

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NUMBER 100 OF 2012**  
**LAKESIDE TOWNSHIP LTD & 2 OTHERS.....APPELLANTS**  
5 **VS**  
**LAKESIDE CITY LTD & ANOTHER .....RESPONDENTS**

**CORAM: HON. MR. JUSTICE A.S NSHIMYE, JA**  
**HON. MR. JUSTICE KENNETH KAKURU, JA**  
10 **HON. MR. JUSTICE FMS EGONDA-NTENDE, JA**

**JUDGMENT OF THE COURT**

The three appellants filed a joint appeal in this Court on 17<sup>th</sup> August 2012 appealing from the decision of Hon. Mr. Justice Joseph Murangira J, in *High Court Civil Suit No. 25 of 2010* dated 15 28<sup>th</sup> June 2012.

That suit in which the appellants were plaintiffs had been dismissed on a preliminary objection raised by the defendants now the respondents.

20 The grounds of appeal are set out in the memorandum of appeal as follows;

- 25 ***1. The learned Trial Judge erred in law and fact when he determined issues and matters of fact by way of preliminary objections raised by the Respondents without hearing evidence.***

2. ***The learned Trial Judge erred in law and fact when he held that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants were non citizens without any evidence.***

5 3. ***The learned Trial Judge erred in law and fact when he relied on the Memorandum of registration purportedly executed by the learned Commissioner for Land Registration which was not in evidence.***

10 4. ***The learned Trial Judge erred in law and fact when he held without any evidence that the transfer of the land from the 2<sup>nd</sup> Appellant was invalid, null and void.***

15 5. ***The learned Trial Judge erred in law and fact when he held that the 3 Appellant was not a bonafide purchaser for value without notice in the absence of any evidence of fraud.***

20 6. ***The learned Trial Judge erred in law and fact when he failed to find that the suit land was not leased on conversion within the meaning of the law.***

25 7. ***The learned Trial Judge erred in law and fact when he disposed of the suit basing on documents attached to submissions of the Respondents which were not in evidence.***

30 8. ***The learned Trial Judge erred in law and fact when he failed to find that in view of paragraph 8 (g) of the 3<sup>rd</sup> Amended Plaintiff, the 1<sup>st</sup> Respondent did not have any cause of action against the 2<sup>nd</sup> to 5<sup>th</sup> Defendants.***

35 9. ***The learned Trial Judge erred in law and fact in holding that a Memorandum of transfer by the Registrar of Titles is not a document known in law.***



10. ***The learned Trial Judge erred in law and fact when he dismissed the Counterclaim without hearing evidence of the Counterclaimant.***

5 11. ***The learned Trial Judge erred in law and fact when he relied on a purported Written Statement of Defence filed by the 1<sup>st</sup> Defendant on the 22<sup>nd</sup> day of February, 2012, which had been filed out of time and was never served on any of the Parties.***

10 The appellants now seek from this Court the following orders;-

***(i) The Appeal be allowed.***

***(ii) The decision of the learned Trial Judge be set aside and substituted with an Order dismissing HCCS No. 251 of 2010.***

***(iii) The Respondent pays to the Appellant the costs of the Appeal.***

***(iv) Alternatively: that the Appeal be allowed, the Suit and Counterclaim be remitted to High Court for hearing on the merits.***

15 When this appeal came up for hearing learned counsel **Mr. Denis Nsereko** appeared for the 1<sup>st</sup> appellant, **Mr. Ntambirweki-Kandeebe** and **Mr. Chris Bwanika** appeared for 2<sup>nd</sup> appellant, **Mr. John Mary Mugisha** together with **Mr. Caleb Alaka** appeared for the 3<sup>rd</sup> respondent.

20 **Mr. Alex Tuhimbise** appeared for the 1<sup>st</sup> respondent while **Mr. Brain Othieno** appeared for the 2<sup>nd</sup> respondent.



Mr. Kandebe submitted that all the parties to this appeal had agreed at the scheduling conference that this appeal be settled on the following terms;-

1) The appeal be allowed.

5 2) The decision of the learned trial Judge be set aside and substituted with an order dismissing High Court Civil Suit No. 251 of 2010, that the respondent pays costs of the appeal.

