THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CIVIL APPEAL N0. 0055 OF 2009

(An appeal from the judgment of High Court of Uganda at Masaka before Musoke-Kibuuka, J delivered on 20th April 2009 2011 in Civil Appeal No. 0018 of 2007)

GERESOM RWAMBOGO::APPELLANT

VERSUS

TEREZA KYATIFU::RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have had the benefit of reading in draft the judgment of my learned sister, Elizabeth Musoke, JA. I concur with her findings and conclusion that the appeal be dismissed with the orders proposed.

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

....

Hellen Obura

JUSTICE OF APPEAL

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CORAM: HON. MR. JUSTICE F.M.S EGONDA-NTENDE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY. JUSTICE HELLEN OBURA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA.

This is a second appeal from the judgment of the High Court of Uganda sitting at Masaka in Civil Appeal No. 018 of 2007, which, in exercise of its appellate jurisdiction, substantially dismissed the appellant's appeal against the judgment and orders of the learned trial Chief Magistrate vide Chief Magistrate's Court of Masaka, Civil Suit No. MSK-00-CV-CS-101 of 2001.

Brief Background

The respondent (original plaintiff) instituted a suit against the appellant and another (original defendants). It was alleged in that suit that the 2nd defendant had trespassed on the plaintiff's land and continued to do so. The record shows that the learned trial Chief Magistrate faced immense hardships in disposing of the said suit as it faced several adjournments due to non-appearance of either of the parties or their counsel on several occasions. Eventually, the learned trial Chief Magistrate heard the matter exparte after the defendants had obstinately refused to attend the hearing of the matter despite having knowledge of the hearing date. At the close of the trial, the learned trial Chief Magistrate entered judgment in favour of the plaintiff

therein and ordered the 2nd defendant to vacate the plaintiff's land and also issued a permanent injunction restraining the 2nd defendant from any further interference with the said land. She also awarded general damages and costs of the suit to the plaintiff against the 1st defendant alone. The appellant herein (2nd defendant in the trial Court) was dissatisfied with the said decision and orders and lodged an appeal in the High Court, whereupon Musoke-Kibuuka, J. substantially dismissed the appeal and condemned him to pay 75% of the respondent's taxed costs in the Court of first appeal as well as the trial Court. Being dissatisfied with the decision and orders of the High Court on appeal, the appellant lodged this appeal in this Court on grounds which were formulated as follows:

"1. **The learned Judge on appeal erred in law to order the Appellant to pay costs in the court of first instance when the Respondent had not appealed or complained against the order absolving the Appellant from paying costs and when the Appellant had not been given the opportunity to argue against the matter. (sic)**

2. **The learned Judge on appeal erred in law when he failed to correct the errors in the decree of the lower court. (sic)**

3. **The learned Judge on appeal erred in law when he failed to subject the plaint and the evidence on record to an exhaustive scrutiny which failure led him to arrive at the wrong conclusion that the trial Magistrate was justified to cover the unsurveyed land in her judgment. (sic)**

4. **The learned Judge on appeal erred in law when he ordered the Appellant to pay costs when his Appeal had substantially succeeded. (sic)"**

Representation

At the hearing of this appeal, Mr. Ngaruye Ruhindi, learned Counsel, appeared for the appellant while Mr. Tumwesigye Lawrence, learned Counsel, appeared for the respondent. Counsel for either party filed written submissions which were accordingly adopted and relied on in the determination of this appeal.

Appellant's case

In his written submissions, Mr. Ngaruye Ruhindi, counsel for the appellant opted to argue the grounds consecutively as presented in the memorandum. On ground one, he faulted the learned first appellate Judge for condemning the appellant to suffer costs in favour of the respondent yet the learned trial Chief Magistrate had only awarded costs against the appellant's co-defendant in the trial Court. In support of the preceding point, counsel pointed out that the respondent had not cross-appealed against the said award by the learned trial Chief Magistrate to justify the intervention by the learned first appellate Judge. He further submitted that the appellant had not been afforded any opportunity to be heard prior to the learned first appellate Judge interfering with the award granted by the lower Court which was a violation of the appellant's right to a fair hearing as protected by **Article 28 (1)** of the **1995 Constitution**. In further support of the foregoing submission, counsel referenced the biblical story of Adam & Eve where God had given Adam a chance to make his defence before his banishment from the Garden of Eden. He then wondered why the learned first appellate Judge had totally overlooked the appellant's divine right to be heard before interfering with the learned trial Chief Magistrate's award of costs. He then invited this court to allow this ground and set aside the impugned award of costs.

