THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSOLIDATED CIVIL APPEALS NO.186 AND 226 OF 2013

[Arising from the judgment of the High Court (Land Division) in HCCS No.193 of 2008 dated3rd July 2013 delivered by the Hon. MR. Justice Joseph Murangira]

1. FRANCIS KIMBUGWE
2. ROBINAH NDAGIRE ::APPELLANTS
3. RONALD MUTEBI

AND

1. ALICE NAMUKASA GAAGA
2. RICHARD SSIMBWA
3. NANZIRI JENNIFER

VERSUS

DEUS BIRUNGI:: RESPONDENT

CORAM: HON.MR.JUSTICE GEOFFREY KIRYABWIRE, JA

HON.MR.JUSTICE F.M.S EGONDA NTENDE, JA

HON MR.JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT

INTRODUCTION

This is a first appeal against the Judgment of the High Court of Uganda (Land division) rendered by the Hon Justice Mr. Joseph Murangira in Civil Suit No.193 of 2008 on 3rd day of July 2013. The Learned Trial Judge entered Judgment in favour of the respondent (then plaintiff) against the appellants (then defendants) jointly and severally.

BACKGROUND

The brief facts of this appeal are that the Appellants as tenant instituted a suit against the first, second and third Respondents (as Administrators) for breach of two tenancy agreements entered into with a one Joseph Kayembe Gaaga as landlord (now deceased). The first agreement was entered into on the 6th day of May 2007 regarding land comprised in Kyadondo Block No. 250 Plots 201. The second tenancy was subsequently entered on the 23rd July 1999 for the same block of land but regarding Plot 202 (both plots now referred to as the "suit properties"). The tenancies were for a period of fifteen years (15). Pursuant to the said tenancies, it is the Respondent case that he carried out renovations and alterations of the premises with the approval of the land lord.

At the time of death Mr. Gaaga, it is the case of the Appellant's that the Respondent was in rental arrears for about two years and had sublet the premises to different people contrary to the tenancy agreements. The first three Appellants then began demanding that the rental arrears be paid.

The first three appellants on being granted Letters of Administration for the estate of the late Joseph Kayembe Gaaga continued to demand for payment from the respondent. They further accused the Respondent of subletting the suit property. The first three Appellants then called default and re-entered the suit properties and evicted all but one of the sub tenants. The Respondent

then sued the first three Appellants at the High Court for unlawful re-entry and further claimed special, compensatory and general damages for breach, economic loss, and unjust enrichment.

The other appellants (fourth to sixth) though not originally sued by the respondent applied to be joined the as co-defendants to effectively defend their interests since they were also beneficiaries to the estate of the late Joseph Kayemba Gaaga. Judgment at the High Court was in favour of the Respondent.

Being dissatisfied by the Judgment of the High Court, the appellants launched two separate appeals namely Civil Appeal No 0226 of 2013 (for the first, second and third Appellants) and Civil Appeal Number 0182 of 2013 (for the rest).

On13th April 2017 when both appeals were called for hearing, the said appeals were consolidated under Rule 101 of the Judicature (Court of Appeal) (Direction) Rules (hereinafter referred to as the "Rules of this Court").

REPRESENTATIONS

The Appellants were represented by Mr. Ambrose Tebyasa while the Respondent was represented by Mr. Byarugaba Felix, Philemon Shwecherera and Mr. Felix Ampaire.

PRELIMINARY OBJECTIONS.

At the start of the joint hearing of the appeals counsel for the Respondent raised two objections.

The first objection was an informal application made at the bar that it had come to the attention of the Respondents that the Appellants in Civil Appeal Number 0182 of 2013 did not serve their Notice of Appeal on the Appellants in Civil Appeal No 0226 of 2013. Counsel for the Respondent submitted that this was in violation of the mandatory Rule 78 (1) of the Rules of this Court as such service should have been effected within seven days. He further applied under Rule 102 (b) of the Rules of this Court for leave to strike out the appeal as a nullity. The Appellants opposed the objection.

We considered this objection and the arguments for and against it and over ruled it; with reasons to be given in this judgment. We shall now give our reasons.

The main thrust of Counsel for the Respondent's objection was that the failure to serve the Notice of the Appeal by the Appellants in Civil Appeal Number 0182 of 2013 on the Appellants and in Civil Appeal Number 0226 of 2013 which is a mandatory requirement under the Rules of this Court rendered the whole appeal a nullity.

Mr Semuyaba for the Appellants submitted that this objection could not be raised informally as it required evidence in the form of an affidavit made under a Notice of Motion that the former Advocate in for the Appellants actually did not serve the Notice of Appeal so that the affected persons would have an opportunity to rebut this allegation also by affidavit.

He further argued that this was an old appeal (of 2013) and that there had been plenty of time to raise this objection before the hearing but this had not been done; it was therefore late in the day to raise the objection.

Finally he submitted that the objection did meet the test of sufficient cause under Rule 102 (b) of the Rules of this Court.

Mr. Tebyasa also for the Appellants equally submitted that the objection was without merit. He argued that there had been plenty of time for counsel for the Respondent to formally raise the objection by Motion but he did not. He further argued this was a lapse on the part of counsel for the Respondent which did not meet the test under Rule 102 (b) of the Rules of this Court.

He further argued that counsel to the Respondent did not represent the affected Appellants and wondered what injury could have been occasioned by this alleged default.

He argued that if the Court was inclined to uphold the objection then a formal application by motion would have to be made.

We have considered the objection raised and the arguments for and against it. We overruled the objection for the following two reasons.