In the alternative that the appeal be allowed and the suit and counter claim be remitted to the High Court for hearing on merit.

10 This Court declined to enter a consent Judgment as requested and ordered that the appeal proceeds.

Mr. Kandebe, then proceeded, first by abandoning ground 8 of the memorandum of appeal and prays number 1, 2 and 3. He retained on prayer 4 which was in the alternative and to the effect that, the  
15 appeal be allowed and the suit and the counterclaim be remitted to the High Court for hearing on the merits.

Counsel submitted that the learned Judge erred when he dismissed the suit on a preliminary objection raised by the plaintiffs, and dismissed the suit and entered Judgment on the  
20 counter claim for one of the defendants with costs.

Counsel contended that at the time the objection was heard and the suit dismissed, the scheduling conference had not been completed,



the documents the parties intended to adduce at the trial had not been agreed upon.

That the documents had not been admitted in evidence and as such had not been marked as exhibits. He submitted further that some  
5 of the documents relied upon by the Judge to dismiss the suit did not form part of the pleadings.

That the Judge had made a finding of fact that, the 1<sup>st</sup> appellant was not a citizen of Uganda without any evidence having been adduced to prove that fact.

10 That the learned Judge had gone ahead to nullify all the transaction carried out by the 1<sup>st</sup> appellant in respect of the land it held in free hold tenure.

He referred to the case of **Haji Yusuf Bagalye vs Damanico Properties and Other, Constitutional Reference No. 20 of 2011**,  
15 (Unreported) for the proposition that, the issue of citizenship is a question of fact that requires prove by evidence. Counsel submitted that the learned trial Judge ought to have allowed parties to adduce evidence as to the citizenship of the 1<sup>st</sup> appellant and that he erred when he decided the issue of citizenship purely as a question of  
20 law.

Counsel also cited the case of **Kasirye Byaruhanga & Co. Advocates and Mugerwa Pius Mugarasi, Civil Appeal No. 087 of 2008**. In this case counsel contended that the Judge had denied



the parties an opportunity to hold a mediation hearing and a scheduling conference. The Judge had asked the parties to file their documents, witness statements and skeleton arguments after which he set a date for delivery of the Judgment. On appeal, the decision  
5 was set aside by this court inter alia because the proceedings were irregular and the plaintiff had been denied a fair hearing.

He asked Court to follow the above decision which he contended was at all fours similar with this appeal. He asked this court to allow the appeal and to grant the orders sought.

10 Learned counsel Nsereko, Bwanika, Mugisha and Alaka representing the other appellants associated themselves with the submissions and prayers of Mr. Kandebe. For the respondents Mr. Tuhimbise and Mr. Brain Othieno did not oppose the appeal.

**Resolution of issues:**

15 We have carefully listened to the submission of Mr. Kandebe. We have also perused the court record and the authorities cited to us.

We observe that the respondents have no objection to this appeal. Perhaps this appeal ought to have been allowed on that account alone. However, for the reasons given by this Court in the case of  
20 ***Edith Nantumbwe and others vs Mariam Kuteesa, Court of Appeal, Civil Application No. 294 of 2013***, a court ought not allow an appeal by consent of parties or simply because it is not contested.



This is because a consent Judgment is in effect a contract between parties. Parties cannot contract to set aside a Judgment of Court. This Court cannot set aside a decision of the High Court without first hearing the appeal and without making its own decision on all issues of law and fact. *See also;- American Procurement Company Ltd Vs Attorney General, Court of Appeal, Civil Appeal No. 0035 Of 2009.(Unreported)*

That is why in this case we declined to enter a consent Judgment as had been requested by the parties.

When this suit came up for hearing before the trial Judge at the High Court the plaintiff now appellant raised the following preliminary objections;-

1. That the registration of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants is/was tainted with illegality in view of the provisions of Section 40 (4), (7) and (8) (a) of the Land Act; Cap. 227 as amended and Article 237 of the Constitution of the Republic of Uganda, 1995.
2. That the memorandum of registration executed by learned Commissioner Land Registration transferred no interest to the 2<sup>nd</sup> defendant or was un effective under the law.
3. That the transfers executed by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant and those of the 3<sup>rd</sup> defendant to the 5<sup>th</sup> defendant were not duly executed and were not attested to in accordance with the Registration of Titles Act, Cap. 230.
4. That the letter written by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant amounted to rescission.



