a manifest error on the face of the record in the following instances:

(a) *If the error is not self-evident and has to be detected by the process of reasoning;*
(b) *If there are two possible views regarding the interpretation or application of the law;*
(c) *Any ground of appeal;*
(d) *Any erroneous decision;*
(e) *A mere error or wrong view; and*

(f) *A different view on a question of law or an erroneous view on a debatable point or a wrong exposition or wrong application of the law.*

- See: **Nguza Vikings @ Babu Seya** (supra).

The question which comes to the fore at this juncture is; what is the situation in the present case? This is the question to which we now turn to answer.

The ground that the impugned decision is marred with a manifest error on the face of the record occasioning injustice is pegged on the following finding of the Court as appearing at p. 18 of the impugned judgment:

> *"As the suit property appears from the ruling in exhibit D2 to be held under a letter of offer with a plot and block numbers, and there being information in the said exhibit that the same was jointly owned by the fourth respondent and her relatives, the second respondent having purchased the property without prior inquiry into the extent of the title of the judgment debtor on the suit property, cannot qualify as a bonaftde purchaser for value without notice. This is because in the circumstance of this case, any reasonable man would have expected the second respondent to, before purchasing the suit property, inquire and find out in*

the relevant authorities what interests, if any, the said fourth respondent's relatives had in the suit property. Her unreasonable omission to make an inquiry, put her to constructive notice and/or imputed notice of the appellants' ownership interests on the suit property."

The applicant's counsel submitted that the foregoing consists a manifest error on the face of the record resulting into a miscarriage of justice "because the law is undisturbingly clear that a purchaser in the auction ordered and supervised by the court is a bonafide purchaser, even if there is a defect in title". The learned counsel went on to cite **Black's Law Dictionary** on the definition of the term bonafide purchaser. He also cited **Godbertha Rukanga v. CRDB Bank Ltd & 3 Others** [2019] 1 T.L.R. 339 in which we cited the provisions of section 135 of the Land Act, Cap. 113 of the Laws of Tanzania and held that a purchaser who buys a property in an auction as a bonafide purchaser is protected. Counsel for the applicants cited other authorities in which we similarly held that the law in our country protects the bonafide purchaser for value who purchased the property in good faith and without any notice of encumbrance. Such authorities include; **Tom Morio v. Athumani Hassan & Others** (Civil Appeal No. 179 of 2019) [2022] TZCA 114 (16 March, 2022) TanzLII, **Evarist Peter Kimathi &**

Another v. Protas Lawrence Mlay, Civil Appeal No. 3 of 2000 (unreported), **Stanley Karama Mariki v. Chihiyo Kwisia w/o Nderingo Ngomuo** [1981] T.L.R. 143 and **Suzana S. Waryoba v. Shija Dalawa** (Civil Appeal No. 44 of 2017) [2019] TZCA 66 (11 April 2019) TanzLII. Other authorities cited by counsel for the applicants are **Omar Yusufu v. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169, **Millicom Tanzania NV v. James Alan Russels Bell & Others** (Civil Revision No. 3 of 2017) [2018] TZCA 355 (26 July 2018) TanzLII and **Shinyanga Region Co-operative Union SHIRECU Ltd v. Polycarp Kimaro t/a Shinyanga Mwananchi Garage & 2 Others**, Civil Revision No. 3 of 2013 (unreported).

In view of the above the learned counsel submitted that the foregoing authorities sets the law that a bonafide purchaser who purchases a property in auction, whether ordered by the court or in exercise of powers under a mortgage, is protected by law, and he is not affected by reversal or modification of a decree and cannot be blamed for any defect in title of the holder of the property auctioned. In the premises, the learned counsel argued, the impugned decision is faulted with an error occasioning injustice to the applicants and implored us to correct the same by review and thereby protecting the bonafide purchaser.

