THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CIVL APPEAL NO.0162 OF 2012

(Arising from the judgment of the High Court (Land Division) in Civil Suit No.176 of 1999 dated 30th July 2012 delivered by the Honourable Justice Mr. Joseph Murangira)

NAVINCHANDRA K.RADIA==========APPELLANT

VS

THE REGISTERED TRUSTEES OF

BIBLE SOCIETY OF UGANDA==========RESPONDENT

CORAM

HON.MR.JUSTICE KENNETH KAKURU, JA

HON.MR.JUSTICE GEOFFREY KIRYABWIRE, JA

HON.MR.JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF KIRYABWIRE, JA

Introduction

This is an appeal from the Judgment of the High Court (Land Division) in Civil Suit No.176 of 1999 dated 30th July 2012 delivered by the Hon. Mr. Justice Joseph Murangira. The learned trial Judge found in favour of the respondent and ordered a refund of USD 175,000 to the respondent within thirty days from the date of judgment together with, general damages of UGX 50,000,000 (fifty million Ugandan shillings), interest on USD 175,000 at a court rate and

the costs of the suit. The appellant being dissatisfied with the judgment filed this appeal.

Background

The appellant sold property comprised in Plot 10 Army Avenue, LRV 207 Folio 11 in his capacity as the director, shareholder and advocate (of the company Kakubhai Kalidas & Co Ltd) to the respondent for USD 175,000. This property was Asian expropriated property which had just been repossessed and accordingly under the law could not be sold until five years had passed so instead a lease agreement was executed for five years from 1st April 1987. The sale money was paid into the appellant's bank account and he was to transfer it to the company account. After taking possession of the building the respondents were evicted by government because the External Security Organization (ESO) wanted to occupy the building. It was agreed that the appellant refund the respondent the current value of the property. The government had paid compensation to appellant company but the respondents were never refunded of their money. They thus sued the appellant and were successfully awarded damages and costs of the suit. The appellant being dissatisfied with the judgment lodged this appeal.

Grounds of appeal

1. **The learned trial judge erred in law and in fact in holding that the transaction of the said suit land between the plaintiff and the defendants was legal.**
2. **The learned trial judge erred in law and in fact in holding that the suit was not statute barred.**

3. **The learned trial judge erred in law and in fact in holding that the 1st defendant acted as an advocate and further that as an advocate who received monies for a client he has obligations to the client and the person who paid him the money.**
4. **The learned trial judge erred in law and in fact in holding that the main issue to determine surrounds the money had and received by the defendant and whether the same could be refunded.**
5. **The learned trial judge erred in law and in fact in holding that the as a an advocate, director, shareholder, the 1st defendant made undertaking including ensuring refunding the money he received binds him in light of being in a dual capacity. Accordingly that's why he is jointly and severally liable for the funds had and received.**
6. **The learned trial judge erred in law and in fact in holding that the 1st defendant has not shown by evidence or otherwise that the US $175,000 was remitted from his account to an account of the company or a managing Director as he alleges.**
7. **The learned trial judge erred in law and in fact in holding that the 1st defendant was accountable to the plaintiff on the basis of the legal principle of money had and received.**
8. **The learned trial judge erred in law and in fact in holding that Section 8 of the Expropriated Properties Act does not forbid parties to enter into lease agreement and that the plaintiff acquired both legal and equitable interests in the suit land.**

9. **The learned trial judge erred in finding and holding that the defendants should have passed over the government compensation of UGX 421,935,750 to themselves to the plaintiff.**
10. **The learned trial judge erred in finding and holding that "since the defendants do not seem to agree as to who has the compensation money and who has received and has paid lease /sale price it is only right that the defendants are held jointly and severally liable."**
11. **The learned trial judge erred in law and in fact in making orders as to damages and costs, which he made.**

REPRESENTATIONS

The appellant was represented by Mr. Albert Byamugisha while the respondents were represented by Mr. James Mukasa Ssemugenyi.

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 heard 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.**

Ground 1: The learned trial judge erred in law and in fact in holding that the transaction of the said suit land between the plaintiff and the defendants was legal.

Submissions of the Appellant

Learned counsel for the appellant submitted that the lease to the respondent amounted to a sale which was prohibited by Section 8 of the Expropriated Properties Act. He relied on page 180 line 20 of the record of appeal where the learned trial judge found:

'...the possession and the price is ably defended by the lease transaction confirmed by PW2, PW3 AND DW1. It is important to clarify that the price paid and the lease covered the requirements of the law up to the time 5 years would lapse for a sale to materialize...'

He submitted that the learned trial judge erred in law in holding that there was nothing crude, illegal with the lease since it was not barred by law.

Learned counsel submitted that there an immediate sale since the purchase price was paid and the respondent took possession of the property. He argued that it was merely the legal transfer that was postponed.

