THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CIVIL APPEAL N0. 0027 OF 2011

(Arising from the judgment of the High Court of Uganda (Mwondha, J.) in High Court Civil Suit No. 246 of 2011 delivered on 26th August 2011)

BETWEEN

1. **BISHOP BALAGADDE SSEKADDE** }
2. **M. NASSANGA-SERUNJOGI** }
3. **E.P. LUBWAMA** }
4. **DDUNGU LIVINGSTONE** }
5. **HAJJI DIRIZA KAFEERO** }
6. **Y. SEMAKULA** }

(Administrators of the estate of the late Edward Nelson Serunjogi) }::::::::::::::::::::::::::::::**APPELLANTS**

AND

1. **MOSES WAMALA** }
2. **MARY WAMALA MUSOKE** }::::::::::::::::::::::::::::::**RESPONDENTS**
3. **NAMPIIMA J. WAMALA** }

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my learned brother Egonda-Ntende, JA. I agree with his finding that the trial was incomplete and irregular and the conclusion that the resultant judgment cannot stand hence an order for a retrial.

Dated at **Kampala** this..2nd.....day of.....Dec.....2019.

.....

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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1. **BISHOP BALAGADDE SSEKADDE**
2. **M. NASSANGA-SERUNJOGI :: APPELLANTS**
3. **E.P LUBWAMA**
4. **DDUNGU LIVINGSTONE**
5. **Y. SEMAKULA**

(As administrators of the estate of the late Edward Nelson Serunjogi)

AND

1. **MOSES WAMALA**
2. **MARY WAMALA MUSOKE**
3. **NAMPIIMA J WAMALA :: RESPONDENTS**

JUDGMENT OF ELIZABETH MUSOKE, JA

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

I agree that the trial in the lower Court was irregularly conducted, and the judgment which arose therefrom ought to be set aside, and a retrial ordered. As directed by Egonda-Ntende, JA, each party should bear its own costs of the appeal for the reasons given.

Dated at Kampala this 2nd day of Dec 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. 0027 of 2011

(Arising from High Court Civil Suit N0. 246 of 2011)

BETWEEN

1. Bishop Balagadde Ssekadde
2. M. Nassanga -Serunjogi ==========Appellants
3. E. P Lubwama
4. Ddungu Livingstone
5. Hajji Dirisa Kafeero
6. Y. Semakula

(Administrators of the estate of the late Edward Nelson Serunjogi)

AND

1. Moses Wamala
2. Mary Wamala Musoke ==========Respondents
3. Nampiima J Wamala

(*On appeal from the judgment of the High Court of Uganda at Nakawa (Mwondha, J.) delivered on 26th August 2010.)*

Judgment of Fredrick Egonda-Ntende, JA

Introduction

[1] The respondents as the beneficiaries of the estate of the late Zubaili Sebulo instituted High Court Civil Suit No. 246 of 2002 against the appellants seeking a declaration that the late E.N Serunjogi breached the trust conferred on him by the late Zubaili Sebulo when he fraudulently transferred the land comprised in Kyadondo Block 194 Plot 111 into his names.

[2] The background of the case is that the late Zubaili Sebulo purchased 8.5 acres of land from a one Yakobo Musisi for a consideration of UGX 200 on 7th February 1939. Part of the land constituting 4 acres was transferred into the names of Erukana Kigozi upon subdivision and the remaining 4.5 acres which constitutes the suit property was registered in the names of the late Zubaili Sebulo. It was alleged by the respondents that the late Zubaili Sebulo deposited the duplicate certificate of title to the suit property with the late E.N Serunjogi for safe custody since they were close friends. From the time of acquisition of the suit property to date, the family of the late Zubaili Sebulo has been in possession of the said land.