On behalf of the first to fifth respondents, Ms. Mallaba submitted that the first ground of review is an open ground of appeal as it does not meet the test of ground for review under any of the paragraphs falling under rule 66 (1) of the Rules. This purported ground of review, she argued, has not shown a manifest error in compliance with rule 66 (1) of the Rules. On the contrary, she went on, it has several discontents and shortcomings. Ms. Mallaba went on to submit that the complaint was raised as ground 8 of appeal and was adjudicated upon by the Court. The applicants have just been dissatisfied by the decision which they allege have departed from the original position on bonafide purchasers. Citing **Jumuiya ya Hifadhi ya Wanyamapori Burunge v. Udaghwenga Bayay & 16 Others**, Civil Application No. 16 of 2013 (unreported), she argued that, that the court had reached a wrong conclusion of the law, could be a good ground of appeal but not of review.

Ms. Mallaba also cited **Blueline Enterprises Limited vs East African Development Bank** (Civil Application No. 21 of 2012) [2013] TZCA 171 (16 May, 2013) TanzLII to buttress the point that once a court has adjudicated upon an issue, it cannot review it. She added that there is no paragraph under rule 66 (1) of the Rules that provides for a ground of review

described as departing without jurisdiction from previous decisions on a certain position of law. After all, it would require a long drawn process to ascertain the error complained of thereby making it not falling within the scope of an apparent error on the face of the record amenable to review.

Giving Ms. Mallaba a helping hand, Mr. Lugwisa emphasized on the principle that litigation must come to an end. All the grounds raised as grounds of review are grounds of appeal and therefore, upon a plethora of authorities including **Abdiel Reginald Mengi & Another v. Jacqueline Ntuyabaliwe Mengi & Others** Civil Application No. 618/17 of 2021 (unreported), not amenable to review. He added that the applicants are in search for an alternative view which course of action is not acceptable. Review should not be used to abuse the court process, he surmised.

The sixth and seventh respondents had nothing useful to say in resistance of the application. They simply agreed with the submissions of counsel for the first to fifth respondents and asked the Court to dismiss the application.

Ms. Shengena's submissions on behalf of the eighth respondent, to a large extent, dovetailed with those of Ms. Mallaba and Mr. Lugwisa for the first to fifth respondents. She emphasized that all matters that are

complained of in the grounds of review were decided in the impugned judgment and the applicants are just seeking a second opinion of the Court, which is unacceptable. Ground four, for instance, was discussed at p. 19 of the impugned decision. The Court discussed at length the importance of a third party and made a decision on it. The applicants, therefore, cannot be heard on a review of the same issue.

The gravamen of the applicants' counsel argument is, we think, that the Court departed from the previous authorities on what should befall a bonafide purchaser for value who purchased property in a public auction ordered by a court of law. On the authorities cited above, this does not fall within the scope and purview of matters amenable to review. What the applicants state is loudly clear that the Court in the impugned decision departed from previous decisions on the matter without any justification and a string of authorities that underscore the standpoint are cited. Whether the Court departed from its previous decisions may, as already stated before, be a good ground of appeal but not one falling within the realm of grounds of review. In any event, in the impugned decision, the Court did not say a bonafide purchaser for value without notice is not protected. It categorically

stated that the applicant had notice of the encumbrance on property. We therefore find no reason to review our decision on this ground.

Determination on the second ground of review, having decided above that the fact that the Court may have departed from its previous decisions on protecting a bonafide purchaser in an auction is not a ground amenable to review, will not detain us. Arguing in support of this ground, counsel for the applicants faulted the Court for holding that the first to fifth respondents were lawful owners of 6/7 shares of suit premises while it was fully aware that the second respondent had developed the property to acquire the status it had. Yet, counsel went on, the Court proceeded to hold that the second respondent did that at his own peril. The learned counsel contended that as long as the Court was aware that the first to fifth respondents did not have any sweat in developing the land to acquire the status it had, the decision is palpably erroneous for flouting the principle of law that goes; *nemo locupretari potest aliena iactura* which means no one should benefit at others' expense; a principle of law against unjust enrichment. On this principle, counsel referred us to our decision in **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd & Others**

(Civil Appeal No. 51 of 2016) [2020] TZCA 251 (26 May 2020) TanzLII in which we held that the law frowns at unjust enrichment.