Learned counsel argued that leases created under the Registration of Titles Act (RTA) are disposals of land and registrable thereunder. He concluded that this was an illegal act and court should not sanction an illegal act as was held in the case of **Makula International vs. His Eminence Cardinal Nsubuga CA NO.4 of 1981.**

Submissions of counsel for the respondent

In response to ground one learned counsel for the respondent submitted that the respondent was mindful of the restriction of Section 8 of the Expropriated Properties Act and this is why they opted for a lease. He argued that by virtue of the said lease, the property was not sold or otherwise disposed of because by law the lessor retains a reversionary interest.

Counsel for the respondent submitted that by leasing the premises which was referred to as "sub-letting" under Section 109 of the Registration of Titles Act, there was no sale or disposal of the interest that was repossessed by the second defendant. Learned counsel further submitted that creation of the lease was not prohibited by the Expropriated Properties Act.

Counsel for the respondent also submitted that the appellant had admitted in their summary of evidence at page 50 of the record of appeal that the defendant leased the suit property to the plaintiff for five (5) years. He agreed with the authority cited by the appellant of **Interfrieght Forwarders (U) limited vs East African Development Bank** [1990-1994] EA 117 where it was held that a party is expected to prove the case as alleged by him and as covered by the issues framed. He submitted that by now alleging that there was a sale is a departure from his own pleadings.

Counsel concluded that the learned trial judge rightly held that the transaction was lawful and did not require the consent of the minister.

Court's findings

The essence of this ground is that the lease granted to the respondent was illegal because it was contrary to Section 8 of the Expropriated Properties Act.

Section 8 of the Expropriated Properties Act provides that;

"...any property of business transferred to a joint venture company or to a former owner under this Act shall not be sold or otherwise disposed of without the written consent of the minister until after five years from the date of the transfer..."

There is no doubt that this was a carefully structured transaction given the law that was in force at the time. However this is not uncommon in commercial transactions. Title as an example may be contracted to pass at a future agreed time and this would not in itself be illegal. In leases a lessee may pay rentals for a car and only exercise an option to buy at a future time for a nominal amount of money.

I accept the submissions of counsel for the respondent that a lease is different from a sale because with a lease there is always a reversionary interest that the landlord enjoys. This is precisely what the lease signed between the parties to this appeal dated 1st April 1987 provided for. Paragraph 2 (j) of the lease provides:

"...To yield up the demised premises on the determination of the term in such a state of repairs and condition as shall be in strict compliance with these covenants..."

So clearly the reversionary interest would revert to the lessor.

I find nothing wrong and or illegal in the lease providing as it did, in Paragraph 3 (c), an alternative that after the five year lease period expired and subject to the law the lessee could opt for a of purchase of the suit property.

I accordingly find that the lease granted to the respondent did not amount to a sale. I also find that a lease was not prohibited by section 8 of Expropriated Properties Act.

This ground therefore fails.

Ground 2: The learned trial judge erred in law and in fact in holding that the suit was not statute barred.

Submissions of the Appellant

Counsel for the appellant submitted that the trial Judge found that there was a sale of land (page 182 line 3 of the record) and payment of money (US$ 175,000) was for that purpose. In this regard the trial Judge found

"...This transaction concerns the purchase of land. This suit is based on the recovery of land or payment in the money terms is covered under Section 18 (1) of the Limitation Act..."

He then argued in my understanding that the trial Judge had found that the suit was barred by Section 18(1) of the Limitation Act.

Submissions for counsel for the respondent

Counsel for the respondent submitted that in this case the suit property was compulsorily taken over by Government vide Statutory Instrument No. 12 of 1990 dated 12th January 1990. This was when the cause of action arose. The limitation period of twelve years under Section 18 (1) of the Limitation Act would have expired on or about the 12th January 2002. Counsel submitted that since the plaint was filed on the 19th February 1999 then within the limitation period.

Court's findings

Section 5 of the Limitation Act provides as follows;

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."

This is a fairly straight forward matter of computation of time.

I accept the submissions of counsel for the respondent and find that twelve years had not yet lapsed and thus this suit was not barred by limitations since the cause of action rose when the respondents were denied access to the premises by the government was in 1990 and they filed their action in 1999.

This ground also fails.

Ground 3: The learned trial judge erred in law and in fact in holding that the 1st defendant acted as an advocate and further that as an advocate who received monies for a client he has obligations to the client and the person who paid him the money.

Submission of the appellant

Counsel for the appellant submitted that this ground was not justified by any of the issues, pleadings or the law. He submitted therefore that this finding was a departure from the pleading prohibited by Order 6 Rule 7 of the Civil Procedure Rules.

In this regard he relied on the case of **Interfrieght forwarders (U)LTD vs East African Development Bank [1990-1994]EA at 125** for the proposition that a party is expected to be bound to prove the case as alleged by him and as covered by the issues framed therein.