[3] The respondents also alleged that before the late Zubaili Sebulo's death, he demanded for his duplicate certificate of title from the late E.N Serunjogi who refused to return it. Unknown to the late Zubaili Sebulo, the late E.N Serunjogi had transferred the suit property into his names. Upon discovery of this through Fredrick Nelson Serunjogi laying claims to the land, the children of the late Zubaili Sebulo lodged a caveat on the suit land. The appellants denied the respondents' allegations and claimed that the late E.N Serunjogi bought the suit land from the late Zubaili Sebulo for valuable consideration of UGX 2000 and merely allowed the latter to stay on the land.

[4] The learned trial judge entered judgment in favour of the respondents holding that the late E.N Serunjogi procured the transfer of the suit land into his names through fraud and therefore the appellants were not entitled to the suit property. She ordered the cancellation of the late E.N Serunjogi's names from the title and the restoration of the late Zubaili Sebulo's names as the proprietor. The learned trial judge also awarded the respondents general damages of UGX 5,000,000 and the costs of the suit.

[5] Being dissatisfied with the decision of the trial court, the appellants appealed on the following grounds:

'1. The Learned Trial Judge erred in law and fact when she held that the Limitation Period was not challenged in total disregard of the Appellant's submissions on the matter.

2.The Learned Trial judge erred in law and fact when she found that the late Zubairi Sebulo deposited his certificate of title to land comprised in Kyadondo Block 194 Plot 11 (the suit land) with the late E.N Serunjogi who in breach of trust transferred the same into his names.

3.That the Learned Trial Judge erred in law and fact when she held that the late E.N Serunjogi procured registration of the suit land into his names through fraud.

4.The Learned Trial Judge erred in law and fact when she ordered the Registrar of Titles to cancel the late E. N Serunjogi's name from the certificate of title to the suit land and restore it into the late Zubaili Sebulo name.

5.The Learned Trial Judge erred in law when she granted the Respondents General Damages of UG shs 5,000,000 (Five Million Uganda Shillings Only) and costs of the suit

6.The Learned Trial Judge erred in law and fact when she failed to assess and evaluate the evidence on record as a whole'

[6] The respondents oppose the appeal.

Submissions of Counsel

[7] At the hearing, the appellants were represented by Ms Dorothy Nandugga while Mr. Mbogo Charles represented the respondents. Counsel adopted their written submissions.

[8] With regard to ground 6, counsel for the appellants submitted that the learned trial judge did not properly evaluate the evidence on record as a whole otherwise she would have arrived at a different conclusion. Ms.

Nandugga argued that the order of the trial court to rely on affidavit evidence in a matter that had already been partially heard orally denied the appellants' witnesses a chance to be cross examined which led to an injustice. She was also of the view that failure by the trial court to take oral evidence denied the trial judge the opportunity to receive the evidence at first hand and assess the demeanor of the witnesses. Counsel for the appellants averred that the trial judge ought to have invited the witnesses who in her opinion were not truthful for cross-examination instead of misdirecting herself. She particularly singled out the affidavit evidence of Mujumbula Stanley which the learned trial judge had rendered a falsehood. Counsel for the appellants relied on Gachigi v Kamau [2003] 1 EA 69 for the above submission.

[9] Ms. Nandugga also submitted that the learned trial judge's failure to evaluate the evidence was an abuse of the principles of natural justice. She relied on the case of Hon. Kipoi Tonny Nsubuga v Ronny Waluku Wakata & 2 others [2012] UGCA 6 for the proposition that failure to avail an appellant the opportunity to cross examine a witness amounts to an infringement of their right to a fair hearing. She prayed that this court finds on the basis of the above that the learned trial judge did not appreciate the case of the appellants. Counsel for the appellants also relied on Rule 30(1) of the Judicature (Court of Appeal Rules) Directions S I 13-10 and Non-Performing Assets Recovery Trust v S.R Nkabula & Sons Ltd [2007] UGSC 23 with regard to the duty of a first appellate court.