Regarding the second ground, Ms. Mallaba, Mr. Lugwisa and Ms. Shengena rebutted that an allegation that the court misapplied the law and that it proceeded on an incorrect exposition of the law and arrived at a wrong conclusion is no ground for review but one of appeal. **Jumuiya ya Hifadhi ya Wanyamapori Burunge** (supra) was cited to buttress that proposition. We respectfully agree with counsel for the respondents. That depicts the positon of the law in our jurisdiction. The complaint that the decision made by the Court on 13th April, 2022 is based on a manifest error on the face of record resulting into miscarriage of justice because the applicants are made to suffer and making the first to fifth respondents reap what they did not sow, may be an error in the decision which, on the authorities already cited above, is not a ground amenable to review. In the premises, that ground suffers the same consequences as the first one.

The third ground upon which the applicant beseechs us to review the decision we made on 13th April, 2022 is that it is a nullity for want of jurisdiction. Counsel for the applicants contended that Land Case No. 185 of 2004 was filed on 15th September, 2004 to set aside a sale of the property

in a court auction conducted on 19th April, 2000. In terms of item 4 to the Law of Limitation Act, Cap. 89 of the Laws of Tanzania, which sets a time limit of two years, he argued, the suit was time barred. Citing our decision in **Venant Kagaruki v. Permanent Secretary, Ministry of Finance and another**, Civil Appeal No. 103 of 2007 (unreported), he argued that the court had no jurisdiction to determine on merits a matter which was barred by limitation. To buttress the point of jurisdiction and time bar, we were referred to **Director of Publication Prosecutions v. ACP Abdallah Zombe & Others** (Criminal Appeal No. 254 of 2009) [2013] TZCA 497 (8 May, 2013) TanzLII. Likewise, we were referred to our decision in **Kilombero Sugar Company Limited v. Commissioner General, Tanzania Revenue Authority** (Civil Appeal No. 444 of 2020) [2022] TZCA 314 (30 May, 2022) TanzLII, to reinforce the point that no valid appeal will stem from null proceedings of the High Court. The learned counsel thus asked us to review the decision in terms of rule 66 (1) (c) of the Rules.

For their part, the learned counsel for the first to fifth respondents as well as Ms. Shengena for the eighth respondent, submitted that the complaint that the suit was time barred is not a ground of review and is not founded on the pleadings. They contended that there is no room to raise

new matters at the level of review and accuse the Court of not taking into account new points of law because that would mean accusing the Court for not taking into account the law of limitation which has never been a ground for review. Should this ground be entertained, they argued, the course of action would rob the respondents the right to be heard thereby occasioning failure of natural justice.

We agree with counsel for respondents that the ground may be fit for appeal but not for review. What the applicants want the Court to do is to have a second look at the evidence, peruse the record with a view to seeing whether the suit was timely filed. A second look at the evidence disqualifies the point as one for review. As we held in **Patrick Sanga v. Republic,** Criminal Application No.8 of 2011 (unreported):

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigation be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through the back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice*

system, like ours, litigation must have finality and a judgment of the final court in the land is final and its review should be an exception. That is what sound public policy demands."

We find no justification in this complaint and decline the invitation to review our decision on this ground.

We now turn to consider the fourth ground of review. Counsel for the applicants submitted that one of the components of the determination of the appeal was the propriety or otherwise of the joinder of the Government in the suit before the High Court as a third party. The parties were not heard on it but the Court went on to deliberate on it and make a decision thereon. In so doing, it was argued, the Court abrogated the parties' right to be heard. The learned counsel implored us to vary our decision on review as we did in **Truck Freight (T) Limited v. CRDB Bank Limited**, Civil Application No. 157 of 2007 (unreported).

Responding on the fourth ground of review, counsel for the first to fifth respondents and the learned Principal State Attorney for the eighth respondent submitted that the applicants cannot be heard at the level of review that they were not heard while they opted not to intervene when the third party was joined at the level of the appeal. They further submitted

that the trial court decided on the issue but the first to fifth respondents did not appeal on it, as such, they cannot be heard on this application for review on it as they acquiesced to it, especially when the applicant chose not to cross appeal on it.