On ground two, counsel complained that the learned first appellate Judge had failed to correct the errors in the decree of the trial Court. He pointed out that although the learned trial Chief Magistrate had in her judgment awarded costs against the 1st defendant only, the decree which was purportedly extracted from the same judgment showed that the 2nd defendant, too would pay costs of the suit. He further submitted that the foregoing anomaly was raised on appeal and the learned first appellate Judge had found that the relevant decree was defective as alleged because it did not correspond to the judgment of the trial Court. However, counsel complained that the learned first appellate Judge had abdicated his duty to correct the anomaly in the decree and instead ordered that the appellant

should have applied to the trial Court to correct the same. He prayed to this Court to allow this ground of appeal.

On ground three, counsel faulted the learned first appellate Judge for failing to properly evaluate the evidence on record when he made a finding in respect of issues which had not been pleaded by the respondent. He specifically complained about the finding by the learned first appellate Judge that the portion of the respondent's land which had been trespassed on by the appellant was partly surveyed and partly unsurveyed and pointed out that the respondent's pleadings in the trial Court, by which she was bound concerned surveyed land only which was comprised in Block 983 Plot 15. He then submitted that the learned first appellate Judge had erred to make a pronouncement on unsurveyed land as it was not part of the relevant pleadings. Counsel prayed to this Court to allow this ground of appeal.

On ground 4, counsel faulted the learned first appellate Judge for awarding costs against the appellant yet his appeal had substantially succeeded. In counsel's view, ground 7 of the Memorandum of Appeal was the main ground in the first appellate Court and as it succeeded, the appellant should not have been condemned to pay costs as he was. He prayed to this Court to allow this ground of appeal too, and overall to allow this appeal with costs.

Respondent's case

On ground one, counsel supported the decision of the learned first appellate Judge to award costs as he did. He cited **section 27** of the **Civil Procedure Act, Cap.71** which provides that costs in any suit are awarded according to the discretion of the Court. He also cited **Rwantale vs Rwabutoga (1988-90) HCB 100** for the general principle that costs follow the event and the loser of any suit must pay the winner costs. Counsel submitted that the learned first appellate Judge had re-evaluated the evidence before him and come up with a decision to condemn the appellant to costs which was within his remit as enunciated in **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 0010 of 1997.** He maintained that the learned first appellate Judge was right to award 75% of taxed costs against the appellant

in the High Court and in the Court below. He invited Court to dismiss this ground of appeal.

On ground two, counsel supported the findings of the learned first appellate Judge and submitted that the error or mistake in the extracted decree should have been brought to the attention of the trial Court for rectification, and should not have been the subject of an appeal. He prayed to this Court to dismiss ground two, as well.

On ground three, counsel supported the decision by the learned first appellate Judge to base his findings on an unpleaded issue, and submitted that pleadings are meant to set out the parties' cases in summary form and need not contain evidence and other extraneous matter. He contended that in the instant case, the learned trial Judge had found that the respondent's plaint in the trial Court was sufficient to assist the Court in its investigation of the truth between the parties and was pertinent in assisting in the resolution of the real issues between the parties. He urged Court to dismiss this ground.

On ground 4, counsel disagreed with the submissions by counsel for the appellant that his appeal in the first appellate Court had substantially succeeded. He pointed out that only one out of the seven grounds of the appeal in the High Court had succeeded. He contended that had the first appellate Court applied a mathematical formula in awarding the costs against the appellant, it would have condemned the appellant to a higher percentage of costs than 75%. However, counsel conceded that the award of Costs was within the Court's discretion and supported the award made by the learned first appellate Judge because the appeal had substantially failed. All in all, counsel invited this Court to dismiss all grounds of this appeal with costs to the Respondent both in this Court and in the Courts below.