[10] In relation to grounds 2 and 3, Counsel for the appellants argued that no documentary or direct evidence was adduced at the trial to show that the late Zubaili Sebulo deposited his certificate of title with the late Edward Nelson Serunjogi for safe custody. She submitted that the late Zubaili Sebulo did not deposit the certificate of title with the late Edward Nelson Serunjogi but instead sold to him the land for valuable consideration. She also submitted that no documentary or direct evidence was adduced at the trial to show that the late Zubaili Sebulo ever demanded for any title from the late Edward Nelson Serunjogi from the time of transfer in 1973 to 2002. Counsel for the appellants submitted that the learned trial judge erred in

law when she failed to weigh the coached and uncorroborated evidence of PW2 who stated that he was sent by the late Sebulo to claim for the certificate of title.

[11] She further argued that due to the fact that the late Sebulo was a Muluka Chief who knew how to read and write, there is no justifiable reason for the deceased's failure to put the demand in writing. She submitted that this evidence is corroborated by the affidavit evidence of Fredrick Serunjogi, Lawrence Kyazze and Stanley Mujumbula which was to the effect that at the time of the late Sebulo's illness, he had been abandoned by the family and neither of his children visited him while at home and during his admission at Mulago hospital. She also contended that PW2 testified that the deceased used to stay alone therefore there is no way PW2 would have been continuously sent to demand for the certificate of title yet he was not available. She was of the view that the respondents ought to have called Maama Faridah as a witness since she used to stay with the late Sebulo. Ms. Nandugga submitted that the respondents ought to have made their claim from the administrators of the estate of the late Edward Nelson Serunjogi when they invited all persons with claims for settlement. She relied on the affidavit evidence of a one Margaret Nassanga for this averment.

[12] With regard to ground 3, counsel for the appellants submitted that in reaching the decision that the late Edward Nelson Serunjogi procured registration of the suit land into his name through fraud, the learned trial judge did not consider the evidence on record and ignored the evidence of the appellants on the matter. Ms. Nandugga submitted that an assessment of the documents of transfer by Olanya Joseph Okwonga from the Government Analytical Laboratory revealed that the late Zubaili Sebulo purchased 8. 5 acres of land comprised in Kyadondo Block 194 Plot 9 from Yakobo Musisi on 18th March 1952 and in 1967. The land was subdivided into two plots. 4 acres of land was given to a one Erukana Kigozi who had a claim on the land and that the remaining 4.5 acres of land were transferred by the late Zubaili Sebulo to the late Edward Nelson Serunjogi

in 1973 for valuable consideration of UGX 2000. She averred that this evidence was corroborated by the evidence of Kulumba Kingi, a former Assistant Registrar of Titles.

[13] Ms. Nandugga also argued that there was no complaint of fraud from the late Zubaili Sebulo for 12 years since the transfer had been executed and similarly the children of the late Zubaili Sebulo did not lodge a claim of fraudulent acquisition of land against the late Edward Nelson Serunjogi for fourteen years until his death. She further submitted that the evidence of Nassanga and Stanley Mujumbula was to the effect that the late Edward Nelson Serunjogi met with the late Zubaili Sebulo's children and asked them to purchase the suit property from him but they did not get back to him. She therefore submitted that the respondents have no claim in the suit land and instituted High Court Civil Suit No. 0246 of 2002 to derail the execution of the late Edward Nelson Serunjogi's will. Counsel for the appellants concluded by stating that the late Edward Nelson Serunjogi did not procure registration of the suit property through fraud and there was no breach of trust because the late Zubaili Sebulo did not deposit a certificate of title with him for safe custody.

[14] Ms. Nandugga also urged this court to consider Kampala Bottlers Ltd v Domanico (U) Ltd [1993] UGSC 1 that lays down the standard of proof of fraud. She also referred to section 43 of the Evidence Act cap 6 that allows court to seek expert opinion on specified matters and cited the case of Njuku v Republic [2004] 1 EA 188 for the proposition that the court is entitled to accept the opinion of an expert if it is a confident one and not challenged in cross-examination. Counsel for the appellants while arguing that the evidence of the handwriting expert ought to be upheld by this court relied on the case of Ugachick Poultry Breeders Ltd v Tadjin Kara T/A S.T Enterprises Ltd [1998] UGCA 11 where this court held that court is not bound by the opinion of experts if it has found good reason for not doing so but rejecting the expert evidence without giving reason might be prejudicial.