5. That the transfer from the 3<sup>rd</sup> defendant to the 5<sup>th</sup> defendant was in contravention of a Court order and was tainted with illegality.

5 6. That the counterclaim by the 3<sup>rd</sup> defendant raises no cause of action against the counter-defendants.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants also raised their own the preliminary objections before the court had considered the objections first raised by the plaintiffs. They were that:-

10 1. By virtue of paragraph 8 (g) of the emended plaint, the 1<sup>st</sup> defendant had no interest to pass to the plaintiff.

2. The plaintiff had no cause of action against the 1<sup>st</sup>-5<sup>th</sup> defendants.

15 3. The plaintiff has no right of action against them in respect of the suit land.

The court ordered the parties to file written submissions in respect of their respective objections, which they did. On the basis of the written submissions the learned trial Judge proceeded to deliver his  
20 decision, upholding the defendants' objections and dismissing those of the plaintiffs. In the result he dismissed the suit without a full trial.

A casual glance at the preliminary objection raised by the plaintiffs reveals that the issues raised there-in particularly the allegations of  
25 fraud could not have been determined by way of a preliminary objection on a point of law. They required to have been proved by





evidence. In fact all the objections raised by the plaintiffs as set out above save for objection 6 could only have been determined after a full trial. See the decision of this Court in **Hajji Numani Mubiakulamusa versus Friends Estate Limited Court of Appeal, Civil Appeal No. 0209 OF 2013** (Unreported) which discussed at length the requirement that issues relating to fraud and illegalities in land matters ought to be resolved after a full trial in which evidence is adduced and parties are granted opportunity to cross examine witnesses. In that case fraud had been determined on the basis of affidavit evidence at the High Court.

With all due respect, the learned trial Judge erred, when he entertained the issues raised in the preliminary objections as if they were purely questions of law.

Having held as we have in respect of the objections raised by the plaintiffs now appellants, we also find that the second and third objections raised by the defendants now respondents already reproduced above were untenable as indeed the plaint raised serious questions fact and law to be determined by the Court. The plaint therefore disclosed a cause of action against all the defendants in respect of the suit land

The question as to whether the 1<sup>st</sup> defendant had any interest in the suit land to pass on to the plaintiff is a question of both fact and law that could not have been determined without a full trial there being no admissions.



We find no reason to delve into the other issues raised by Mr. Kandebe in respect of pre-trial procedure. We agree that the decision of this court in the **Kasirye -Byaruhanga and Co. Advocates case** (supra) dealt exhaustively with that issue. Suffice it to say, the learned trial Judge erred when in the determination of the suit he relied on documents that had not been admitted in evidence. He also erred when he disposed of the suit before the parties had completed the scheduling conference. That issue was also discussed in a recent decision by this Court, **Brian Kagwa vs Peter Muramira Civil Appeal No. 26 of 2009.**(Unreported) The decision is dated 14<sup>th</sup> March 2014. We find no reason to repeat what was held in that case. This court allowed the appeal, after finding that there was no fair trial, the trial Judge having disposed of the suit before a scheduling conference. He decided the case relying on documents attached to the pleadings.

In this case we find that the Judge erred when he dismissed the suit on what he termed as preliminary issues of law. The objections raised were not preliminary issue of law but rather they were issues of mixed law and fact that required proof by way of evidence.

We find that the decision of the trial Judge was arrived at in contravention of **Article 28 (1)** of the Constitution which stipulates as follow;-

**“ 28 Right To a fair hearing**



**(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”**

5

Any act that contravenes the Constitution is null and void. The decision of the learned Judge is therefore null and void in so far as it did not accord the parties a fair hearing.

We accordingly it set aside.

10 We order that the file be remitted to the High Court for re-trial before another Judge.

We make no order as to costs since the respondent did not oppose the appeal.

Dated at Kampala this ..... 24<sup>th</sup> ..... day of ..... June ..... 2015.

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**HON. A.S NSHIMYE**  
**JUSTICE OF APPEAL**

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**HON. KENNETH KAKURU**  
**JUSTICE OF APPEAL**

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**HON. FMS EGONDA NTENDE**  
**JUSTICE OF APPEAL**