THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL N0. 43 OF 2011

BETWEEN

1. **MALINGA NOAH** }	
2. **OBOTE CHARLES** }	::::::::::::::::::::::::::::::::::::::**APPELLANTS**
3. **EMONG ROBERT** }	

AND

AKOL HENRY ::**RESPONDENT**

(An appeal from the judgment and decree of the High Court of Uganda (Oguli Oumo, J.,), dated 28th February 2011)

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my brother Egonda-Ntende, JA. I concur with his findings and the conclusion that this appeal be allowed with costs here and the judgment of the trial court is reinstated pending a trial *de novo* of the appeal to the High Court before another judge.

Dated at Kampala this...27th...day of...May...2019.

....

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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(Coram: Egonda-Ntende, Musoke and Obura,JJA)

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1. MALINGA NOAH
2. OBOTE CHARLES
3. EMONG ROBERT ::APPELLANTS

AND

AKOL HENRY ::RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Uganda, [Oguli Oumo, J) dated 28th February 2011)

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my brother, Fredrick Egonda-Ntende, JA with which I agree. I have nothing useful to add.

Dated at Kampala this ......27th...... day of ......May,...... 2019.

Elizabeth Musoke

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

Civil Appeal No. 43 of 2011

(Arising from High Court Civil Appeal No.22 of 2010 at Soroti)

BETWEEN

1. MALINGA NOAH .... APPELLANTS
2. OBOTE CHARLES
3. EMONG ROBERT

AND

AKOL HENRY .... RESPONDENT

(*On Appeal from the Judgment and Decree of the High Court of Uganda, [Oguli Oumo, J., dated 28th February 2011.*)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

1. This is a second appeal arising from High Court Civil Appeal No. 22 of 2010. The background of the case as reflected in pleadings and related documents is that the respondent filed Civil Suit No.21 of 2001 in the Grade 11 Magistrate's court at Kachumbala against Zedekia Irigei and Odeke John. It should be noted that the appellants were not parties in this case. He sought an order for the restoration of six gardens out of the 22 acres of land allocated to him in 1975 by his father who was defendant no.1 in the suit. The trial court referred the matter to the clan to resolve. The clan in its decision allocated to the respondent thirteen acres of land. The trial court in its judgment delivered on 7th May 2003 confirmed the clan's decision and decreed the same to the respondent.

2. After delivering this judgment, the trial magistrate visited the locus in quo and apparently discovered that the piece of land given by the clan to the respondent was only ten gardens (acres) not thirteen. The trial Magistrate wrote a letter to the Chairman LC 11 Kongatuny/Kachumbala instructing him to add one more garden to the respondent to make a total of 11 gardens therefore altering the judgment by the trial court.

3. The respondent being dissatisfied with the directive of the trial Magistrate appealed to the Chief Magistrate's court at Soroti (Civil Appeal No. 38 of 2008) seeking an order to enforce the original judgment. His Worship Charles Emuria in his decision delivered on 17th July 2007 found that the trial magistrate's acts of visiting the locus in quo after judgment and thereafter varying his orders were irregular and illegal. He allowed the appeal and ordered that 13 acres of land be allocated to the respondent. The file was forwarded to High Court for revision and the High Court upon revision upheld the decision of the learned Chief Magistrate.

4. However, the court orders were not implemented prompting the respondent to file a complaint to the Inspector of Courts. Consequently the respondent filed Civil Suit No. 40 of 2008 against the appellants before the Grade 1 Magistrate's court at Bukedea. He sought the recovery of his land measuring 7 gardens located at Kongatuny village, Kachumbala sub-county in Bukedea district. He also sought for an order for vacant possession and a permanent injunction against the appellants. The case was dismissed on the ground that the respondent had no idea of what parcel of land he owned.

5. The respondent appealed against the decision vide High Court Civil Appeal No.22 of 2010. The appellate court held that the decision of the Grade 1 Magistrate was null and void and of no effect. That the parties were bound by the prior decisions and judgments of the Magistrate Grade 11 in Civil Suit No. 21 of 2001, the Chief Magistrate decision in Civil Appeal No.38 0f 2003 and the High Court Revision order. Being dissatisfied with the decision, the appellants have filed this appeal on the following grounds:

> '(1) The learned judge grossly erred in both law and fact when she held that the previous decisions of Magistrate

Grade 11 Kachumbala Civil Suit No.21/2001, the Chief Magistrate in Civil Appeal No.0038/2003 and the High Court Revision Order affected and included/covered the three Appellants.

(2) The learned judge misdirected herself when she held that the case before Magistrate Grade 1 Bukedea was the same subject matter in the previous suits in which the Respondent had litigated with Zedekia Irigei and Odeke John.

(3) The learned judge failed to see and appreciate that there had been no earlier Order of any court that bound the Applicants in relation to the subject matter before the Court.

(4) The learned judge failed to determine the Appeal before the Court on its merits thereby wrongly nullifying the trial before Magistrate Grade 1 Bukedea.