First, Rule 102 (b) of the Rules of this Court provides

"....a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 82 of these Rules; ..."

We agree with Counsel for the Appellant that for this Court to entertain the objection with leave, sufficient cause needs to be provided as to why there was non-compliance with Rule 82 of the Rules of this Court. We find no reason has been provided as to this noncompliance save for the Respondents just identifying the alleged defect a day before the hearing when on the other hand

this appeal has been pending for the last 5 years. There was more than enough time to deal with objection but the Respondents did nothing. We agree with the notion that in these circumstances the lapse of counsel does not amount to sufficient cause. This is sufficient to dispose of the objection.

Secondly we take the view that this objection was an exercise in time wasting in light of very clear rules to be followed. The Respondents fault the Appellants for not following the Rules of this Court and yet they themselves have committed the same error.

The Second objection was that Mr. Tebyasa Counsel for Appellants and now appearing in this appeal had at the High Court had been disqualified from the conduct of this case as counsel in this matter as he was a potential witness. In this regard he relied on Reg. 9 of the Advocates Professional Regulations. The Appellants opposed this objection as well.

We considered this objection and the arguments for and against it and overruled it; with reasons to be given in this judgment. We shall now give our reasons.

Counsel for the Respondent submitted that since the Trial Judge had disqualified Mr. Tebyasa from representing his clients in court since he was a potential witness and therefore he could not now be allowed continue representing his clients on appeal as an appeal is not another suit. In this regard he referred to case of

Lawrence Musitwa Kyazze V Eunice Busingye (SC) CA 19 of 1990

In response, Mr Tebyasa submitted that Reg. 9 of the Advocates Professional Conduct Regulations only operates from the moment an Advocate is called to

give testimony in court but in this case he was not actually called to give evidence. In this regard he prayed we be persuaded by the lower court decision of

Jefferali & anor V Borrissow & anor [1971] EA 165

He further argued that this Court should be viewed differently from the High Court where the disqualification happened.

We have considered the objection raised and the arguments for and against it. We overruled the objection for the following two reasons.

First, Regulation 9 of the Advocates Professional Conduct Regulations provides

"...

Personal involvement in a client's case.

No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears..."

The Trial Judge found that while appearing in the matter at the High Court, it became apparent that Mr Tebyasa would be required as a witness to give

evidence and therefore ruled that he shall not continue to appear in that case. We shall address the merits of that finding later on in this Judgment. The reality however is that the ruling of the Trial Judge notwithstanding, the case at the High Court ended without Mr. Tebyasa, for whatever reason, giving the anticipated evidence. Regulation 9 of the Advocates Professional Conduct Regulations is precautionary to avoid Advocates being witnesses in cases in which they are appearing. In this matter before us the need for Mr. Tebyasa to give evidence did not occur at the High Court. Secondly there is no application before us for additional evidence which would necessitate Mr. Tebyasa to give evidence at this Court. All in all therefore the authorities relied on notwithstanding (we find them not applicable), we see no reason why Mr Tebyasa should be barred from continuing to appear in this appeal.

The above reasons finally dispose of the two objections.

ISSUES FOR DETERMINATION

The parties agree to look at the grounds of appeal raised in both appeals and agreed to the following issues were raised for the determination of the court.

1. **Whether the disqualification of counsel for the 1st -3rd Appellants from their conduct of the case was proper.**
2. **Whether the learned trial judge erred in the proceedings with the determination of the suit when Miscellaneous Application No.150/2013 arising there from was still pending**
3. **Whether the appellants were denied a fair hearing.**
4. **Whether the trial judge rightly held that the respondent's tenancy agreements were wrongfully terminated by the 1st-3rd appellant's re-entry into the suit property.**

5. **Whether the reliefs granted by the trial judge were proper.**
6. **What remedies are available to the parties?**

DUTY OF THE COURT

This is a first appeal and this court is charged with the duty of reappraising the evidence and drawing inferences of fact as provided for under rule 30(1) (a) of the Judicature (court of appeal rules) Directions SI 13-10.This court also has the duty to caution itself that it has not seen the witnesses who gave testimony first hand. On the basis of its evaluation this court must decide whether to support the decision of the High Court or not as illustrated in **Pandya vs. R [1957] EA 336 and Kifamunte Henry vs. Uganda Supreme Court criminal appeal No.10 of 1997.**

Issue one

Whether the disqualification of counsel for the 1st -3rd Appellants from their conduct of the case was proper?

Appellant's submission

Learned counsel for the appellants challenged the learned trial judge decision to disqualify lawyer Mr. Ambrose Tebyasa from the conduct of their case yet he was not a witness in the case. He contended that the learned trial judge misconceived Regulation 9 of the Advocate (Professional Conduct Regulations) and speculated that counsel for the appellants would be a potential witness in the case. He proffered the following arguments.

The first argument is that Mr. Ambrose Tebyasa was listed as a witness in the case and there was no indication that he would be called as a witness by either the plaintiff, who had closed his case or the defendants.

Secondly, the disqualification of the lawyer was premised on a letter written by M/s Ambrose Tebyasa & Co Advocates to Kampala City Council to authentic documents that had been tendered into evidence. The impugned letter was signed by on behalf of the law firm but not the lawyer as an individual. This letter was written on behalf of the client as is the common practice. In any event DW1 Ronald Mutebi had already testified in court as to why the letter was written and so there was no need for the lawyer to do so as well.

Thirdly, counsel argued that the mischief behind Regulation 9 of the Advocates (professional conduct) regulations was to cure any prejudice to the parties and embarrassing situations for counsel. In this regard he referred court to the case of **Ebil Fred vs. Otim Nape William E.P.A No.48/2012** where court held that a party seeking to disqualify counsel from the conduct of the case has got to show what information is seized by counsel and how prejudicial the same is likely to be the party.

