THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 138 OF 2013

SWIFTSERVE ENTERPRISES LTD ..... APPELLANT

VERSUS

ANYAKU KHEMIS ..... RESPONDENT

(An appeal from the decision of Hon. Mr. Justice Yasin Nyanzi dated at Arua on 12th September, 2012 in HCCS No.2 of 2012)

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 Madrama, JA.

I agree with him that this appeal ought to succeed for the reasons he has ably set out in his Judgment. I also agree with the orders he has proposed and I have nothing useful to add.

As Kiryabwire, JA also agrees. It is so ordered.

Dated at **Kampala** this 24th day of June 2020.

.....

Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 138 OF 2013

SWIFTSERVE ENTERPRISES LTD ========== APPELLANT

VERSUS

ANYAKU KHEMIS==========RESPONDENT

(CORAM: KAKURU,KIRYABWIRE, MADRAMA)

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my Brother Hon. Mr. Justice Christopher Madrama, JA in draft and I agree with the findings and final decisions and orders and have nothing more useful to add.

Dated at Kampala this 24th day of June 2020.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 138 OF 2013

(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

SWIFTSERVE ENTERPRISES LTD} .....APPELLANT

VERSUS

ANYAKU KHEMIS} .....RESPONDENT

(Appeal from the decision of Hon. Mr. Justice Yasin Nyanzi dated at Arua on 12th September, 2012 in HCCS No 2 of 2012)

JUDGMENT OF CHRISTOPHER MADRAMA

This appeal arises from the decision of the High Court Nyanzi J in which he dismissed the Appellant's suit under Order 6 rule 29 of the Civil Procedure Rules on the ground that the suit is not maintainable.

The background to the appeal is that the Plaintiff who is now the Appellant filed the suit against the Respondent on 25th January, 2012 for declaration that the Respondent is a trespasser on the land comprised in LRV 1597 Folio 9 Plot M. 34 Wadriff Road Arua, and for an eviction order against the Defendant, a permanent injunction, an order for the removal of a caveat wrongfully lodged by the Respondent forbidding the registration of any interest in the suit property, mesne profits, general damages, interest and costs of the suit. The facts disclosed in the plaint are that the Non-Performing Assets Recovery Trust as the successor of Uganda Commercial Bank sold the suit property to the Appellant upon default of the registered proprietor in the repayment of a loan secured by a legal mortgage on the suit property. The Appellant was registered as proprietor on 17th of March 2004. Upon

transfer of the suit property into the names of the Appellant, the non-performing assets recovery trust gave the Respondent 14 days' notice to vacate the suit property. However, the Appellant was unaware that around 23rd of July 2004, the Respondent lodged a caveat forbidding registration of any interest on the suit property in a capacity as proprietor. Secondly, the plaint alleged that the Respondent refused to vacate the suit premises.

In reply the Respondent in the written statement of defence averred that he would object to the suit on the ground that it is frivolous, vexatious and an abuse of court process. In paragraph 5, the Respondent averred that the property was claimed by one Lucy Azza and registered in the names of Tom Azza who were the Defendants in High Court Civil Suit No 0029 of 2006 and the matter awaited judgment of the court. In the premises, the Respondent averred that he had lodged a caveat to protect his interests in the suit property because the previous proprietor fraudulently got registered and the Plaintiff had constructive notice of the fraud. The written statement of defence is dated 29th of March 2012.

Further the Respondent counterclaimed against the Appellant for orders and declarations that the Appellant was registered on the property through fraud or that the Appellant had constructive notice of the fraud and for cancellation of title, general damages, interest and costs.

The suit did not proceed to the level of taking evidence because the Respondent's Counsel on 13th of July 2012 objected to it on the ground that the suit had been affected by the judgment and orders of the same court in HCCS No. 29 of 2006 between the Respondent and Lucy Azza and another. The Respondent's Counsel stated that the suit related to the same property and the Defendant/Respondent to the appeal had been declared the lawful owner and it was ordered that the Plaintiffs/Appellant's name be cancelled from the register and therefore the Appellants suit was no longer sustainable.

The Respondent's Counsel opposed the objection and argued *inter alia* that the Appellant could not be condemned unheard and that the Appellant should be given a chance to be heard in defence of the claim to the suit property.

The Respondent's Counsel in rejoinder argued that the Plaintiff/Appellant was aware of HCCS No. 29 of 2006 and ought to have applied to be joined therein as a party.