(5) The learned Judge failed to afford the Appellants a fair hearing when they were ordered out of the Chambers where the Court sat while the Judge, Registrar, the Court Clerk and then the Appellant/Respondent remained in chambers and the Appellants/ Respondents were later on merely called to receive the Order of the Court.

(6) The decision of the learned judge has caused grave injustice to the Appellants jointly and severally.'

6. The respondent opposes the appeal.

Submissions of Counsel

7. At the hearing of this appeal the appellants were represented by Ms. Nampola Elizabeth and the respondent was represented by Mr. Matovu. The appellants adopted their conferencing notes as their submissions and the respondent filed written submissions.

8. With regard to ground 1 it is the appellants' submission that there was no earlier order of any court binding the appellants in relation to the subject matter before

court. The appellate court did not peruse the file and proceedings of the lower court to decide the matter therefore arriving at a wrong conclusion. That Civil Suit No.21 of 2001 is not analogous to Civil Suit No. 40 of 2008. They relied on Section 7 of the Civil Procedure Act and the authority of Maniraguha Gashumba vs Sam Nkundiye, (C.A Civil Appeal No.23 of 2005) [2014]UGCA 1. The appellants reiterated this submission with regard to ground 2 and 4; and were of the view that the High court failed to exercise its duties as a first appellate court. They relied on the authority of Fr. Narsensio Begumisa & others v Eric Tibebaga, (S.C. Civil Appeal No. 17 of 2002), [2004] UGSC 18.

9. Turning to ground 5 the appellants allege that they were not given an opportunity to address the appellate court as evidenced by the ensuing court order. The court did not explain to the parties their right to appeal and no reasons were advanced for the decision by the High court on the face of the record. They relied on the provisions Articles 28(1) and 44 of the Constitution and Order 21 rule 4 of the Civil Procedure Rules. The appellants contend, in light of Article 28(1), that the decision is illegal. This court cannot sanction an illegality once it has been brought to its attention. They relied on the authority of Makula International vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11.

10. In reply to the ground 1 and 3 the respondent submitted that the learned trial judge rightly held that the previous decisions of the Magistrate Grade 11 in Civil Suit No.21 of 2001, Civil Appeal No.38 of 2003 and the High Court Revision order affected and bound the appellants. He contended that Civil Suit No.24 of 2010 had been filed irregularly as the subject matter of the suit had been determined in Civil Suit No.21 of 2001. A letter marked exhibit 'C' had been presented before the learned trial magistrate who confirmed that it was a letter written by the deputy Registrar inquiring about the reasons for failure to execute the orders of the High court. In that letter the trial judge makes mention of a complaint to the Inspector of Courts in May 2009 by the respondent about the failure to implement the court orders. This resulted into filing a fresh suit over the same subject matter which shows that Civil Suit No.24 of 2010 had been filed irregularly.

11. In reply to ground 2 and 4 the respondent reiterated the submissions above. He contended that in light of section 7 of the Civil Procedure Act, the issues raised in

Civil Suit No.24 of 2010 had been directly and substantially in issue in Civil Suit No.21 of 2001. The defendants were different but they were litigating under the same title and the points raised belonged to the subject of litigation. He relied on the case of Maniraguha Gashumba v Sam Nkundiye, (C.A. Civil Appeal No.23 of 2005), [2014] UGCA 1. He contended that Civil Suit No.24 of 2010 fits the test of suits barred by *res judicata* and therefore the trial court had no jurisdiction to entertain the matter. The learned judge properly directed herself when she concluded that there was no need for an appeal against the judgment of the Magistrate Grade 1 and proceeded to render the court order null and void.

12. In reply to ground 5 the respondent submitted that this ground is not in compliance with Rule 82 (1) of the Court of Appeal rules. It doesn't specify any point alleged to have been wrongly decided as a result of the alleged failure to avail a fair hearing. That it is not based on any evidence availed to court as the record of appeal does not include the record of proceedings before the learned trial judge. In the alternative, he relied on the holding in Maniraguha Gashumba vs Sam Nkundiye (supra) that Section 7 of the Civil Procedure Act bars court from trying a suit or even an issue that is *res judicata* as it lacks jurisdiction. In the instant case the learned judge could not go on to determine any issues on the merits of the appeal after holding that Civil Suit No. 24 of 2010 was *res judicata* and had been irregularly filed before the Grade 1 Magistrate at Bukedea. He relied on the authority of Hwan Sung Limited vs M & D. Timber Merchants and Transporters Limited, (S.C. Civil Appeal No. 2 of 2018), [2018] UGSC 31.

Analysis

13. Section 7 of the Civil Procedure Act cap 71 provides for *res judicata* and it states:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."

14. The Constitutional Court in Karokora v Attorney General, (Constitutional Petition No.45 of 2012) [2014] UGCC 16, cited the case Cheborion Barishaki v Attorney General Constitutional Petition No.04 of 2006 (unreported), which discussed the principle of *res judicata* and observed:

> "Essentially the test to be applied by court when determining the question of *res judicata* is this: Is the plaintiff in the second or subsequent action trying to bring before the court in another way and in the form of a new cause of action, a matter which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of *res judicata* applied not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the time: See Greenhalgh v Mallard [1947]2 All ER 255."