Learned counsel further relied on the Supreme Court case of **Uganda Development Bank Vs M/s Kasirye Byaruhanga & Co. Advocates Civil Appeal No. 35 of 1994** to support the proposition that that the advocate must have given evidence verbally of by affidavit before he can be disqualified which was not so in this case.

Respondent's submissions

Counsel for the respondent in reply submitted that the disqualification of Mr. Ambrose Tebyasa was proper. He proffered the following arguments.

First he argued that it was Mr. Tebyasa Ambrose personally (not for and on behalf of his clients) under his law Firm who wrote and signed a letter to the Director of physical planning, Kampala City Council Authority seeking evidence in relation to the availability of the building plains and approvals on the basis of which the Respondent made works. He then wrote in his submissions

"...The personal involvement in the matter to look for evidence by Mr. Tebyasa was against the provisions of the said Regulation 9 ***[Advocates (Professional Conduct) Regulations S.I. No 267-2]****..." (Addition ours)*

Counsel for the Respondent submitted that by Mr. Tebyasa getting personally involved in his client's case he became a witness in the matter and could not continue in the case as counsel. In this regard counsel referred us to the case of **Uganda Development Bank V M/s Kasirye, Byaruhanga & Co Advocates** SCCA No. 35 of 1994

In that case it was held that the sole criteria for disqualification of an advocate appearing in a case is if he/she had reason to believe that he will be witness in the case or having appeared and finds him/herself a witness then he or she ought not to appear as counsel in that case. In this regard this regulation applies where counsel may be required to give evidence not just where one has already given evidence.

Counsel further submitted that since it had become apparent that Mr. Tebyasa would be a witness he would have to step down from the conduct of the case in accordance with Rule 9 of the Advocate (Professional Conduct) Regulations.

The Court's findings and decision

We have considered the submissions of all counsel to this appeal and authorities provided for which we are grateful.

We have already reproduced **Rule 9 of the Advocates (Professional Conduct) Regulations** earlier in this decision which is the applicable provision of the law.

In this appeal Mr. Ambrose Tebyasa wrote the impugned letter to the Directorate of Physical Planning Kampala City Council Authority on 3rd July 2012 requesting for information as to whether any plans had ever been submitted and approved to alter the original plan of Plot 201 Kyadondo Block 250. It is this letter that Mr Tebyasa wrote during the pendency of that trial that he would have been required to testify about. Apart from the request for information from Kampala City Council authority the letter also read as follows:

".... The same information is crucial and necessary in court proceedings for civil suit No 193/2008 in the High Court of Uganda at Kampala Land Division..."

The letter is signed but it is not possible to know the author of the signature. Perhaps this signature was notorious to the parties in suit so they were able to say that it belonged to Mr. Tebyasa (in any event Mr. Tebyasa did not deny the signature was his). That notwithstanding, the letter is copied to The Registrar

High Court (Land Division), The Division Planner (Makindye Division) and "our clients".

A review of the record of proceedings leading up to the ruling barring Mr. Tebyasa makes dismal reading. Counsel for the plaintiff (then) submitted that since the impugned letter had been put on record awaiting proof this had to be done by counsel who wrote it as a witness because he personally authored it. Mr. Tebyasa at first thought he would but on reflection changed his mind on the grounds that he signed the letter as coming from his law firm. He also protested the plaintiff choosing who the defence witnesses should be. In his Ruling the Trial Judge held

"...in total, the said letter was written by Mr. Ambrose Tebyasa and since the Physical Planner of KCCA is relying on it, and the defence want it tendered in Court, then Mr. Ambrose Tebyasa is a potential witness for the defence...in the instant situation the plaintiff's lawyers may still make an application to court to have Ambrose Tebyasa called and cross examined on the letter in issue and on other related matters in that regard..."

The Trial Judge then barred Mr. Tebyasa from continuing as counsel under Reg. 9 of the Advocates (Professional Conduct) Regulations.

We find the objection raised at the Trial Court by counsel for the plaintiff and the Ruling upholding was totally flawed. These are our reasons.

The personal who received the letter was scheduled to testify that he received the letter and responded to it. Why then do you need the lawyers who wrote the inquiry to identify the letter and be cross examined on it? What problem

or prejudice would this cause if the recipient testified on the letter and not the lawyer who wrote it? We say none.

It is not evident from the record that while appearing in the case, Mr. Tebyasa would be required as a witness to give evidence whether verbally or by affidavit, and therefore he should not continue to appear as counsel . If this was so then, counsel in conduct of cases would always end up as witnesses on basic correspondence they make in pursuit of their instructions. The objection raised triggered this misdirection and in our considered opinion therefore was clearly a waste of time and abuse of court process.

We hold that Mr. Tebyasa was improperly barred from appearing for his clients.

Issue two

Whether the trial judge erred in proceeding with the determination of the suit when Miscellaneous Application No.150 of 2013 thereof was still pending

Appellant's submissions

Counsel for the Appellants submitted that the learned Trial Judge erred in law and fact in hearing the main suit without first disposing of the interlocutory application pending before him. In this application the appellants were challenging the disqualification of their advocate Counsel Ambrose Tebyasa from the conduct of the case.

Counsel argued that the trial judge ought to have disposed of the application o first before determining the main suit. He further argued that the failure of

court to do this occasioned a miscarriage of justice as they had also written to the court to have the said application fixed. Counsel for the Appellant submitted that under Rule 42(1) of the Judicature (Court of Appeal) Rules an application has to be made to the High Court first and heard whether allowed or dismissed and then later the applicant can file another application to the Court of Appeal.