[15] With regard to ground 1, counsel for the appellants submitted that the appellants challenged the filing of High Court Civil Suit No. 0246 of 2002 on the ground that it was barred by limitation and or laches. She argued that on pages 131, 132, 133 and 134 of the record of appeal, the appellants submitted on this issue but the learned trial judge ignored the submissions. She also stated that the issue of limitation was raised by the appellants under paragraph 4 of their written statement of defense. Ms. Nandugga submitted that if any cause of action for fraud or breach of trust ever arose, it was in 1973 when the suit land was transferred into the names of the late Edward Nelson Serunjogi or in 1983 when the late Zubaili Sebulo started asking for his title or even after the death of the latter in 1985 since PW2 kept on demanding the title from the late Edward Nelson Serunjogi. In her submissions, counsel for the appellants relied on section 5 of the Limitations Act Cap 80. She concluded by stating that had the learned trial judge properly evaluated the evidence on record and addressed her mind on the relevant law, she would have found that the respondent's claim was barred by the law of limitation.

[16] In his submissions on ground 4, counsel for the appellants relied on section 64 of the Registration of Titles Act and reiterated her submissions on grounds 2 and 3 and maintained that fraud was not strictly proved as required by the law. She was of the view that had the trial judge properly addressed her mind to the law relating to cancellation of title and properly evaluated the evidence on record, she would not have ordered for the cancellation of the appellants' title.

[17] With regard to ground 5, counsel for the appellants relied on Mbogo v Shah [1968] EA 93, Uganda Development Bank v National Insurance Corporation, G.M Combined (U) Ltd [1996] UGSC 5 and Matiya Byabalema & 2 ors v Uganda Transport Company [1993] UGSC 18 which lay down the principles upon which an appellate court can interfere with the discretion of the trial court in awarding damages. Counsel for the appellants reiterated her submissions on grounds 2 and 3 and submitted that there was neither breach of trust nor fraud on the part of the appellants that warranted the grant of general damages to the respondents. She

referred to the evidence of DW1 and the affidavit evidence of Margaret Nassanga. She also relied on Rule 22 of the Judicature (Court of Appeal Rules) Directions to pray for an eviction order against the respondents. She relied on Odd Jobs v Mubia [1970] EA 476 and Sinba (K) Ltd & 4 Ors v Uganda Broadcasting Corporation [2015] UGSC 21.

[18] In conclusion, counsel for the appellants prayed that this court finds that the late Edward Nelson Serunjogi was the lawful owner of the suit land and issue eviction orders against the respondents.

[19] In reply to the appellants' submissions, counsel for the respondents submitted that the ground 1 should be struck out because the issue of limitation was pleaded by the respondents in the trial court but it was not effectively challenged. Mr. Mbogo averred that a scheduling conference was held but the appellants did not raise a preliminary objection nor frame it as one of the issues to be resolved. They therefore waived the issue. He relied on the case of Attorney General v Orient Construction Co. Ltd Supreme Court Civil Appeal No. 9 of 1991 (unreported) for the proposition that issues not raised in the trial court should not normally be raised on appeal. He further argued that the trial judge was alive to the issue of limitation as she referred to it in her judgment. He also submitted that appellants merely denied the respondents' pleadings in paragraphs 10 in their reply to the amended plaint but did not state how the suit is barred by the law contrary to Order 6 Rule 8 of the Civil Procedure Rules that provides that denials must be specific.