15. In Ismail Karshe vs Uganda Transport Co. Ltd [1967] EA 774, Sir Udo Udoma, former Chief Justice of Uganda, held,

> 'Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given, subject to certain conditions'

16. For the doctrine of *res judicata* to apply the parties must be the same as in the previous suit or claiming under them. Secondly the issues in the second or subsequent suit should have been conclusively dealt with by a court of competent jurisdiction. The relevance of *res judicata* is to prevent multiplicity of suits and to put an end to litigation.

17. In Mansukhlal Ramji Karia and Anor v Attorney General and Ors, (S.C Civil Appeal No.20 of 2002), [2004] UGSC 32, the two courts below had held that the suit was res judicata because the subject matter had already been decided in the previous suit and on appeal. However, two of the plaintiffs/appellants were not parties to this suit. Tsekooko JSC when interpreting section 7 of the Civil Procedure Act stated thus:

'The provision indicates that the following broad minimum conditions have to be satisfied:-

1. There have to be a former suit or issue decided by a competent court.
2. The matter in dispute in the former suit between parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.
3. Parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.'

18.Upon perusing the record, the issues in Civil Suit No. 40 of 2008 are substantially the same as those in Civil 21 of 2001 from which Civil Appeal No. 38 of 2003 and H.C.C.R No.1 of 2007 arose. However, the matters relate to completely different parties. The appellants were not party to Civil Suit No. 21 of 2001. It was therefore erroneous and improper for the learned judge to invoke the doctrine of *res judicata*. See Dr. Kizza Besigye & 10 Others v The Attorney General, (Constitutional Petition No. 07 of 2007), [2009] UGCC 3. The Magistrate Grade 11decision in Civil Suit No. 21 of 2001, the subsequent decision in Civil Appeal No.38 0f 2003 and the High Court Revision order are not binding on the appellants and have no effect on Civil Suit No. 40 of 2008.

19.I would allow grounds 1, 2 and 3.

20.In relation to grounds 4, 5 and 6 the appellants have not availed this court with the record of proceedings in the court below upon which they base their allegations. Nor have I been able to see a copy of the memorandum of appeal that was filed in the High Court. It appears that there were no proceedings in the appellate court in regard to the appeal. This can be deduced from the court order at page 31 of the record of proceedings. I reproduce the court order below.

'I have gone through the history of the case.

1. The matter was first filed in Kachumbala Grade 2 Court under No. 21/2001.
2. The Plaintiff appealed to the Chief Magistrate under No.38/2003 and a judgment was passed in the plaintiff's

favour and orders were also made on Revision by the High court on 7/1/2007

3. The High court under Civil Revision No.1/2007 revised the orders of the Grade 2 court on 7/11/2007.

4. Plaintiff complained to the Inspector of Courts in May 2009 after failure to implement the orders until he filed a fresh suit over the same subject matter before Grade 1 Court at Bukedea in C.S. No.40/2008 and lost the case.

5. He has now filed an appeal against that decision.

6. To me the Judgment of the Chief Magistrate and High Court Revisional Order still stand and can be enforced and there is no need for an appeal against the Judgment of Grade 1 Magistrate. The suit was filed irregularly and the order of Magistrate Grade 1 is null and void and has no effect.

Consequently, court makes the following orders:-

(1). The judgment and order of the Grade 1 Magistrate Bukedea are null and void and of no consequence

(2). Judgment of the Chief Magistrate 13/7/2007 and the Revision Order of 7th November, 2007 are upheld and should be implemented immediately.

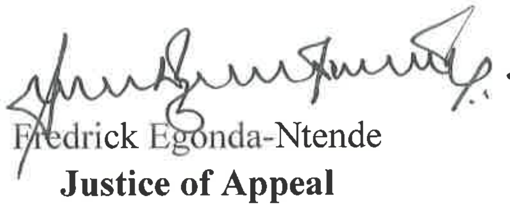
21. From the above it appears that the High Court did not afford an opportunity to the parties to present their cases on appeal contrary to Article 28 (1) of the Constitution. The parties had a right to a fair hearing which is non-derogable under Article 44 (c) of the Constitution thus occasioning a miscarriage of justice. To that end, the aforementioned court order is null and void. Grounds 4, 5 and 6 are allowed.

22. I would allow the appeal with costs here. I would set aside the decision of the High Court. I would reinstate the judgment of the trial court and direct that the appeal before the High Court be tried *de novo* before another judge.

Decision

23. As Musoke and Obura, JJA, agree this appeal is allowed with costs here. The decision of the High Court is set aside. The judgment of the trial court is reinstated pending a trial *de novo* before another judge.

Signed, dated and delivered at Kampala this 27th day of May 2019



Fredrick Egonda-Ntende
Justice of Appeal