Counsel concluded by stating that mere technicalities should not override substantive justice which is provided for under **article 126(2) (e) of the 1995 Constitution.** In this regard he relied on the Supreme Court Authority **Tropical Bank Ltd VS Grace Were Muhwana, SCCA No.3 of 2012,** in which **Katureebe, JSC** held as follows;

"... This court has laid down a long line of cases, that mistakes or inadvertence by counsel should not be visited on the litigants themselves who come to court seeking substantive justice. The failure to produce the record of proceedings in time or certify as to the period required for its preparation, was a failure of court officials. It would be wrong for this court to these mistakes, omissions or failures on the applicant who is only yearning for justice which he can only get by having his appeal heard or determined..."

Respondent's submissions

Counsel for the respondent submitted in reply that never at any point did the appellants bring it to the attention of the trial judge that they had filed an application for leave to appeal and the judge failed to act on it.

He further argued that it is not the Trial Judge who fixes matters for hearing but rather the Registrar of court. Counsel for the Respondents also disputed

the letter requesting the Registrar requesting him to fix the said application since it was written on 21st March 2013 and yet judgment was to be delivered on 20th March, 2013.

Learned counsel further challenged the application stating that it was incompetent and not an application in law because it had been filed 33 days late yet rule 2(1) and rule 40(2) of the judicature court of appeal rules provides that an application for leave to appeal against an order of court must be filed within 14 days of the date of the order.

Court's findings and decision

We have considered the submissions of all counsels to this appeal and authorities provided for which we are grateful.

We find this issue relating to Miscellaneous Application No.150 of 2013 an afterthought. First, it is not founded under any of the grounds of appeal that were filed in this court. Secondly, the said application and the correspondence relied upon by counsel in arguing this issue are not part of the record of appeal. Finally, in the record of appeal there is no reference whatsoever to Miscellaneous Application No.150 of 2013 and decision taken or for that matter not taken on it by the Trial Judge.

We therefore find that there is nothing in the record of in the trial Court in relation to Miscellaneous Application No.150 of 2013 to reappraise and or draw inferences of fact as provided for under rule 30(1) (a) of the Rules of this Court. It will therefore be a waste of time for us to address the arguments of both counsel on this issue.

ISSUE 3

Whether the defendants were denied a fair hearing?

Appellant's Submissions

Counsel for the Appellants submitted that the Trial Judge erred in law and fact when he denied the appellants an opportunity to engage another advocate of their choice but merely summarily and forcefully closed the defence case.

Counsel submitted that after the Trial Judge had disqualified Mr. Tebyasa as counsel for the Defendants he did not heed the plea of the second defendant Ms Robinah Ndagire that they had not been given enough time to source another lawyer. This is because she stated that the other lawyer handling the case Mr. Kajubi had been stopped when Mr. Tebyasa took over instructions.

Counsel for the Appellants submitted that in his view the Trial Judge was biased against them in favour of the respondent and this amounted to the denial of a fair hearing.

Respondent's Submissions

Counsel for the respondent submitted that the allegation against the Trial Judge of bias were misplaced.

He clarified that when Mr. Tebyasa was disqualified on the 22nd January, 2013, the hearing of the case was then adjourned to the 25th February, 2013 (almost a month later) with Directions of Court that Mr. Mohammed Ali Kajubi (of the other firm of Kawanga & Kasule Advocates) who had been appearing with Mr. Tebyasa continue to conduct the case on behalf of the defendants. However when Ms Ndagire (as a party) appeared on the 25th February, 2013 she still made a plea for another adjournment to get a new lawyer as Mr. Kajubi had

been discontinued as a lawyer. Counsel, however, insisted that there was nothing on record to show that M/s Kawanga & Kasule Advocates had withdrawn from the case at the High Court.

Furthermore Counsel submitted that the case had been fraught with adjournments at the instance of the defendants at the High Court and that this was just another uncalled for attempt of delaying the disposal of the case which the Trial Judge rightly rejected.

Court's findings and decision

There is no doubt that every person who appears before a court of law is constitutionally entitled to representation and an impartial hearing.

We have perused the record and there is also no doubt that whereas M/s Kawanga & Kasule Advocates were the lawyers who filed the pleadings for the first, second and third defendants and Mr Kajubi from that law firm appeared for the said parties when the case began in May 2010. However from October 2010 the record shows that Mr. Ambrose Tebyasa joined the legal team for the first, second and third defendants; there were therefore joint appearances of counsels in this case. So clearly the first, second and third defendants had two law firms representing them. We agree that there is nothing on record to show that M/s Kawanga & Kasule Advocates had withdrawn from the case representing the first, second and third defendants. If the said firm had withdrawn from the case it was incumbent upon them to seek leave to withdraw from the case from the court formally and not just quietly disappear from the record.

It is this state of facts that must have informed the Trial Judge to direct Mr. Kajubi to continue with the defence on behalf of the first, second and third defendants. We cannot no fault the trial judge for this direction.

We accordingly answer this issue in the negative.

ISSUE 4

Whether the trial judge rightly held that he tenancy agreements were wrongfully terminated by the 1st -3rd appellants' re-entry into the premises

Appellants' submissions

Counsel for the Appellant submitted that the Respondents were wrong to contend that the Appellants were not legally entitled to re-entry and termination of the tenancy. He argued that there was overwhelming evidence on the record that by the time Joseph Kayemba Gaaga died the Respondent was in rental arrears of over two and a half years and therefore the Appellants were entitled to re-entry.