[20] Counsel for the respondents further submitted that none of the appellants' witnesses in their affidavits challenged the suit on the ground that it was barred by limitation save in the affidavit of Margaret Nassanga who stated that the respondents' claim was caught up by the doctrine of laches. He argued that being caught up in the doctrine of laches is not the same as being barred by the statute of limitation. He cited James Semusambwa v Rebecca Mulira [1999] UGCA 4 where this court held that latches is merely a delay not amounting to a bar by the statute of limitation. Counsel

for the respondents submitted that the respondents' cause of action against the appellants accrued when the fraud was discovered by the 1st respondent. He stated that this was when the 7th appellant started claiming the suit land through a letter dated 3rd July 2002 addressed to the chairman LC 1 Nalongo zone Kkungu and copied to the respondents which prompted the 1st respondent to conduct a search on the suit land and discovered that the suit land had been registered in the names of the late Edward Nelson Serunjogi. He relied on Stanbic Bank Uganda Ltd v Uganda Crocs Ltd [2005] UGSC 16 and Charles Lubowa & 4 others v Makerere University, Supreme Court Civil Appeal No. 2 of 2011 (unreported).

[21] In reply to ground 2, counsel for the respondents submitted that the appellants did not challenge the evidence adduced by the respondents' witnesses. He also submitted that the learned trial judge rightly found that the evidence of PW2, PW3 and PW4 was credible. Mr. Mbogo further submitted that the respondents' witnesses gave partly direct and circumstantial evidence. He cited the case of Simon Musoke v R [1958] E.A 715 and Tumuheire v Uganda [1967] EA 328 to point out the relevance of circumstantial evidence. Mr. Mbogo also relied on Suleiman v Azzan [1958] EA 553 where it was held that circumstantial evidence suffices to prove fraud. Counsel for the respondents submitted that there was no justifiable reason why the late Edward Nelson Serunjogi, who was an intimate friend to the late Zubaili Sebulo failed to visit him during the period that he was sick. He also submitted that the late Edward Nelson Serunjogi was a supplier at Mulogo hospital at the time when the late Zubaili Sebulo was admitted there but he still failed to visit him. He reiterated the trial court's findings on the matter and agreed with the conclusion of the trial court that the late Zubaili Sebulo entrusted his certificate of title with the late Edward Nelson Serunjogi for custody.

[22] In reply to ground 3, counsel for the respondents submitted that the expert evidence of the handwriting expert for the appellants was not credible. He argued that his report was inconclusive because the expert did not give an answer to whether the land transfer was executed by the late Zubaili Sebulo. Mr. Mbogo further submitted that on the other hand, the

handwriting expert that was called by the respondents identified, isolated, analysed and investigated the questioned signature on the land transfer form and compared it with known undisputed samples. It is his submission that the conclusion of the handwriting expert called by the respondents that the signature on the land transfer was not written by the late Zubaili Sebulo is credible. Counsel for the respondents further submitted that it was not reflected on the certificate of title that the late Zubaili Sebulo transferred land to the late Edward Nelson Serunjogi. He was of the view that if there was no fraud, the late Edward Nelson Serunjogi should not have had a fresh duplicate certificate of title issued by Kulumba Kiingi David, the Assistant Registrar of Titles in charge of Kampala mailo land office at the time.

[23] Counsel for the respondents submitted that it is not true that Kulumba Kiingi David registered the mutation form for the subdivision of the land because another Assistant Registrar approved the subdivision on 14th August 1969. He submitted that the mutation form at page 75 of the record of appeal dated 12th May 1967, Instrument no. MRV 1151/19 was creating Plot No. 110 for Erukana Kigozi and plot 111for the late Zubaili Sebulo and therefore it was unnecessary to import a mutation form from Erukana Kigozi if the transaction from the late Zubaili Sebulo to the late Edward Nelson Serunjogi was a direct transfer. Counsel for the respondents further submitted that the mutation form dated 22nd March 1972 that approved the survey for the late Edward Nelson Serunjogi is different from instrument no. KLA 64272 that was purportedly signed by the late Zubaili Sebulo as the vendor. He submitted that Mr. Kulumba Kiingi David acted illegally and fraudulently to use a mutation form in a direct transfer. Mr. Mbogo further submitted that given the fact that the appellants did not produce an agreement of sale between the parties and all the documents relied on to prove transfer of land were forged, it can only be concluded that the late Edward Nelson Serunjogi fraudulently transferred the suit property into his names in breach of the late Zubaili Sebulo's trust.