Submissions for counsel for the respondent

Counsel for the respondent submitted that the trial Judge was resolving issue number three, when he found that an advocate who received monies for a client, has obligations to the said client and the person who paid him the money. He submitted that, the appellant acted contrary to his obligations as an advocate when he paid US $175,000 into the personal account of the managing director.

Counsel further submitted that the appellant had a duty to ensure that this money was forwarded to the company for which the money was intended. However, there was no evidence was adduced to show that the appellant remitted this money to the company though he testified twice that he did.

Counsel also submitted that it was trite law that a company is separate from its members and directors and as such the director personally receiving the money did not in itself amount to the company actually receiving the money.

Court's findings

In the trial court the parties raised an issue of whether the first defendant was the lawful and authorized agent of the 2nd defendant, this issue led the trial judge to hold that the defendant was acting as an advocate of the second defendant.

It is important to point out at the onset that the appellant had a multiple role in this transaction. He was a shareholder/director of the company that sold the suit property while at the same time the appellant also acted as advocate and legal adviser for the same company. Needless to say, this was an untidy and mixed up state of affairs as can be seen from the various correspondences at the trial. The probability for conflict of roles and interest was very high. This company in particular had a clear weakness in its corporate governance.

I agree with the trial court's finding that the appellant acted as an advocate of the company. My re-evaluation of the evidence and specifically the record at pages 21 of the a correspondence between the appellant to the respondent wherein he refers to the company Kakubhai Kalidas & Co Ltd as his client and states that he was acting on their behalf) and a letter written by a director of the said company acknowledging that the appellant N.K.Radia was the advocate of the company supports this finding of fact.

In my view, the trial Judge was prudent to establish in what capacity the appellant was acting in so as to be able to apportion liability properly. He was thus justified in doing so.

This ground also fails.

Ground 4: The learned trial judge erred in law and in fact in holding that "the main issue to determine surrounds the money had and received by the defendant and whether the same could be refunded".

Submissions of the appellant

Counsel for the appellant submitted that this finding was not part of the issues framed for determination by this court. He argued that the finding was

therefore a departure from the pleadings and therefore an illegality on the part of the trial Judge to frame it and answer it against the appellant. In this regard he again relied on the case of **Interfrieght forwarders (U) LTD vs. East African Development Bank [1990-1994] EA at 125.**

Submissions for the respondent

Counsel for the respondent submitted that facts of the dispute lent themselves to the principle of money had and received and therefore this was the underlying issue throughout the case since the appellant admitted that the sum of US $ 175,000 as agreed was fully paid. Learned counsel further submitted that the appellant had also admitted that the property was compulsorily acquired by government after the respondent was put into possession. The appellant further admitted that the respondent was entitled to a refund.

Courts findings

It is my finding that the principle of money had and received is a legal one hence a point of law that need not be established at trial as a pleading or an issue for determination.

At this court I must emphasis, an appeal is determined is on the basis of the grounds of appeal not issues famed by the parties. The question of money had and received is clearly set out in ground 4 of appeal. Counsel's issues are therefore misconceived since the court is required to reappraise the evidence and make its own findings on all issues of law and fact. (**See Kifamunte supra).**

In any event Order 15 rule 5(1) allows the court to at any time before passing a decree to amend the issues or frame additional issues as it deems fit or may be necessary for determining matters controversy between the parties. (See Okello-Okello vs. UNEB [1993] Vol. II KALR 133 (SC)

Pleadings are to concisely state the facts and cause of action in issue but not the law.

I am therefore unable to fault the trial Judge in his application of this law to the facts as the appellants would want it.

This ground also fails.

Ground 5: The learned trial judge erred in law and in fact in holding that "...the as an advocate/ director/ shareholder, the 1st defendant made undertaking including ensuring refunding the money he received binds him in light of being in a dual capacity. Accordingly, that's why he is jointly and severally liable for the funds had and received..."

Submissions of the appellant

Counsel for the appellant again submitted that this finding of the trial Judge was a departure from the pleadings and especially so paragraph 28 of the plaint where the claims were placed against the second defendant company and not the appellant (then first defendant).

Submissions of counsel for the respondent

Counsel for the respondent submitted that the appellant had accepted he had acted as both director and advocate of the second defendant company. The evidence showed that the appellant received the money as an advocate but there is no evidence that the appellant then remitted the money to the defendant company. Counsel further submitted that the appellant had undertaken to the respondent to have the US $ 175,000 refunded by way of letters (dated 11th February 1992 and 7th December 1987) but no refund was made. The appellant instead kept the money for himself which he had to account for.

Court's findings

I have largely resolved this ground while resolving ground number three and the multiple roles of the appellant herein before. I need not repeat this here again suffice it to reiterate that there is no evidence that the appellant paid the suit sum to the company as alleged and therefore the onus was on the appellant had actually remitted the money, which he failed to do, or otherwise account for the money.