Counsel faulted the Trial Judge for finding that the Appellants wrongfully terminated the tenancy by reason of illegal re-entry. He submitted that it was agreed that not only was the respondent in arrears in rent for the suit but that in addition he had sublet them to other tenants without the consent and or authority of the landlord.

Counsel further submitted that the respondent also breached the tenancy agreement by subletting the property without consent of the landlord. Learned counsel submitted that under section 102 (a) and 103(b) of the

Registration of Titles Act, the first, second and third appellants as land lords had a right to re-enter the premises for nonpayment of rent and for subletting of the premises.

Respondents' submissions

Counsel for the Respondent submitted that tenancy in question was for a long period of 15 years. He argued that the tenancy agreements did not have express provisions stating the reasons as to when termination would occur. The only express provision on termination required each party to give an advance notice of six months in writing which was not triggered in this case. Counsel therefore argued that the appellants acted in breach of the provision on termination since they did not give the six months' notice.

Counsel for the Respondents further argued that the reasons the Appellants gave did not entitle them to re-enter. He submitted that the Respondent had not failed to pay rent at the time of re-entry.

Learned counsel admitted that the respondent had accumulated rental arrears by the time the landlord had passed away. He however argued that the parties had expressly agreed under clause 4 of the tenancy agreement that if any of them neglected to execute their duties the party not in default would seek a legal remedy. The thrust of his argument is that the parties were only entitled to sue in courts of law or to distress on the tenant's properties in the event of default but not to terminate the contract.

Counsel further argued that given the length of the period of the said tenancy agreement (15years), the tenancy ought to be considered as a lease and not a mere tenancy agreement. In this regard counsel referred to the case of **SOUZA**

FIGUEIREDO & CO LTD VS MOORINGS HOTEL CO LTD [1960] EA 926 for the notion that an unregistered lease acts as an agreement inter-parties and that tenancy agreements can be regarded as leases.

Learned counsel also submitted that the tenancy/lease agreements did not give the first to third appellants a right to re-enter the premises for no-payment of rent because it had not been expressly provided for in the agreements. Counsel for this proposition relied on the textbook WOOD **FALL'S LAW OF LANDLORD AND TENANT**, LIONEL A. BLUNDELL & WELLINGS (27TH Ed Vol 1 London Sweet and Maxwell, 1968 at page 877) where it is written that a lease may be determined by re-entry or ejectment for forfeiture incurred either by; breach of a condition in the lease or breach of any covenant, in case the lease contains a condition or proviso for reentry for beach of such covenant.

Court's findings and decision

This issue addresses the heart of the dispute between the parties to the appeal.

A review of the Judgment of the trial Court shows that the trial Judge found the eviction of the respondent from the suit premises unjustified (Page 247 of the record of appeal) and unlawful (Page 255 of the record of appeal). He learned judge then held (at page 258 of the record of appeal):

"...Therefore, it is my considered opinion that the 1st- 3rd Defendants were actuated by the desire to eject the plaintiff and take over his source of income and not that the plaintiff was in both law and fact wrong in any way- The 1st-3rd

Defendants' reentry into the premises and eviction of the plaintiff was unlawful and unjustified..."

The Trial Judge found that the re-entry was unjustified for the following reasons. First, though it was common ground that the plaintiff was indebted by way of back rent to the deceased, MR Gaaga, the trial Judge stated that *"...Being indebted is not a crime..." (Page 244 of the record of appeal)*

The Judge went on to opine that

"... The Plaintiff is an honest man who disclosed to the family his indebtedness to the family (sic) when the person to whom he was paying and who knew the fact of indebtedness was dead. The plaintiff is a truthful and wise person who advised members to pursue letters of administration so that he could pay the estate..."

Secondly, the tenancy agreement provided the remedy in the event of default under Art 4 (a) which provides

"...in the event of default where one party fails or neglects to execute his duties the other party shall be at will to seek legal remedy..."

The Trial Judge then went on to find:

"... Reentry was not an action in pursuit of their rights upon the wrong doing of the plaintiff which he had shown willingness to correct by paying. They had means to seek payments through legal ways by getting a distress which course they had first wanted to take or to recover the debt- they did not. Their intentions in my opinion were not to recover unpaid dues but to eject the plaintiff from the suit premises..."

The trial Judge further found that the eviction was unlawful for the following reasons. First, the trial Judge found (at page 248 of the record of appeal) that in the event of non-payment of *rent "...re-entry was blatantly excluded and the course to take properly defined..."* The appellants therefore should have:

"...

a. *Carried out a distress or*
b. *Sued for the debt..."*

The trial Judge then found that by not taking the above mentioned actions to recover the unpaid rent, the appellants had contravened the contract Act and this was therefore unlawful.

Secondly, the Judge found that the tenancy agreement was for all intents and purposes a lease and that re-entry can only occur when there is a breach of some condition or covenant in the agreement where re-entry is preserved for that breach. He however found that in this case (page 251 of the record of appeal):

"... there is nowhere in the Tenancy/Lease Agreement between the parties that there was a condition put therein that upon failure to pay rent then a re-entry (ejectment) would follow and whereas there is a covenant to pay rent as agreed there was no proviso that the breach of such a covenant would entitle the Land lord to re-enter and determine the Tenancy..."

Thirdly, the trial Judge stated that under common law before a landlord re-enters for non- payment of rent he must make a formal demand. He, however, found that in this case (page 254 of the record of appeal) there was no formal demand for rent made to the respondent. This is because the demand made by

the first to third appellants on the 29th September, 2007 was made before they had obtained letters of administration on the 10th October, 2007 and therefore they did not have locus to do so.