Rejoinder by the appellant

Counsel reiterated his earlier submissions but added specifically on ground 1 that the first appellate Court should not have acted arbitrarily when

awarding the costs but should have done so judiciously in reliance on well-established principles.

Resolution of Court.

I have carefully considered the submissions of both counsel, the Court record, the authorities and the law cited. This is a second appeal and the law on second appeals is well settled. **Section 72** of the **Civil Procedure Act, Cap. 71** provides that:

> **"72. Second appeal.**
>
> **(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—**
>
> **(a) the decision is contrary to law or to some usage having the force of law;**
>
> **(b) the decision has failed to determine some material issue of law or usage having the force of law;**
>
> **(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.**
>
> **(2) An appeal may lie under this section from an appellate decree passed ex parte."**

Further section 74 of the Civil Procedure Act, Cap. 71 provides that:

> **"74. Second appeal on no other grounds.**
>
> **Subject to section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in section 72."**

Section 74 precludes lodging of second appeals to the Court of Appeal except on the grounds set out in Section 72. It follows therefore that the

grounds of appeal in case of a second civil appeal to this Court must be those of law and not grounds of fact or mixed law and fact. **(See: Lubanga Jamada vs. Dr. Ddumba Edward, Court of Appeal Civil Appeal No. 0010 of 2011.)** In light of the above principles, I shall proceed to consider the grounds of appeal starting with ground 3 for reasons which will become apparent later in this judgment.

Ground 3:

It was the case for the appellant that the learned first appellate Judge had not subjected the plaint and evidence on record to proper scrutiny but had instead, while considering the appeal, taken into consideration matters which had not been pleaded in the respondent's plaint in the trial Court. Counsel for the respondent countered that not all matters need to be pleaded in order to be adjudicated upon by a court and that the court may base its findings on unpleaded issues as long as evidence is adduced on the same by both parties, as was the case in the present appeal.

It is trite that every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be. **See: Order 6 rule 1 (1) of the Civil Procedure Rules, S.I 71-1.** The courts have taken a consistent view on the question of sufficiency or otherwise of pleadings. The earliest decided case on the matter is **Odd Jobs vs. Mubia [1970] 1 EA 476,** a decision of then Court of Appeal for East Africa. The brief facts were that the plaintiff at trial, had pleaded in his plaint that the defendant was obliged to return his money to the tune of Ksh. 5700, being money had and received after the sale of a motor vehicle by the defendant. The plaintiff's case from the pleadings was that there was no contract at all with the defendant. However during the trial, the plaintiff had departed from his pleadings and led evidence on a different cause of action to show that there was a conditional contract pursuant to which the defendant was required to carry out repairs before selling the car to the plaintiff. The trial Judge entered judgment on the new cause of action and the defendant appealed on grounds that he had no jurisdiction to enter the

judgment as he did on an unpleaded cause of action. In his lead judgment **Law, JA** observed as follows:

> **"In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision."**

Law, JA further stated that:

> **"In the case now before us, I am impressed by Mr. Malik-Noor's argument that although Mr. Sharma objected to evidence being led relating to the unpleaded issue, he cross-examined the other side's witnesses and led his own witness on this very issue; and although in his final address he objected to the new issue being considered unless made the subject of an amendment to the plaint, he nevertheless made submissions on the unpleaded issue. In these circumstances, although with some hesitation, I consider that the unpleaded issue was left to the judge for decision. I have no doubt the appellant was taken by surprise by the introduction of the unpleaded cause of action at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action, both by leading evidence and addressing the court with reference to it, and I am not satisfied that the procedural irregularities in the court below have in fact led to a failure of justice necessitating intervention by this Court. In other words, it has not been shown to my satisfaction that in the event the decision in the court below was wrong."**

In **Interfreight Forwarders (U) Limited Vs. East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992,** the brief facts were that the appellant was contracted by the respondent to arrange for the transportation of the respondent's brand new car from Mombasa to Kampala. Unfortunately, the appellant's vehicle carrier was involved in an accident as a consequence of which the respondent's car fell off the said carrier and was badly damaged. The respondent's cause of action against the appellant from the relevant plaint in the trial Court was based on negligence of the appellant. The learned trial Judge found for the respondent as pleaded and in addition found that the appellant was strictly liable for failing to ensure safe delivery of the car as a common carrier. The additional

finding was based on an unpleaded cause of action. On appeal against the finding **Oder, J.S.C** observed:

> **"With respect I am unable to go along with learned Principal Judge in this regard. Firstly, because it does not appear to have been the Plaintiff's case as stated in the plaint that the Defendant was a "common carrier". Paragraphs 3 & 4 of the plaint which have a bearing on the issue did not indicate that the contract was made with the Defendant as "a common carrier." By all indications from the plaint and a letter dated July 19, 1988 (Exh.D.2) the contract appears to have been an ordinary one. Exhibit D2 is a letter which the Plaintiff wrote to the Defendant authorising the latter to clear from Mombasa and forward to Kampala a Volvo car which the former was expecting to arrive at Mombasa at the end of that month. No other documentary evidence of the terms of the contract was produced.**
>
> **Secondly, no evidence was adduced indicating that the Defendant acted as "a common carrier" when it undertook to clear and forward the motor car in question for the Plaintiff."**

He further noted:

> **"The system of pleadings is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

He then concluded:

> **"For the above reasons, if the Plaintiff did not plead that the Defendant was a common carrier, I think that he cannot be permitted to depart from what clearly appears to have been his case as stated in the plaint and claim that there was evidence proving that the Defendant was a common carrier. As already found above no evidence, in fact, supported that contention."**

I note that the Supreme Court, in the **Interfreight Forwarders case (supra)** left the door open for a matter to be decided on an unpleaded cause

of action/ issue as long as evidence was led on the unpleaded cause of action on behalf of both parties during the trial. The Supreme Court has recently observed in **Sinba (K) Ltd & 4 others vs. Uganda Broadcasting Corporation, Supreme Court Civil Appeal No. 003 of 2014,** after citing with approval the case of **Odd Jobs vs Mubia** that:

> **"The case of Odd Jobbs v Mubia [1970] EA 476, is to the effect that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to "arrive at a correct decision in the case and to finally determine the controversy between the parties. In the instant case, the record shows that all the parties not only led evidence by way of affidavits in support of their respective positions in the application but their lawyers addressed court on all the issues raised in the pleadings and by the court during the course of hearing the application as well. On top of that, the learned Justices of Appeal had before them; the Record of Appeal in CACA No. 107 of 2012 which included the record of proceedings right from the High Court to the Court of Appeal pertaining to all the transactions that had led to the sale of the suit properly to the 5th Appellant. (Underlining is for emphasis)**
>
> **It follows, therefore, that notwithstanding the finding that there was no pleading or prayer for the cancellation of the 5th Appellant's certificate of title, since the evidence before the court had disclosed that the whole transaction leading to the sale of the property to the 5th Appellant was based on an illegal consent judgment and thus null and void, the court was obliged to make that order, after establishing that fact, in line with the authority of Odd Jobs (supra)."**

In my opinion, the thread of cases cited above is consistent with the principle that a court may found its decision on an unpleaded cause of action/ issue provided that evidence is led on it by both parties to the dispute. I observe in the present case that the learned first appellate Judge was alive to the foregoing principles when he observed at page 120 of the record that:

> **"In any case, it is trite law that a court may base its decision upon an (sic) pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. See Odd Jobs vs. Mubia [1970] E.A. 476. Upon the facts and the evidence, the issue of**

unsurveyed land being part of the 100 acres bought by the respondent was clearly addressed by both counsel. It was also covered by the evidence during the trial. The trial Magistrate was, therefore, justified to cover it in her judgment.

Court does not find the authority of Esso Petroleum Co. Ltd South Port Corporation (1956) AC 218 (sic), which the appellant cited to support the contention that the appellant was condemned upon a ground on which any fair notice had been given to him to have no relevance to this appeal. The claim of the appellant was for land purchased by her and her husband and part of which the appellant claimed to have purchased from Sam Wasswa. No Notice could have been clearer than that. Whether the land was surveyed or not that was not material."