Ground 6:

The learned trial judge erred in law and in fact in holding that the first defendant "has not shown by evidence or otherwise that the US $ 175,000 was remitted from his account...to an account of the company or a Managing Director as he alleges...

This is a finding of the trial Judge that he repeatedly made and I have addressed in grounds three and five wherein I am unable to fault the findings of the trial Judge. It is my finding that this ground is simply a variant of the

same grounds I have previously resolved and found that the appellant failed in his legal duty to adduce evidence that he remitted the money he received to the company.

For that reason this ground like other similar grounds before fails.

Ground 7: The Learned trial Judge erred in law and fact in holding that the first defendant is accountable to the plaintiff on the basis of the legal principle of money had and received.

This in substance is another repeated ground which I resolved in dealing with ground number four. I have already found that the trial Judge correctly applied the legal principle of money had and received.

That being my earlier finding it is equally applicable to this ground as framed. So this ground equally fails.

Ground 8: The learned trial Judge erred in law and in fact in holding that section 8 of the Expropriated Properties Act

"...does not forbid parties to enter into a lease agreement and that the plaintiff acquired both equitable and legal interests in the suit land"

I shall reiterate my finding in ground one. I find that the lease granted to the respondent did not amount to a sale. I also find that a lease was not prohibited by Section 8 of Expropriated Properties Act.

This ground therefore fails as well.

Ground 9: The learned trial judge erred in finding and holding that

"...the defendants should have passed over the government compensation of UGX 421,935,750 to themselves to the plaintiff..."

I don't have to make a ruling on this ground since it was abandoned by the appellants.

Ground 10: The learned trial judge erred in finding and holding that "...since the defendants do not seem to agree as to who has the compensation money and who has received and has paid lease /sale price it is only right that the defendants are held jointly and severally liable..."

I have substantially dealt with this ground in the preceding grounds and accordingly find no merit in it. I do not accept the proposition of the appellants that this finding was a departure from the pleadings. In any event the onus was on the appellant to prove that he transmitted the money to the company. This ground fails as well.

Ground 11: The learned trial judge erred in law and in fact in making orders as to damages and costs, which he made.

Submissions of the appellant

Counsel for the appellant submitted that the learned trial judge erred in law and fact in making the orders as to damages and costs. He argued that there was no joint and several prayers for damages in the plaint. He submitted that was there was a principal claim against the 2nd defendant under paragraph 28 of the plaint and an alternative claim against the 1st defendant under paragraph 29 of the plaint.

Learned counsel further submitted that that the learned trial judge committed a fundamental error of law and fact by treating a sale contract, as a lease.

Submissions of counsel for the respondent

Counsel for the respondent submitted that the appellant was jointly and severally liable to the respondent for the refund of the US$175,000 as well as damages and costs arising from the inconvenience and loss occasioned in the circumstances.

Counsel submitted that the appellant played a direct role in the transaction that resulted in the respondent's loss.

Court's findings

Regarding general damages the law is that they are awarded at the discretion of court but they are a natural consequence of the defendant's act or omission and they are intended to compensate the plaintiff for the injury suffered(**Robert Cousens VS AG** SCCA No.8 of 1999) followed.

Furthermore, in the case of **Uganda Commercial Bank VS Kigozi** [2002]1 EA 305 court held that in the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter the inconveniences that the party was put through at the instance of the opposite party and the nature and extent of the breach.

In this case, the appellant knew well that the option to purchase the property at the end of the lease (hence the consideration agreed to) had been triggered but was negated by the compulsory acquisition by Government of the suit property. It was wrong of the appellant to believe that he could benefit from

both the lease agreement value and the full compensation for the same property from the Government leaving the respondent with no remedy; on the grounds of frustration. I find that the monetary orders of the trial Judge were fair and not excessive. I find no reason to disturb them.

Final Result

This appeal fails and is hereby dismissed with costs here and in the court below.

Dated at Kampala this 26th day of April 2019

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO.162 of 2012

NAVINCHANDRA K. RADIA ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF

BIBLE SOCIETY OF UGANDA ..... RESPONDENT

(An appeal arising from the decision of the High Court of Uganda at Kampala (Land Division) before Hon. Mr. Justice Joseph Murangira dated 30th July 2012 in Civil Suit No. 176 of 1999)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the judgment of my learned brother His Lordship Hon. Mr. Justice Geoffrey Kiryabwire.

I agree with him that this appeal has no merit whatsoever and ought to be dismissed with costs for the reasons he has set out in his Judgment. As Hon. Christopher Madrama, JA also agrees it is so ordered.

Dated at **Kampala** this .....26th.....day of .....April..... 2019.

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Kenneth Kakuru

JUSTICE OF APPEAL