Fourthly, the trial Judge also found that under common law in order to re-enter for non-payment of rent the tenant must have nothing to distress on which was not the case in this matter.

Fifthly, the trial judge further found that the ground of breach by reason of subletting the suit premises was misguided. This is because in the tenancy agreement there was no express provision barring subletting by the tenant.

We have carefully re-evaluated the evidence on record and find there are important areas of evidence that were over looked.

We find that there were critical misunderstanding as to the contractual provisions under the two tenancy agreements. The respondent to start with testified (page 310 of the record of appeal) as follows with regard to termination of the tenancy:

"... and if the landlord wished to terminate the lease before the lease expired he was to compensate me for the developments at 100% and to give me 6 months' notice... and that in case of any failure by the party to seek a legal remedy. That is, in case any party fails to play it part, the aggrieved party should go to court...and the said notice has to be in writing and served sufficiently..."

A careful perusal of the tenancy agreement shows a different set of undertakings from the findings in the case. Whereas the respondent testifies about compensation of "developments" at 100% on termination of the tenancy, Art 3 (d) on the other hand provides

"... full compensation shall be made in consideration of the ***repairs*** *and* ***renovations*** *made by the tenants..." (Emphasis ours).*

There is no reference to developments in the said agreement at all and there is a stark difference between developments on the one hand and repairs and renovations on the other hand. Developments connote additions to what is already there while repairs and renovations refer to restorations. Furthermore, this view is in consonance with the earlier Art 2 (b) on renovation and adjustments. There is common ground in the evidence that the suit property was in dire need of renovation at the time of the agreement but there is nothing that pointed to the need for redevelopment to accommodate an art gallery. If developments beyond housing an art gallery were to be made and for which compensation was necessary on the landlord's property (these being major structural changes with cost implications), then the prudent thing would have been to specifically provide for them in the agreement; which was not.

It has been argued for the respondent that the late Mr. Gaaga somehow authorized these developments and went on to obtain permission from KCC for the alterations. Letters from KCC dated 11th August, 1999 and 22nd February, 2005 were exhibited as proof of this authority. A careful scrutiny of these letters gives interesting reading. The approvals given in both letters have the same wording and read as follows:

"....

4. *No new structure or part will be allowed other than what is requested above (the request "above" is not shown rather it is below – addition ours)*

This renovation and repairs shall include:

- ❖ *Erecting of toilets – water born (sic)*
- ❖ *Roof and repairs*
- ❖ *Wall repairs*
- ❖ *Sewage system*
- ❖ *Painting and decorations*
- ❖ *Storm water drainage*
- ❖ *Minor alterations as seen on your submitted plans*
- ❖ *Floor finish*

...”

Clearly these authorizations were for minor adjustments to the suit property and are in stark contrast and contradiction to the elaborate building plans (the basis of which the bulk of the claims are based) that were submitted to the trial court. This was not addressed at all at the trial court.

This factual and legal misunderstanding of the facts is fatal to the total evaluation of the evidence in this case and yet it permeates the entire hearing and the final Judgment of the Court.

Secondly, it is the respondent's testimony and essentially also the interpretation of the trial Judge that if there was a dispute then under Art 4 (a) (supra) the aggrieved party could seek a legal remedy and that remedy essentially meant only going to court. We disagree. Re-entry in itself is a legal remedy. Indeed **Black's Law Dictionary** 10th Edition defines reentry (2) *as "...a landlord's resumption of possession of leased premises upon the tenant's default under the lease...".* So where there is default it is possible to elect to pursue re-entry as a legal remedy. Whereas it is agreed that not every default

should lead to a remedy in re-entry, payment of rent in our view is fundamental condition that has to be complied with. Payment of rent is an implied term in every lease pursuant to section 102 of the registration Titles Act. Secondly payment of rent is specifically provided for by Art 1 of the tenancy agreement dated 28th May 1999 states in part:

"...in consideration of ***the rent*** *reserved of the covenants and conditions hereinafter contained on the one party the tenant,* ***and the rent paid*** *...the landlord hereby demises unto the tenant ALL THAT house to be used for* ***COMMERCIAL GALLERY PURPOSES*** *for the fifteen years..." (Emphasis ours)*

The second tenancy agreement dated 22nd July 1999 is also by and large couched in the same language save that Art 2 therein provides that the additional land leased therein was:

"... To be used as ***car parking area*** *for the Gallery...." (Emphasis ours).*

Failure to pay rent therefore in our view is a breach of a fundamental condition in this contract and would inter alia entitle the landlord to re-entry and or resumption of possession of leased premises. In this regard we are fortified by the Supreme Court decision in **Erukana Kuwe Vs Damji Vader** SCCA No 02 of 2002. In that appeal it was common ground that the respondent (in that case) as lessee had been in breach of the lease agreement by failing to pay rent, by failing to keep the suit property in good and tenantable repair and clean condition, and by sub-letting it without the consent of the appellant. It was also not in dispute that the appellant as lessor was by reason of those breaches entitled to re-enter the suit property. The Hon Justice A. Oder (JSC, as he then was) in the lead Judgment in that appeal held:

"...The lease agreement between the appellant and the respondent was terminated by the appellant's re-entry for clear breaches of covenants by the respondent..."

While concurring with the Justice Oder's lead Judgment, Hon Justice J. Mulenga (JSC, as he then was) further held:

"... It is correct that the breaches of the lessee's covenants rendered the lease voidable at the option of the lessor. In order to void it he had to terminate it by reentry or otherwise...".