[24] Counsel for the respondents also argued that the late Edward Nelson Serunjogi was not a bonafide purchaser for value without notice. He relied

on the Black's law dictionary and the case of David Sekajja Nalima v Rebecca Musoke Supreme Court Civil Appeal No. 12 of 1985 (unreported) to define a bonafide purchaser for value without notice. He also cited sections 176 (c) and 181 of the Registration of Titles Act. Mr. Mbogo submitted that the fact the appellants failed to adduce evidence that the late Edward Nelson Serunjogi bought the suit property, coupled with the facts that the suit property was not listed in the late Edward Nelson Serunjogi's will as part of his properties and that he was not in possession of the land shows that he was not a bonafide purchaser for value without notice.

[25] In reply to ground 5, counsel for the respondents submitted that general damages of UGX 50,000,000 are reasonable to adequately compensate the estate of the late Zubaili Sebulo for the inconveniences since 2002. He relied on the fact that the late Zubaili Sebulo demanded for his duplicate certificate of title from the late Edward Nelson Serunjogi in vain and he died worrying about recovering his certificate of title. He also alluded to the times and the resources the late Zubaili Sebulo and the respondents used to demand for the certificate of title. Mr. Mbogo also contended that the 7th appellant caused a lot of fear and anxiety to the respondents when he started claiming for the land. He also referred to the expenses the respondents incurred in obtaining a lawyer to search the land and institute the suit.

[26] Counsel for the respondents concluded by praying that this appeal be dismissed with costs.

Analysis

[27] As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanor of the witnesses which we do not have. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda

[1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8.

[28] I shall start with ground 6. The main contention of the appellants, under this ground, is that the trial court's directive to the parties to file affidavit evidence denied the appellants' witnesses a chance to be cross examined. However, this appears to be clearly outside the ground as framed. Ground 6 states that the learned trial judge erred in law and fact when she failed to assess and evaluate the evidence on record as a whole. The thrust of this ground is to challenge the evaluation of evidence by the judge and not how she conducted the trial. Nevertheless, as a first appellate court we are obliged to re- appraise the evidence on the record and reach our own conclusions. In doing so if it becomes obvious that the learned trial judge did not actually conduct the trial according to the law we are obliged to determine if the resultant judgment can stand. I shall proceed to do so.

[29] From the record of proceedings in the trial court, the hearing of High Court Civil Suit No. 0246 of 2002 commenced on 26th February 2004 before Okello, J., after conducting a scheduling conference on 17th November 2003. The appellants did not appear in court and counsel for the respondents sought leave to proceed ex parte which was not granted. The trial court proceeded to hear the evidence of PW1 and PW2.

[30] The matter was adjourned to 17th June 2004 for further hearing. During the hearing, counsel for the appellants prayed that the witnesses be recalled for cross examination. The trial court made an order for PW1 to be recalled for cross examination at an appropriate time at the cost of counsel for the appellants. PW2 was cross examined and re-examined after completing the examination in chief. On the same day, PW3 and PW4 also testified and were cross examined. On 21st May 2009, the hearing of the case was to resume but the appellants were not in court because they had lost a relative.

[31] The trial court adjourned the matter to 22nd June 2009 in order to give the parties an opportunity to settle the matter out of court. The parties failed to

settle the matter out of court and the case was adjourned to 30th March 2010 to resume the hearing. On that date, the parties appeared before Mwondha, J., (as she then was) because the previous judge had been transferred. Counsel for the appellants was absent but the 7th defendant was in court. In the interest of justice, the learned trial judge directed the parties to file affidavit evidence. On 18th June 2010, the parties appeared in court and discussed the status of their written submissions. Judgment was reserved for 7th July 2010.

[32] Order 18 Rule 11(1) of the Civil Procedure Rules, deals with the situation as it obtained in this case. It states,

> 'Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his or her successor may deal with any evidence taken down under rules 1 to 10 of this Order as if the evidence had been taken down by him or her or under his or her direction under those rules, and may proceed with the suit from the stage at which his or her predecessor left it.'