The trial judge considered the issue of whether the suit before him was sustainable in light of the judgment of the court in HCCS No 29 of 2006. He noted that in the judgment of the court delivered on 13th of July 2012, the High Court decreed that the Respondent who was the Plaintiff in that suit is the owner of the suit property and the names of the Defendants and any other proprietor be cancelled from the register of titles. Further that unknown to the court on 25th of January 2012, the Appellant had filed this suit against the Respondent. He relied on section 33 of the Judicature Act and held that in the former suit, there was evidence that the property had been transferred into the names of another person. However, it was also in the consideration of the learned trial judge that the decision would affect such other person. To avoid multiplicity of suits, the trial judge ordered that the names of the other 3rd parties, not parties to the suit also be cancelled. He further found that it would be contradictory for the High Court to declare the current Defendant/Respondent as the owner of the suit property and then turn round to hear a suit seeking orders that he be declared a trespasser and be evicted. Moreover, the court ordered the cancellation of 3rd parties from the register book and that the property reverts to the Respondent in this appeal. In the premises the learned trial judge held that the Appellant had no locus standi to continue with the suit and allowed the objection.

The Appellant was aggrieved by the decision and lodged an appeal in this court on 5 grounds of appeal as follows:

1. That the trial judge erred in law and fact in dismissing the Appellants suit without a fair trial or hearing when:
    a. He based his decision on Order 6 rule 29 of the Civil Procedure Rules on which none of the parties addressed court.
    b. He deliberately refused to hear the merits of the suit on the ground that the result would have no legal consequence.
    c. He had ordered cancellation of the Appellant's title in a suit to which the Appellant was not a party vide Civil Suit No29 of 2006 Khemis Anyaku versus Lucy Azza & Another.
2. That the trial judge erred in fact and law in allowing the Respondents counterclaim against the Appellant without hearing any evidence to prove fraud against the Appellant as required by law.
3. That the learned trial judge erred in law and fact in holding that the Appellant had no capacity to sue the Defendant in so far as its title had been cancelled in Civil Suit No 29 of 2006 Khemis Anyaku versus Lucy Azza & Another.
4. The trial judge misdirected himself on the principles of fraud in **Civil Appeal No 4 of 2006 F.J. K Zaabwe vs Orient Bank Ltd & 5 others** thus coming to a wrong conclusion that the Appellant's title to the suit land was liable for cancellation due to the alleged fraud of the former proprietor.
5. That the learned trial judge erred in law and fact when he ordered the Appellant to pay costs of the Respondent on the ground that the Appellant preferring the suit against the Respondent after being alerted in the written statement of defence was not the best option of the Appellant.

The Appellant prayed that the appeal is allowed and the decision and orders of the High Court set aside and the suit heard de novo before a different judge in Kampala. Finally, the Appellant prays for the costs of the suit to be provided for.

Due to the Covid 19 crisis, the court directed through the registrar of the court that it be addressed in written submissions. The Appellant is represented by Messieurs Waymo Advocates while the Respondent is represented by Messieurs Madira & Company Advocates.

Submissions of Counsel

After setting out the facts, the Appellants Counsel addressed the court on ground 3 of the appeal first.

Ground 3 is that: **That the learned trial judge erred in law and fact in holding that the Appellant had no capacity to sue the Defendant in so far as its title had been cancelled in Civil Suit No 29 of 2006 Khemis Anyaku versus Lucy Azza & Another.**

He submitted that Judgment in HCCS No. 29 of 2006 in which the title of the Appellant was cancelled was delivered on 13th of July 2012 about 6 months after the Appellant had filed the suit giving rise to this appeal before the same judge. He argued that the title of the Appellant had been cancelled when it had already filed the suit on 25th of January 2012. He submitted that the learned trial judge erred in holding that the Appellant had no capacity to sue on account of the court's order of cancellation which was made on 13th of July 2012 because the ruling could not have retrospective effect.

The Appellant's Counsel submitted that grounds 1, 2 & 4 concerned the denial of a fair hearing to the Appellant both in the main suit and in the counterclaim.

He submitted that there was evidence before the learned trial judge and which is referred to in his judgment at page 5 thereof that in HCCS No. 29 of 2006, he made an order for cancellation of the 2nd Defendant's name from the suit property when there was evidence that DW1 had obtained a loan against the title and defaulted and the property was sold by the bank. Following precedents referred to, he held that where contested property has already been transferred and registered in the names of other persons, the Supreme Court ordered that the registration be cancelled and the original position is to be restored (See **Nile Bank Ltd v Richard Desmond Kaggwa C.A. No. 7 of 2004** and **F.J.K Zabwe v Orient Bank S.C.C.A No 4 of 2006**). He ordered that the names of the 2nd Defendant or any other subsequent registered proprietor be cancelled from the register book. The learned trial judge relied on section 33 of the Judicature Act to justify the order against third parties on the ground that it seeks to avoid multiplicity of suits. Further learned Counsel referred to the written statement of defence which discloses the existence of High Court Civil Suit No29 of 2006 (the former suit).