Counsel for the appellant complained that the above finding by the learned first appellate Judge showed that he had not read the record of proceedings because had he done so, he would have noted that the trial had proceeded exparte and that no evidence was led on behalf of the appellant, who was the 2nd defendant at the trial on the point. I accept the foregoing submissions as it is glaringly clear that the impugned findings by the learned first appellate Judge were at variance with the trial proceedings which were exparte meaning that the defendant's counsel did not appear before the learned trial Chief Magistrate as concluded by the first appellate Judge. However no miscarriage of justice was occasioned on the part of the appellant because he had not participated in the lower court proceedings where counsel for the respondent (plaintiff) had led evidence on the unpleaded issue pertaining to trespass on her unsurveyed land by the appellant.

Therefore in line with the cited authorities, it is my finding that the unpleaded issue of trespass on the respondent's unsurveyed land was left to the decision of Court, when counsel for the plaintiff led evidence on it during trial. Hence the learned trial Chief Magistrate was justified to adjudicate on it and in turn the first appellate Judge was right to uphold her decision. As a result, the appellant's complaints on the point are disallowed.

Further, on ground 3, counsel for the appellant submitted that the learned first appellate Judge did not properly evaluate the plaint and the evidence before coming to the conclusion that the appellant had trespassed on the respondent's land while it was submitted for the respondent that the learned first appellate Judge had properly evaluated the relevant evidence. I observe that the learned first appellate Judge handled this issue, which was ground 7 in the first appellate Court at pages 121 to 122 of the record as follows:

> **"The appellant's complaint in relation to this ground of appeal is about the evidence given by the respondent during the trial that her claim was 21 acres which she said the appellant had trespassed upon. The appellant complained that PW2, the surveyor testified that the unsurveyed land was only 10 acres and not 21 acres. The appellant argues that the unsurveyed land would not be 10 acres but only 7 acres since the certificate of title for the respondent already comprises 92.862 acres out of 100 acres which she bought.**
>
> **It is true that at pages (sic) 3 of the judgment of the learned chief Magistrate she arrived at the following conclusion.**
>
> **"The evidence of the plaintiff and her witnesses shows that the land occupied by D2 is the 10 acres that were not surveyed plus another piece of land surveyed and forming part of the certificate of the plaintiff's certificate of title. The plaintiff is entitled to have D2 evicted from her land i.e both surveyed and unserveyed land (sic)."**
>
> **Court agrees that by specifically insisting upon the figure of 10 acres that were not surveyed, the learned Chief Magistrate misdirected herself in light of the evidence contained in the certificate, of title exhibit P2, showing that the registered land and, therefore, surveyed land, was 37.58 hectares which is more than 90 acres which PW2 said that he had surveyed. The unserveyed (sic) land of the respondent, if the learned Chief Magistrate had properly evaluated the evidence on record, would have been found to be the balance that would bring up the 37.58 hectares to the figure of 100 acres that the respondent's certificate of title ought to comprise.**
>
> **The trial chief magistrate's order shall, therefore, be adjusted in that regard, the unserveyed (sic) land trespassed upon by the appellant is**

not specifically 10 acres but is such acreage as would bring up the 37.58 hectares, comprising exhibit P2, to 100 acres. Ground number 7 succeeds to that extent."

The appellant complained in this appeal that the learned first appellate Judge erred to arrive at the conclusion that the learned trial Chief Magistrate was justified to cover the unsurveyed land in her judgment, where she held that the appellant was a trespasser on the respondent's unsurveyed land as well. I observe that the respondent, testified as PW1 in the trial Court at page 48 of the record that:

"I brought the defendants to Court because they sold part of my land. They sold 21 acres of my land. They sold 21 acres. The 21 acres is part of the land covered by my title.

It is Sam Wasswa son of the man who sold the land to us who sold to Geresom Rwembogo who is now using that land. He does not have houses there. He uses the land by rearing cattle.

I want court to bring back my land. I want compasation (sic) and damages from the period those people have been in my land. My husband died in 1994 in November. It is me who got the letters of administration. Here it is."