[33] It was open to the new trial judge to proceed from the point at which the trial had stopped under Okello, J. That would have been to hear the remaining witness for the plaintiff and then hear the defendant's witnesses in the manner provided for under Order 18 rules 1 to 10 of the Civil Procedure Rules.

[34] The learned trial judge did not do so. On the contrary the learned trial judge adopted a procedure that was unknown to the law of civil procedure. The judge decided to try the case *de novo* which in itself was not a problem. However, she ordered both parties to file affidavits and she then proceeded to write a judgment and deliver the same. The question that arises is whether this case was heard and determined in accordance with the law?

[35] Order 18 provides the procedure to be used in the conduct and hearing of a civil case including the taking of evidence. I shall set it out in part below.

'ORDER XVIII—HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. Right to begin. The plaintiff shall have the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he or she seeks, in which case the defendant shall have the right to begin.

2. Statement and production of evidence.

(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.

(2) The other party shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case; except that in cases in which evidence is tendered by the party beginning only he or she shall have no right to reply.

3. Evidence where several issues.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his or her option, either produce his or her evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his or her evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

4. Witnesses to be examined in open court.

The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

5. How evidence to be recorded.

The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of a narrative, and when completed shall be signed by the judge.

6. Records made in shorthand or by mechanical means. Notwithstanding rule 5 of this Order, the evidence given or any other proceeding at the hearing of any suit may be recorded in shorthand or by mechanical means, and, if the parties to the suit agree, the transcript of anything so recorded shall, if certified by the judge to be correct, be deemed to be a record of the evidence or other proceeding for all the purposes of the suit.

7. Summary of evidence in certain cases.

Notwithstanding rule 5 of this Order, in all cases before any court in which the subject matter in dispute or amount claimed can be valued in money and that value does not exceed three hundred shillings, it shall be sufficient for the judge to make in writing a brief summary of the evidence given before him or her.

8. Any particular question and answer may be taken down. The court may, of its own motion or on the application of any party or his or her advocate, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

9. Questions objected to and allowed by court.

Where any question put to a witness is objected to by a party or his or her advocate, and the court allows the question to be put, the judge shall take down the question, the answer, the objection and the name of the person making it.

10. Remarks on demeanour of witness. The court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

11. Power to deal with evidence taken before another judge. (1) Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his or her successor may deal with any evidence taken down under rules 1 to 10 of this Order as if the evidence had been taken down by him or her or under his or her direction under those rules, and may proceed with the suit from the stage at which his or her predecessor left it.

(2) The provisions of subrule (1) of this rule shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act.

12. Power to examine witness immediately.

(1) Where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his or her evidence should be taken immediately, the court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of the witness in the manner hereinbefore provided.

(2) Where the evidence is not taken immediately and in the presence of the parties, such notice as the court thinks sufficient of the day fixed for the examination shall be given to the parties. (3) The evidence so taken shall be read over to the witness and, if he or she admits it to be correct, shall be signed by him or her, and the judge shall, if necessary, correct the evidence, and shall sign it, and it may then be read at any hearing of the suit.

13. Court may recall and examine witness.

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force,

put such questions to him or her as the court thinks fit.

14. Power of court to inspect.

The court may at any stage of a suit inspect any property or thing concerning which any question may arise.'

[36] The learned trial judge did not follow the above procedure in the taking of the evidence in the case. Order 19 allows the proof of certain facts or the evidence of any witness to be by way of affidavit.

[37] It provides,

'**ORDER XIX—AFFIDAVITS.**

1. Power to order any point to be proved by affidavit.

Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of that witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination.

(1) Upon any application evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) The attendance shall be in court, unless the deponent is exempted from personal appearance in court or the court otherwise directs.'

[38] The foregoing provisions allow affidavit evidence to prove a particular fact or of any witness. What it does not authorise is the conduct of a whole trial only on affidavit evidence. Secondly where such witness would need to be cross examined then no order should be made for affidavit evidence to be received from such witness.