The trial judge in the record of proceedings stated that the suit was pending Judgment which was due on 13th of July 2012. He noted that the two suits concerned the same property and before the current suit from which the appeal emanates, proceeded, it was better to await the pronouncement of the court in HCCS No. 29 of 2006. The instant suit from which the appeal emanates was adjourned to await the judgment of the same judge in HCCS No. 29 of 2006.

In the premises the Appellants Counsel submitted that there was no fair hearing because the learned trial judge determined not to hear the current suit from which the appeal emanates. Firstly, the learned trial judge knew that the registered proprietor was not a party to HCCS No. 29 of 2006. Secondly, he also knew that he was going to cancel the title of the Appellant without having heard from the Appellant in that suit. Thirdly, he declined to hear the

Appellant because he knew he had written a judgment cancelling the title of the Appellant. Fourthly, he adjourned the hearing of the suit 13th of July 2012 to deliver judgment in High Court Civil Suit No29 of 2006 so as to advise the Appellant on the legal implications of the judgment.

Further, he submitted that there was no fair hearing which is a right entrenched by articles 28 (1) & and 44 (c) of the Constitution of the Republic of Uganda. He submitted that the right to a fair hearing means hearing before condemning, the right to present evidence, cross examine witnesses (see **EPA No 4 of 2009 Baluba Peter Mukasa v Betty Namboze Bikireke, Constitutional Petition No 4 of 2006 Turyatemba & Others v Attorney General and another**).

The Appellant's Counsel submitted that because the Appellant was not a party to HCCS No 29 of 2006, the suit was not maintainable against it because a suit for recovery of land only lies against the registered proprietor according to **Kampala Bottlers Ltd versus Damanico (U) Ltd SCCA No 22 of 1992** as well as the provisions of sections 176 & 177 of the Registration of Titles Act. Counsel further submitted that the Plaintiff in HCCS No. 29 of 2006 never even prayed for cancellation of the title of the Appellant (who was not a party to the suit). He submitted that it was erroneous for the court to grant a relief which was not prayed for in the pleadings (see **Turyatemba and Others v Attorney General and another** (supra); **Fang Min v Belex Tours & Travels Ltd; SCCA number 6 of 2013**.) He submitted that the relief of cancellation of the title of the Appellants violated the right to be heard.

Further in **Zabwe v Orient Bank** (supra) there was no remedy against a 3rd party who was not a party to the suit. The Appellant's Counsel further submitted that section 33 of the Judicature Act does not empower the court to make conclusive orders against 3rd parties. He submitted that the court can only make orders against parties to the suit. In any case the right to a fair

hearing would be violated if an order was made against a party not in the suit contrary to articles 28 and the 44 (c) of the Constitution of the Republic of Uganda.

Counsel further submitted that the legal effect of the order cancelling the title of the Appellants without being heard is that the order is null and void ab initio. The Appellants Counsel submitted on other issues that I need not go into.

The Respondents submissions contain a detailed background of how the case proceeded and was decided on a preliminary point of law. I have read the detailed facts which had not need to repeat here. It is the duty of this court to reappraise the evidence on the record inclusive of steps taken in the proceedings.

In his written submissions in reply, the Respondent's Counsel adopted his conferencing notes and submitted that the main issues for determination by this court are only 2 namely:

1. Whether the trial judge was entitled to dismiss the suit as he did under Order 6 rule 29 of the Civil Procedure Rules, and if so,
2. Whether the Appellants were given a hearing before the suit was dismissed by the learned trial judge.

I have tried to follow and consider the arguments in the conferencing notes and the written submissions as stated in the written submissions.

Issues 1 and 2 in the joint conferencing memorandum deal with fair hearing and the issue of whether the learned trial judge allowed the Respondent's counterclaim against the Appellant without giving the Appellant a fair hearing. This covers grounds 1 and 2 of the appeal.