The determination of this point will also not detain us. The Court, in the impugned decision, discussed this issue at pp. 19 through to 20 of the impugned judgment. The Court observed that the trial court made a decision in respect of the third party to the effect that the proceedings against the third party were barred by law. The Court also observed that the applicants against whom the finding was made, did not prefer any cross appeal and that their two counsel did not comment anything in response to the submissions by the third party on appeal. We find difficulties in giving countenance to the arguments by counsel for the applicants. Admittedly, a ground that a party was not heard falls within the scope of rule 66 (1) of the rules and once proved, a decision may be reviewed on that ground. That is what we did in **Truck Freight (T) Ltd** (supra), the case referred to us by counsel for the applicants as well as in **Jayantkumar Chandubhai Patel @ Jeetu Patel** (supra). But the case in the instant matter is distinguishable in that the parties were heard and never cross appealed on the issue and,

as if that is not enough, they never made a response on it despite being raised by the third party. This ground as well has no substance as to trigger us review the impugned decision.

The additional ground of review, is, in effect, a complaint that the Court, in the impugned decision, nullified the second applicant's title as a registered owner on the ground that its registration by the Registrar of Titles under power of sale was wrong. In so doing, the Court condemned the Government in general and the Registrar of Titles in particular without being heard. On the authorities cited above, counsel argued, the impugned decision is reviewable and implored us so to do. The respondents did not respond on this additional ground be it in the written submissions earlier filed or in the oral submissions before us. Be it as it may, we do not find substance in this ground as well. The error, if at all, is not one that is apparent on the face of the record. By "the face of the record" we simply mean the judgment. It will entail one to go comb the evidence and discover the error. That makes the point not one amenable to review. Given the fact that it is not apparent on the face of the record and will require a long drawn process to discover it, it flops to be a ground that would trigger us review our decision.

In view of the foregoing, despite the ingenuity of counsel for the applicants in their arguments, we are afraid, for the reasons we have assigned, we are not prepared to give countenance to any of the arguments they canvassed in support of the application. As already stated, we are convinced the applicants just wanted to have a second view of our decision; an appeal in disguise, so to speak. We wish to remind litigants that seeking recourse in a court of law is a process that must have an end. The law imbedded in the Latin maxim *interest republicae ut sit finis litium* (it concerns the State that there be an end of litigation), is still good law in our jurisdiction and part of our jurisprudence. There should be an end to litigation and the Court guards this principle. We stated in **Chandrakant Joshubhai Patel** (supra) and we find it irresistible to restate here that:

> *"... no judgment can attain perfection but the most that courts aspire to is substantial justice. There will be errors of sorts here and there, inadequacies of this or that kind, and generally no judgment can be beyond criticism. Yet while an appeal may be attempted on the pretext of any error, not every error will justify a review."*

Let the applicants be contented with some errors that might be in the impugned decision. We cannot somersault and turn a blind eye at well-

established principle of law that litigation must come to an end to avail litigants an opportunity to indulge in other productive endeavours.

In the upshot, this application fails. It stands dismissed with costs to the respondents.

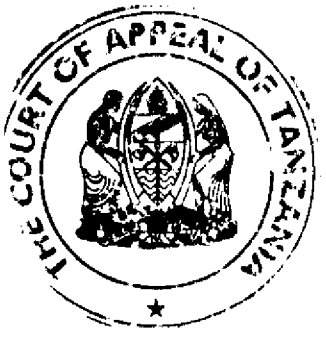
DATED at **DAR ES SALAAM** this 19th day of April, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of April, 2024 in the presence of Mr. Daniel H. Ngudungi, learned advocate, for the Applicants and Ms. Subira Omary, learned advocate for the 1st, 2nd, 3rd, 4th and 5th Respondents, and in the absence of 6th &7th respondent and third party,



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL