

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL AT KAMPALA  
CIVIL APPLICATION NO. 362 OF 2015 AND CIVIL APPEAL NO. 12 OF  
2014 (Consolidated)**

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1. DOROTHY NAKIMBUGWE
2. TEOPISTA KAGERE
3. MUTEBI GEORGE WILLIAM
4. JOHN BAPTIST MUYABALA MUYEGA
- 10 5. KATO CHARLES
6. MUKASA NOAH
7. EMMANUEL KAYONDO .....APPLICANTS/APPELLANTS

**VERSUS**

1. JOHN KAYONDO
- 15 2. SSEGAMWENGE CHARLES
3. NDAWULA FRANCIS
4. NAKAJUMBA MARY
5. NAKABIRI MARGARET
6. NDAGIRE AGNES
- 20 7. ZANSANZE GETRUDE
8. NASOLO NOELINA.....RESPONDENTS

**CORAM:**

- HON. MR. JUSTICE REMMY KASULE, JA
- 25 HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
- HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

**JUDGMENT OF THE COURT**

On 7 June 2017, this Court directed that Civil Application No. 362 filed by the  
30 Respondents to strike out the Appellants' Appeal No. 26 of 2014 be  
consolidated with the appeal and be heard as ground 1 of the appeal. Hearing



of the appeal took place on 6 July 2017. This judgment on the appeal also disposes of Civil Application No. 362 of 2015.

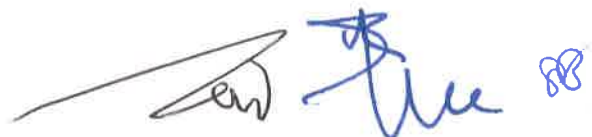
### **Background**

- 5 The applicants filed Civil Suit No. 133 of 2012 in the High Court seeking various reliefs against the Respondent with respect to land belonging to the estates of the late Yozefu Mawanda Wampamba and the late Emmanuel Suuna. They also filed again in the High Court Civil Miscellaneous Application No. 191 of 2012 seeking a temporary injunction to preserve the status quo in the suit.
- 10 The latter application came up for hearing before Justice Moses Mukiibi on 8 November 2012 (hereinafter referred to as the learned trial Judge).

The Learned Trial Judge found the suit to be incompetent in that it did not disclose a cause of action. He also found that the Appellants did not possess  
15 letters of administration to the estate of the late Yozefu Mawanda Wampamba. He therefore dismissed the suit under Order 7 Rule 11 of the Civil Procedure Rules (CPR) with costs. The appellants appealed against this decision in Civil Appeal No. 26 of 2014. The Respondents filed Miscellaneous Application No. 362 of 2015, seeking to strike out Civil Appeal No. 26 of 2014  
20 for being incompetent. The appeal and application were consolidated and heard together.

At the hearing, Ms. Ita Kasaija represented the Appellants while Counsel Byrd Sebuliba and Musa Sekaana represented the Respondents.

25 The first issue to be determined by this Court is whether the appeal before this Court is competent. Counsel Sekaana for the Respondents argued that the decision of the Learned Trial Judge amounted to an order and not a decree because the Learned Trial Judge rejected the plaint of the Respondent under  
30 Order 7 Rule 11 of the Civil Procedure Rules. According to him, Order 44 sets out orders that are appealable as of right and orders for which leave must first be sought. He concluded that Order 7 Rule 11 of the Civil Procedure Rules was not one of such orders and that the Appellant therefore should have obtained leave of Court. As the appellants did not obtain leave before they lodged their  
35 appeal, the appeal was incompetent. Counsel Sekaana also submitted that a



person whose plaint is rejected should extract an order under Order 7 Rule 12 of the Civil Procedure Rules and such person's remedy lies in presenting a fresh plaint in respect of the same cause of action under Order 7 Rule 13 CPR.

- 5 Mr. Sekaana also contended that the plaint was rejected on the additional ground of being in breach of Section 191 of the Succession Act, which provides that one cannot sue for recovery of land under the Succession Act unless such person has letters of administration.
- 10 Mr. Sekaana however conceded that the Learned Trial Judge did not hear the parties on the application for a temporary Injunction that was before him and that the Learned Trial Judge considered the main suit instead. He also conceded that there was no application to court to reject the plaint.
- 15 Counsel Kaija for the appellants, submitted that the appellants had raised issues of fraud in the High Court, which should have been addressed, irrespective of the pleadings. Counsel further submitted that the Learned Trial Judge dismissed the suit under Order 7 Rule 11 CPR; having determined that the Appellants did not possess letters of administration, thus determining the  
20 rights of the parties without hearing them. Further, counsel for the respondents had not complied with Order 21 Rule 7 of the CPR which required him to extract a decree instead of an order, and submit it to opposite Counsel to approve by signing thereon.
- 25 Counsel further contended that the appellants did not require leave to appeal under Order 7 Rule 21 CPR and thus prayed that this Court allows the appeal with costs.

30 The main issue to be determined by this Court is whether the appeal before us is competent. This in turn hinges on the question whether the Learned Trial Judge's decision conclusively determined the rights of the parties before him because if it did so, then the appellants would be entitled to appeal against the said decision without first seeking leave to appeal. In addressing this issue, it is pertinent to recall that this Court as a first appellate court has a duty to



evaluate the evidence and reach its own conclusion on the law and evidence.  
(See **Rule 30 of the Court of Appeal Rules**).

5 We have carefully considered the submissions of both parties and have  
examined the record of proceedings in the lower Court. We note that the  
matter before the Learned Trial Judge was an application for a temporary  
injunction. The parties were not given an opportunity to argue the application  
before the Learned Trial Judge. Instead, the Learned Trial Judge proceeded on  
10 his own motion to ask Counsel for the Respondent three questions that were  
unrelated to the temporary injunction application. The questions, in the order  
in which they were asked, were the following;

“What do you intend to achieve by this plaint?”

“What is the basis of the plaintiffs’ rights?” and then finally;

15 “How did the plaintiffs become owners of the suit land?”

The procedure adopted by the Learned Trial Judge is strange, to say the least.  
The matter before him was an application for a temporary injunction. He did  
not dispose of it, let alone discuss it. Instead, he proceeded to determine the  
20 case on its merits without affording the parties an opportunity to be heard.  
The form of expression that he used conclusively and finally determined the  
rights of the parties, with regard to the matters that are in controversy in the  
suit. It was not a mere rejection of the plaint. Therefore, the decision of the  
Learned Trial Judge amounted to a decree and not an order. The respondents  
25 were, in our view, therefore entitled to appeal as of right without first seeking  
leave of court.

On appeal, we as a court of appeal may interfere where the Judge has gone  
wrong in principle, but also if we are satisfied that the Judge is wrong in giving  
30 weight or insufficient weight to those considerations which ought to have  
weighed with him, or that he had been influenced by considerations which  
ought not to have weighed with him. See: **Wycliff Kiggundu v. Attorney  
General Civil Appeal No. 27/92 of 1993.**



On the evidence before us, we observe that the Learned Trial Judge did not hear the parties at all. He just perused the pleadings and proceeded to pronounce himself on the merits of the case. We consider this approach to be contrary to Article 28(1) of the Constitution of Uganda 1995. That Article provides as follows:

***“ 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”.***

We also rely on ***Constitutional Appeal No. 2 of 1998 Ismail Serugo and Kampala City Council and Another***, where the Supreme Court sitting as a Constitutional Court of Appeal, reiterated that a litigant must not be turned away from the seat of justice before his/her case is heard on merit, except in plain and obvious cases.

In our considered view, the Learned Trial Judge violated the parties’ rights to be heard and to have a fair hearing by neglecting to hear them, more so as the pleadings alluded to fraud.

The hearing was therefore null and void and the trial of the suit ought to be started de novo. In the result, we reject the application to strike out the appeal. It is accordingly dismissed. We allow Civil Appeal No. 26 of 2014 filed by the Respondents. We accordingly vacate the order of the Learned Trial Judge rejecting and striking out with costs to the defendants the plaint in HCCS No. 133 of 2012. We substitute the said order with an order that HCCS No. 133 of 2012 be reinstated on the High Court record and that the same be tried *de novo* before another High Court Judge.

With regard to costs, none of the parties is at fault in the matter. The Learned Trial Judge, on his own volition, decided to examine the merits of the matter without hearing the parties. Each party will therefore bear its own costs regarding Miscellaneous Application No. 362 and Civil Appeal No. 26 of 2014 as well as those costs so far incurred in the court below.



We direct the Registrar of this Court to transfer the file for High Court Civil Suit No. 133 of 2012 back to the High Court to be placed before another Judge for hearing *de novo*.

We so order.

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Dated at Kampala this 13<sup>th</sup> day of October 2017

  
Hon. Justice Alfonse Owiny Dollo, DCJ

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Hon. Justice Remmy K Kasule, JA

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Hon. Justice Solomy Balungi Bossa, JA