The learned trial Chief Magistrate handled the matter at page 55 of the record as follows:

"The evidence of the plaintiff and her witnesses shows that the land occupied by D2 is the 10 acres that were not surveyed plus another piece of land surveyed and forming part of the plaintiff's title. The plaintiff is entitled to have D2 evicted from her land i.e both the surveyed and unsurveyed land."

I observe that the learned first appellate Judge agreed with the above finding by the learned trial Chief Magistrate and I find no reason to fault him for so doing. In my view, the evidence adduced for the respondent at the trial clearly showed that the appellant had trespassed partly on the respondent's surveyed land and partly on her unsurveyed land. I have studied the record

and found that the evidence of PW2, Katwesigye James, a land surveyor at the Masaka Land Office at the trial further buttressed the findings of the lower courts. PW2 had testified that he had been employed by the respondent's late husband to survey the suit land which he had bought from the late Sebbanja. He further testified as follows at page 50 of the record:

> **"I surveyed but was at 1st restrained by the current defendant Rwambogo, later I continued. I completed the survey. The title was processed. The widow has the title. It was supposed to be 100 acres according to the agreement between the late Sebbanja and the husband of Tereza. However I only surveyed off 90 acres.**
>
> **Tereza kept on demanding for her 10 acres which was not surveyed because of the disturbance. I have never surveyed the 10 acres. That is why Tereza prays court to allow her survey them. The 10 acres are not included in her title.**
>
> **Rwembogo refused me to survey that land saying tha he bought a Kibanja from one of the sons of Sebanja. It was not my concern to ask him for proof. Rwembogo complained about the 100 acres. So we forcefully surveyed. The 90 acres. Today I do not know what amount of lant that Rwembogo is occupying. I would be able to identify the boundary of the 90 acres which has the title.**
>
> **I last visited the disputed land about 10 years ago. So I cannot tell which area is occupied by Rwembogo now."**

I have already earlier quoted from the judgment of the first appellate Court and I need not repeat the same, except to state that the learned first appellate Judge after reappraising the evidence made a finding that the unsurveyed suit land which had been trespassed upon by the apellant was not specifically 10 acres but such acreage as would bring up the 37.58 hectares, comprising the respondent's certificate of title to 100 acres. He obviously reasoned that way because the land sale agreement between the respondent's late husband and the vendor, the late Sebanja revealed that the respondent' husband purchased 100 acres and that only 37.58 hectares (approximately 92.823 acres) were surveyed and included in the title. I have

no reason to fault the foregoing findings as they were reached after taking into account the evidence on record.

In the result, this ground of appeal substantially fails. In my view, the learned first appellate Judge properly re-evaluated the evidence on record.

Ground 1:

While resolving ground 3, I reached a conclusion that the decisions in the two lower courts were based on an unpleaded issue that the appellant had trespassed partly on the respondent's unsurveyed land as well as her surveyed land. I upheld the lower courts' decisions in that regard because evidence had been led in relation to the unpleaded issue on behalf of the respondent in the trial Court. In **Odd Jobbs v Mubia (supra),** the Court observed as follows:

> **"This appeal might never have been brought if the true cause of action had been pleaded. Its omission from the plaint is reprehensible enough, but when it became clear early in the course of the trial that the claim was in fact based on a contract, which was the opposite of what had been pleaded, then it became the respondent's duty to have this new cause of action embodied in an amendment to the plaint. I would express my disapproval of the conduct of the respondent's case in the court below by depriving him of the costs of this appeal, and order that the appeal be dismissed but without costs." (Underlining for emphasis)**

The relevant principle from the **Odd Jobbs case (supra)** is that courts should express their disapproval of litigants who fail to plead all the material facts by denying them costs especially if the opposite party is taken by surprise at the trial. However, the current case is distinguishable from the **Odd Jobs case** because, while the defendant therein was not guilty of any reprehensible conduct, the same cannot be said of the appellant. The appellant and his co-defendant in the trial Court caused several unnecessary adjournments and delayed the hearing of the case as much as possible. They eventually failed to participate in the hearing and the case was decided exparte. The appellant cannot be said to have been prejudiced in anyway as he chose not to participate in the proceedings in the trial Court. I have taken

into account the learned trial Chief Magistrate's assessment of the appellant's (as 2nd defendant's) conduct during the course of the trial which is recorded at page 54 as follows:

> **"The defendants did not seem genuine litigants. They appeared evasive with the intention of delaying the case as much as possible."**

I observe that after hearing the appeal, the learned first appellate Judge exercised his discretion to condemn the appellant to pay the respondent 75% of the taxed costs in both of the lower courts. In his submissions, counsel for the appellant complained against the foregoing decision arguing that it was exercised injudiciously as the respondent had not cross appealed regarding the award of costs against the 1st defendant in the trial Court alone. It is trite law that a first appellate court has the power to re-evaluate the evidence and come up with its own inferences of fact. The decision reached by the first appellate Court after re-evaluation of evidence may differ from the decision reached by the trial Court.

The law relating to costs is provided for under **section 27** of the **Civil Procedure Act, Cap. 71**, the relevant portion of which is quoted below:

> **"27. Costs.**
>
> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.**
>
> **(2) The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (1); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

(3) **The court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such."**

In **Impressa Ing. Fortunato Federice vs. Irene Nabwire (Suing by her Next Friend Dr. Julius Wambette, Supreme Court Civil Appeal No. 3 of 2000**, the Supreme Court discussed the provisions of **section 27** of the **Civil Procedure Act, Cap.71** and observed that:

> **"In my view, the effect of the provisions of section 27 in question of the Civil Procedure Act is that the judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid. Of course, like all judicial discretions, the discretion on costs must be exercised judiciously. How a court or a judge exercises such discretion depends on the facts of each case. That is the basis on which in my view the discretions in the numerous cases to which the learned counsel on both sides have referred in this appeal were decided by the courts or judges concerned. The factors which determine the exercise of the discretion in favour of one party and against another in a case do not necessarily apply to any other case. If there were mathematical formula, it would no longer be discretion."**

In **Muwanga Kivumbi vs. Attorney General, Supreme Court Constitutional Appeal No. 06 of 2011, Tibatemwa, J.S.C** in the lead judgment discussed the implication of **section 27** of the **Civil Procedure Act, Cap.71** and opined that:

> **"The principles which can be deduced from the Section are that:**
>
> **-The award of costs is left to the discretion of the court.**
>
> **-Costs normally follow the event – the general rule is that a successful party will be awarded costs.**
>
> **-Just as it is in other areas of the law where the court is empowered to make decisions, the court's discretion must be exercised judicially."**

In my view, the learned first appellate Judge acted within his discretion to condemn the appellant to pay the costs as he did. Of course, he ought to have given reasons for departing from the trial Court's order of costs against the 1st defendant (the appellant's co-defendant) alone, but he failed to do

so. However, having perused the record, I find that the said failure did not occasion a miscarriage of Justice against the appellant. The reasons for my finding, first, is that the behavior of the appellant in the trial Court, where he obstinately delayed the hearing of the case on several occasions is reprehensible and warranted condemnation. Secondly, the appellant's appeal in the first appellate Court substantially failed and the first appellate Judge chose to award costs to the respondent whose suit had substantially succeeded. Hence, I cannot fault the learned first appellate Judge's decision to award costs as he did. Accordingly, ground 1, too must fail.

Ground 2.

On ground 2, the main complaint levied against the learned first appellate Judge by counsel for the appellant is that he did not correct the errors in the decree issued by the trial Court. Counsel for the respondent conceded to the submissions but said that it was unnecessary to bring an appeal on the point as the appellant should have instead applied to the relevant magistrate's court for the rectification of the decree.