The Respondents Counsel submitted that the trial court had powers to make the orders under the law. He relied on article 129 of the Constitution of the Republic of Uganda which establishes courts of judicature. Secondly, he relied on article 139 of the Constitution of the Republic of Uganda and section 13 of the Judicature Act for the proposition that the High Court is vested with original jurisdiction in all matters and causes and such appellate and other jurisdiction as may be conferred on it by the Constitution and any other law. Further, that the High Court had powers or jurisdiction vested in it to grant absolutely or on such terms and conditions as it thinks fit all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim, cause or matter, properly brought before it.

The Respondent's Counsel submitted that under section 98 of the Civil Procedure Act, the court has inherent powers to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of court. He submitted that the jurisdiction vested in the High Court by the Constitution or any other law is supposed to be exercised in accordance with the practice and procedure provided by law or such rules and orders of the court as may be made under the law or any other enactment.

With regard to failure to adhere to the rules of procedure under Order 6 Rule 29 of the Civil Procedure Rules and section 33 of the Judicature Act, he submitted that the learned trial judge was right to dismiss the suit without hearing it on the merits under the above cited rules. He submitted that there is no legal requirement that restricts the discretionary power of court to apply any law. Courts have mandate to adjudicate cases in accordance with any relevant law and the court may on its own motion apply any law that it considers relevant to resolve the issue before it and does not have to be moved by any of the parties to do so.

The Respondent's Counsel submitted that as a matter of fact when the suit was called for hearing on 12 September 2012, the Appellants Counsel did not appear in court and the court allowed an application by the Appellant's representative to adjourn the hearing and the suit was accordingly adjourned to 13th of July 2012. The parties were required to appear on 13th of July 2012 to attend and hear the delivery of the judgment in High Court Civil Suit No29 of 2006 which judgment was said to have a direct bearing on the merits of the Appellants suit. Thereafter judgment was read in the presence of all parties on 13th of July 2012.

The Respondent's Counsel further submitted that the Appellant's advocates were given opportunity to address the court and submit on the objections raised by the Respondent's Counsel in the suit from which this appeal arises. The trial judge found that the Appellant's suit was substantially affected by the decision in HCCS No. 29 of 2006 and dismissed the suit under Order 6 rule 29 of the Civil Procedure Rules which he was entitled to do in the circumstances. He further contended that the Appellant was given a fair hearing and opportunity to be heard on the issue framed by the judge before the its suit was dismissed. The trial judge correctly declined to hear the suit on the merits because the hearing would have no legal consequence and be a waste of courts time, the merits having been over taken by the decision of the High Court in HCCS No. 29 of 2006. The Respondent's Counsel further submitted that the court has wide discretionary powers under Order 6 rule 29 of the Civil Procedure Rules and section 33 of the Judicature Act to make any orders to meet the ends of justice and as the circumstances of the case may dictate. He contended that to limit the powers of the court would be to deny a successful and deserving litigant justice. The Appellant's Counsel further submitted that it would be defeating the purpose of section 33 of the Judicature Act Cap 13 whose intention is to reduce multiplicity of suits concerning the same parties and the same subject matter, to maintain the

Appellants suit. Further, the Respondent's Counsel submitted that it was not in dispute that in HCCS No 29 of 2006, the learned trial judge had already ordered for the cancellation of the name of the Defendants or any person to whom the property was subsequently transferred based on the Supreme Court authorities in **Nile Bank Ltd v Richard Desmond Kaggwa SCCA No. 7 of 2004** and **F.J.K Zaabwe v Orient Bank & 5 others SCCA No 04 of 2006.** In the premises, he submitted that the cancellation of the Defendant's certificate of title was a consequential relief that the court was entitled to grant under Order 6 Rule 29 of the Civil Procedure Rules to meet the ends of justice

The Respondent's Counsel submitted that it would be a mockery of justice and a contradiction for the same court of law to declare the Respondent the lawful owner of the suit property and at the same time turnaround in another suit over the same subject matter to declare him a trespasser and to order for his eviction.

The Respondents Counsel further submitted that under Order 2 rule 9 of the Civil Procedure Rules, the court is entitled to make any declarations of right under the law. The trial court took into account and give effect to the consideration that a person who comes to court must get an effective remedy. Further, the Respondents Counsel submitted that Arua Municipality is a small town and the disputed property is a notorious dilapidated structure that was well-known. He contended that by refusing to join the original HCCS No 29 of 2006 as co-Defendants on a matter affecting their interest, which was duly brought to their attention, the Appellants shot themselves in the foot and have no one to blame.

With regard to the 2nd issue as to whether the Appellants were accorded a hearing before the suit was dismissed, the Appellants were heard. The Respondents Counsel submitted that the learned trial judge was alive to the

right of a fair hearing under article 28 of the Constitution of the Republic of Uganda and the Appellants were accorded them opportunity to be heard as can be established from the record.