The important question therefore is whether or not the re-entry was premised on lawful grounds and not whether re-entry is a legal remedy; Re – entry is a legal remedy.

This is in line with the legal texts and decisions that were already cited by the parties in this case; which we shall not reproduce. We respectfully disagree with the trial Judge's finding that re-entry as a remedy was *"blatantly"* excluded in the agreements and that therefore the only legal options open to the respondents were either to distress for rent or sue for the debt. It was common ground that the respondent was in default in paying rent. The respondent himself (page 332 of the record of appeal) admitted that at the time of Mr Gaaga's death he was in rent arrears for two and half years. Clearly therefore this default of nonpayment of rent was an old one and yet this was a commercial contract. Even though we did not see the demeanor of the respondent during the trial, we find it strange that someone who does not live up to his commercial commitments for two and half years can rightly be referred to as *"an honest man"* as the trial Judge put it. Whereas we agree with the trial Judge that *"being indebted is not a crime"*, commercial contracts such

as this one must be respected and enforceable as written by the parties (see also Justice Mulenga JSC in the Supreme Court appeal **Erukana Kuwe – Supra)**. It matters not in our view, whether you call this contract a tenancy agreement or a lease the principle is the same; rent as contracted must be paid. The nonpayment of rent was a serious default to trigger a re-entry. We are further not persuaded that all of a sudden as a result of the death of Mr Gaaga, the respondent was willing to pay the entire outstanding rent **at once** and that all he required was proof of the grant of letters of administration. The respondent appeared to be in a habit of paying when he wanted. The respondent's lawyers M/s Ojambo & Ojambo Advocates letter to the widow of Mr Gaaga (page 131 of the record of appeal) on the 8th October, 2007 in paragraph (2) is clear evidence of this and states:

"...contrary to the adverse insinuations contained in yours against our client regarding his rent obligations, you will kindly be reminded that the relationship that previously obtained between the parties to the contract in issue was one of ***brotherhood*** *whereupon the deceased (RIP) often times allowed late payments. In other words, by conduct of the parties,* ***time was never of the essence*** *(sic)..." (Emphasis ours).*

In our view, *"brotherhood"* and *"time was never of the essence"* are both phrases incompatible with commercial contracts. Even when the respondent testified in court (page 332 of the record of appeal) that *"After the death of the late Gaaga his widow was my landlord..."* (- i.e. the first appellant) he still did not pay the outstanding rent to the widow; this persisted even after letters of administration were granted to her among others. It was therefore an error,

in our considered view, for the trial Judge to summarily opine that the appellants only wanted to take over the respondent's business.

The upshot of this all is that it is our finding that the appellant's reentry was justified and lawful. We accordingly answer issue number four in the negative.

ISSUE 5

Whether the reliefs granted by the trial judge were justified?

Appellants' submissions

Counsel for the appellants submitted that that the trial judge erred in awarding very high, non- proved, and non-justified and exorbitant special, compensatory and general damages. He argued that the special damages must be pleaded and strictly proved yet in this case no such damages were proved.

Counsel further submitted that the respondent's claims were based on alleged developments on the suit land yet such developments were not proved and the plans on which they had allegedly been based were also not proved to have been submitted and approved by the relevant authorities. Counsel directed the court to parts of the record of appeal (page 230 lines 1557-1561), where the respondent acknowledged that he never submitted the plans to Kampala City Council (KCC) and therefore could not confirm whether the plans were approved.

Counsel further referred Court to the case **M/s Tatu Naiga and & Co. Emporium vs Verjee Brothers Ltd** Civil Appeal No.8 of 2000, where the Supreme Court of Uganda refused a monetary claim because there was no proof of approval of the renovations by KCC.

Counsel argued that the respondent had become a trespasser. In this regard he relied on the case **of Joy Tumushabe and another vs M/s Anglo African Ltd and Another Vs. M/s Anglo- African Ltd and Another; Civil Appeal No.7 of 1999.**

Respondent's submissions

Counsel for the respondent submitted and disagreed with the appellant position that that the reliefs claimed by the plaintiff (now respondent) and those subsequently granted by the trial court were justified because the respondent was no longer in the premises. He argued renovations and adjustments were covered under Art 2 of the tenancy agreement dated 28th May 1999. Counsel further argued the additional tenancy agreement dated 22nd July, 1999 allowed the respondent to:

"...

(a) Grade, compact the area and put murram, and temporary structures.

(b) To fence off the area with barbed wire/live fence

(c) To put up electricity, water and telephone..."

Counsel further argued that it was ironic for the appellants to deny these developments yet they were done during the life time of the late Mr. Gaaga who had approved them and under took to compensate them at the end of the tenancy. He submitted that the developments were approved by the KCC in writing even though there was just one document from KCC in dispute.

Counsel submitted that it would be a travesty of justice to allow the appellants to continue enjoying these developments without compensation to the respondent.

With specific reference to the award by the trial court of Shs 200,356,828/= , this figure he submitted was awarded as compensation for the developments taken over by the appellants and for which there was a professional valuation made by Nicholas Kasimbazi Saali of M/s Katuramu & Co (PW 5) in 1976. He further argued that if there were any discrepancies in this valuation then they were minor and not fatal.

Counsel submitted that all the documents relied upon had been pleaded and subsequently admitted as proved exhibits. This is notwithstanding that counsel for the appellants as an afterthought later during the trial sought to have some of the documents confirmed by KCC but was unable to do so.