The learned first appellate Judge said at pages 117 to 118 of the record that:

> **"Learned counsel for the respondent has agreed that, indeed, the first complaint relates to an error or mistake which took place during the extraction of the decree itself. He argues that the error, however was not good cause for appeal it could be corrected by the court that issued the decree. Court duly agrees with learned counsel in that regard. Every court has inherent powers to review its order or to correct its errors.**
>
> **The second complaint that particulars of the claim are not correctly reflected in the decree, in the mind of this court, is at best, an irregularity. Irregularities in relation to the rules of procedure do not vitiate the proceedings if no injustice has been done to the other party. Mawji vs. Aousha (sic) General Store [1970] E.A. 137. In the view of court, the decree as it stands is clear enough not to lead to misexecution as counsel for the appellant speculates in his submissions. Ground one, is therefore, not sustainable."**

The impugned decree at page 58 is as follows:

"IT IS HEREBY ORDERED AND DECREED that judgement be, and is hereby, entered in favour of the plaintiff in the following terms:

a. **A permanent injunction is issued against the defendants to restrain them from further trespassing on the Plaintiff's land.**
b. **The Second defendant is to vacate the plaintiff's land and is ordered not to restrain the plaintiff any more from surveying her land.**
c. **The defendants to pay the plaintiff Ug. Shs. 2,000,000/= as general damages.**
d. **The defendants to pay the costs of the suit."**

I observe that the learned first appellate Judge upheld most of the terms as decreed by the learned trial Chief Magistrate but did not order for rectification of the decree on the terms proposed by counsel for the appellant. He instead said that the appellant should have applied for rectification in the trial Court. In my view that was an error on his part. However, there was no miscarriage of justice occasioned on the appellant as a result of that error because the terms proposed in the first appellate Judge's judgment were somewhat different from those proposed by the trial Court. This would have been brought out if a decree from the first appellate Court had been extracted. In the result, I am unable to fault the decision not to order rectification of the trial Court's decree by the learned first appellate Judge for the reasons given above. Ground 2, therefore, also fails.

Ground 4

This ground has been covered by my analysis of ground 1 and I must emphasize that the learned first appellate Judge acted well within his powers under the law when he awarded 75% of the costs in both the lower courts as it was reached after a reappraisal of the evidence. He was well within his powers to reach his own conclusions although they were different from the learned trial Chief Magistrate's. Therefore, ground 4, too, hereby fails.

Before I take leave of this matter, I find it necessary to comment about the unsatisfactory way in which the proceedings in the lower Courts were handled. **Order 9 rule 27** of the **Civil Procedure Rules, S.I 71-1** provides that:

"In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also."

It is the recognized practice under the law, that where a matter is heard and decided ex parte, the proper remedy available to an aggrieved defendant is to apply to the same court which passed the decree to have it set aside. In this case, the appellant instead appealed to the High Court, which, in my view was contrary to the Civil Procedure Rules. It is even more baffling that the learned first appellate Judge proceeded to entertain this appeal which was a glaring error in my view. However, I proceeded to determine the merits of this appeal, notwithstanding the aforementioned procedural anomalies as it would not be in the interest of justice to quash the proceedings and order the parties to return to the position in the trial Court given the long history of this case dating way back to 1995. This is a right case to administer substantive justice without undue regard to technicalities as required under **126 (2) (e)** of the **1995 Constitution**.

In conclusion, I would dismiss this appeal and make the following orders:

a) The appellant is hereby ordered to cease from interfering with the plaintiff's land, whether surveyed or unsurveyed, and a permanent injunction is hereby issued for that purpose.

b) In order to give effect to (a) above, a survey shall be carried out at the respondent's cost to determine the boundaries of the respondent's land, which is 100 acres, where after the appellant shall leave any portion of the said land which he is still occupying.

c) The appellant shall pay the costs of this appeal.

d) The first appellate Judge's order on costs is also upheld.

Dated at Kampala this 2nd day of Dec 2019.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke and Obura, JJA]

Civil Appeal No.55 of 2009

(Arising from High Court Civil Appeal No. 18 of 2007 at Masaka)

BETWEEN

Geresom Rwambogo==========Appellant

AND

Tereza Kyatifu==========Respondent

(On Appeal from a judgment of the High Court of Uganda (Musoke-Kibuuka, J.,) delivered on 20th April 2009.)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have read the judgment in draft of my sister, Musoke, JA. I agree with it and have nothing useful to add.

[2] As Obura, JA., agrees this appeal is dismissed with costs in the manner proposed by Musoke, JA., including the orders she proposes.

Dated, signed, and delivered at Kampala this 2nd day of Dec, 2019

Fredrick Egonda-Ntende
Justice of Appeal