[39] Much as this issue was not raised by the parties during trial, it is of relevance in this matter. It is also evident that neither of the parties challenged the directive of the trial court to file affidavit evidence but that does not negate the duty of the trial court to conduct a full and proper trial which must be oral. The relevance of affidavit evidence is to enable the expeditious disposal of the cases by taking up the form of the examination in chief. However, the witnesses must adopt their statements in court during trial and be cross examined on them at the option of the parties.

[40] This court in Kashongole Godfrey v Kafeero Francis [2017] UGCA 130 dealt with a similar matter. In that case, at the scheduling conference, the trial court ordered the parties to file sworn statements of their witnesses upon which they were to be cross examined during the hearing scheduled for 25th June 2010. However, the court was not ready to proceed with the hearing on that date. The matter was adjourned to 10th September 2010 but there was no record of what happened on that date. Subsequently the case was called on 25th January 2011 but the plaintiff and his counsel were not in court. The trial court directed the defendants to file written submissions since there was nothing to cross examine on and the learned trial judge delivered judgement on 17th March 2011.The appellant appealed against the decision of the trial court and this court in answering the question whether there was a trial stated:

> '11. All the four grounds of appeal in this case are all elements of one question on this appeal. The question to be answered on this appeal is whether or not in the court below the case before it was heard or not. Did a trial take place or not? Section 25 of the Civil Procedure Act provides,

'The court, after the case has been heard, shall pronounce judgment, and on that judgment a decree shall follow; except that— if the defendant does not enter such appearance as may be prescribed, the court may give judgment for the plaintiff in default; in cases for which rules have been made under section 41(2)(k) of the Judicature Act, it shall not be necessary for the court to hear the case before giving judgment.'

12. It is clear from the foregoing provision that judgment can only follow after the case had been heard. A trial ought to have taken place.

[*Order 18 Rules 1-11 of the Civil Procedures Rules was set out.]*

14. The foregoing provisions envision an oral hearing with witnesses being called in person and examined by the parties. Provision is made for proof of certain facts by way of sworn statements or affidavits. This is Order 19 Rule 1 which states,

'Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of that witness to be given by affidavit.'

15. The court is authorised to order particular facts to be proved by affidavits but where it appears that cross examination will be necessary no order shall be made authorising evidence to be given by way of affidavits. It cannot be asserted that the procedure adopted in the court below was in compliance with order 19 rule 1.

16. Neither can it be asserted that the procedure adopted in the court below followed what is prescribed in order 18 of the Civil Procedure Rules. No witnesses were called. No hearing took place. The parties filed sworn witness statements which the learned judge took as evidence in the case plus annexures to the pleadings or documents that parties had filed and that formed the basis upon which the judgment was pronounced.

17. We are aware that a practice has developed in the some divisions of the High Court of Uganda in which witness statements are filed before the hearing of the case but such witness statements must be adopted at the hearing of the case by the witnesses in question in person and it is taken to form the examination in chief of that witness's evidence with cross examination following as the appropriate.

18. We approve of efforts taken to develop procedures that expedite the hearing and determination of cases but such procedures must be consistent with existing law or at least not in conflict with existing law.'

[41] In light of the above, there was a clear violation of Order 18 and 0rder 19 rule 1 of the Civil Procedure Rules as this is the kind of matter where cross examination was necessary in the interests of justice. There was no justifiable reason for the trial court to adopt the procedure it did. All the witnesses ought to have been called to give their evidence or their affidavits or written statements read in open court so as to allow cross examination to take place. In my opinion the trial was incomplete and irregular. The resultant judgment cannot stand.

[42] In the result it is unnecessary to consider the grounds of appeal set forth by the appellant.

[43] For the foregoing reasons, I would set aside the judgement of the trial court and order a re-trial. I would direct each party to bear its own costs of the appeal as neither party raised the question of law upon which this appeal has been decided.

Decision

[44] As Musoke and Obura JJA agree this appeal is allowed and a re-trial is ordered. Costs below will abide the outcome of the re trial.

Signed, dated and delivered at Kampala this 2nd day of Dec 2019

Fredrick Egonda-Ntende
Justice of Appeal