With regard to the sum of Shs 215, 670,000/= awarded by the trial court, counsel submitted that his figure was for loss of income. He argued that the respondent took up the tenancy to operate a commercial gallery business but this was subsequently changed to a guest house/entertainment centre with the consent of the landlord.

As to the sum of Shs 3,000,000/= counsel submitted that this was awarded in lieu of the contracted 6 month notice that was not given to the respondent by the appellants when they exercised re-entry onto the suit premises. This was calculated based on the monthly rent of Shs 500,000/= so stood proved. The trial court granted the respondent Shs 300,000,000/= then enhanced this figure to Shs 500,000,000/= as damages. He argued such an enhancement was justified under common law at the discretion of the court based on the egregious conduct of the appellants. Such conduct by the appellants of evicting the respondent from his business when he was still willing to pay rent had landed the respondent into abject poverty, inconvenience, distress and

deprivation over a period of six years at the time the award was made in 2013.

Counsel further submitted that the trial Judge had given the awards in the exercise of his judicial discretion. In this regard he referred us to the case of **Vivo Energy (U) Ltd Vs Lydia Kisutu** SCCA No. 07 of 2015.

In that case it was held that it is trite law that quantification of general damages is an issue of discretion and an appellate court can only interfere with the exercise of discretion where it has acted on wrong principle or where the award is manifestly low or high so as to occasion a miscarriage of justice.

Counsel further argued that where the actions of a party are arbitrary leading to deprivation of property, as allegedly in this case, it was held by the Supreme Court in the case of **Fredrick Zaabwe Vs Orient Bank & 5 Ors SCCA** No 04 of 2006 that damages may be enhanced.

Court's findings and decision

It was the finding of the trial Judge that the respondent had been wronged by the appellants and hence the respondent was entitled to damages and other remedies. We agree with the position of the law enunciated in the case of **Vivo Energy (U) Ltd (Supra).** We only add that the discretion given to courts in awarding damages must be exercised judiciously.

However in subjecting the evidence at the trial court to a fresh scrutiny we have substantially come to a different conclusion from that of the trial Judge. The re-entry by the appellants was lawful. The respondent under his pleadings at the High Court, tried to obtain a finding that the appellant's re-entry on the suit property was unlawful for which he should be awarded

damages on the grounds of breach of contract and unjust enrichment based on the developments that were left there. However, literally nothing is mentioned in the amended plaint that the respondent was in default in rent for nearly two and half years at the time Mr Gaaga died. An action in unjust enrichment is an action in equity. He who comes in equity must come with clean hands. A claim of unjust enrichment is a claim in equity. Unjust enrichment is defined by **Black's Law Dictionary** 7th Edition as a benefit obtained from another, not intended as a gift and not legally justifiable for which the beneficiary must make restitution or recompense. A leading case regarding unjust enrichment is **Fibrosa Spolka Akcyjna versus Fairbairn Lawson Combe Barbour Ltd** [1943] AC 32 at 61. In that case the speech of Lord Wright is very instructive when he held:

"....It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution (emphasis added).

Restitution is an equitable remedy. Courts have long held that actions for money had and received lie "for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances"..."

Furthermore in the case of **Moses Vs Macfarlane** [1760] 2 Burr at 10 it was held that;

"The principle of unjust enrichment requires; first, that the defendant has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the plaintiff and thirdly, that the retention of the enrichment is unjust. This qualifies restitution."

The principle of "clean hands" notwithstanding, the developments made on the suit land were clearly for the benefit of the respondent alone in his business and not the appellants. The evidence of the valuers in this case therefore must be viewed from that perspective. There is evidence that the respondent charged third parties under different tenancy agreements for the use of these developments in terms of rent which he the respondent retained. The fact that the developments remained on the suit property after re-entry on account of contractual default, does not in our finding amount to an imposition (express or implied) or extortion or oppression or undue advantage taken of the respondent by the appellants. In any event we have already found that there was no provision in the tenancy agreements for developments and their repayments. We accordingly find that there is no justification for restitution in these circumstances and answer the issue in the negative.

Issue 6

What remedies are available to the parties?

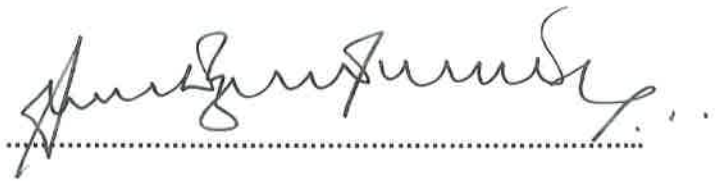
The upshot of our findings is that this appeal in bulk succeeds and we so order.

As to costs these should follow the event unless the Court finds good reason to depart from this principle. In this matter the successful party should be awarded costs.

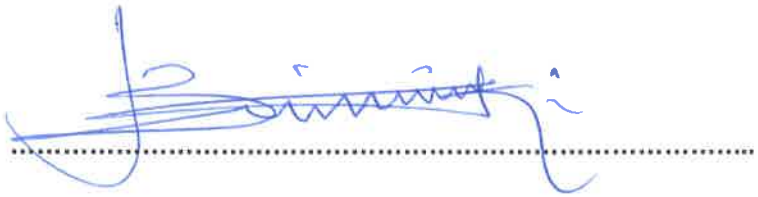
We accordingly allow this appeal with costs. The judgment of the trial court is set aside.

Dated at Kampala this 7th day of May 2019

HON.MR.JUSTICE GEOFFREY KIRYABWIRE, JA



HON.MR.JUSTICE F.M.S EGONDA NTENDE, JA



HON MR.JUSTICE BARISHAKI CHEBORION, JA