The Respondent's Counsel made reference to the chronology of events leading to the dismissal of the Appellant's suit. He submitted that it was clear from the record that the Appellant was accorded a fair hearing and afforded all the opportunities to be heard before a decision was judiciously taken to dismiss the suit.

The Respondent's Counsel disagreed with the contention that the suit ought to have been heard on the merits before a decision is made by the court to dismiss it. He submitted that there is no absolute right to be heard on the merits of the case. What is required in the Constitution is a right to a fair hearing in accordance with the law. Order 6 rule 29 of the Civil Procedure Rules allows a matter to be disposed as stipulated thereunder. He submitted that there was no absolute right for the matter to be heard on the merits as long as the court judicially exercises its discretion in the matter in accordance with the law and the trial judge rightly invoked order 6 rule 29 of the Civil Procedure Rules to dismiss the suit.

Reply to agreed issues 3 and 4

The Respondents Counsel submitted that the Appellants were not a party to the original suit but were made aware of the pending suit HCCS No. 29 of 2006 which had a direct bearing on the merits of the Appellant suit. The suit was between the Respondent and the former proprietors Tom Azza and Lucy Azza but the Appellant chose to ignore the same.

The Respondent's Counsel submitted that it is not disputed that the Respondent is the original lawful owner of the suit property and he was fraudulently disposed of it. Upon tracing the route of the fraudulent transfer

to the former proprietor, the court was right to order cancellation of title of any person registered as a proprietor. He further submitted that the Appellant had actual and constructive notice of the fraud committed by the 1st registered proprietor. This is because the Respondent had been in actual physical possession of the suit property since 1975 to date save for the period between 1979 and 1984 when he was in exile in the Democratic Republic of the Congo. Moreover, the suit property is located within Arua municipality where the Appellant operates its business.

The learned trial judge correctly evaluated the principles of law in **Civil Appeal No 4 of 2006; F.J.K Zabwe versus Orient bank and 5 others** and rightly cancelled the title due to the fraud of the former proprietors. The court also correctly based its decision on the orders issued by the Supreme Court in a similar case of **Nile bank Ltd versus Richard Desmond Kaggwa; CA number 7 of 2004** as well as the provisions of section 33 of the Judicature Act.

The Respondents Counsel submitted that the learned trial judge averted causing greater miscarriage of justice to the Respondent by dismissing the Appellants suit. He submitted that the Appellant has never been in possession of the suit property let alone made an attempt to take possession of the suit property. He contended that the Appellant has at all material times been aware of the Respondent's interest in the suit property but waited for over 8 years to file this suit.

Counsel further submitted that the Respondent was not aware of the Appellant's interest in the suit property and the Respondent after learning of the fraudulent transfer and registration of his property lodged a caveat on the certificate of title. At the material time the Respondent was not aware that the suit property was registered in the names of the present Appellants.

(There is no need to refer to the submissions as refer to evidence since the suit was never heard on the merits and no evidence was taken).

Resolution of appeal

I have carefully considered the record of appeal, the submissions of Counsel, the pleadings in the High Court as well as the judgment of the trial court and the law. In the record of appeal there is no copy of the judgment delivered in High Court Civil Suit No 0029 of 2006 **Anyaku Khemis v Lucy Azza and Another** (hereinafter referred to as the former suit). This is a fundamental issue in light of the judgment of the High Court in the suit from which this appeal emanates namely **HCCS No. 002 of 2012 Swiftserve Enterprises Ltd versus Anyaku Khemis**. The judgment appealed against in this appeal discloses that the former suit was decided on 13th July, 2012. The suit, from which the current appeal arises was filed in court on 25th of January 2012 about six months earlier. The judgment in the former suit is important in light of the provisions of law on stay of suits under section 6 of the Civil Procedure Act, consolidation of suits under Order 11 of the Civil Procedure Rules as well as the law on reviews of judgments under section 82 of the Civil Procedure Act.

Ground 1 of the appeal essentially discloses a point of law or points of law which require consideration of the judgment in the former suit.

In the joint scheduling memorandum signed by Counsel of the parties and filed on 26th of November 2013, the lawyers of both parties wrote that the issues for determination in this appeal are:

- Whether the trial court erred in law and fact in dismissing the Appellants suit without a fair hearing/trial?

- Whether the trial court erred in law and fact in allowing the Respondents counterclaim against the Appellant without a fair hearing/trial?

The Appellant broke down ground 1 of the appeal into sub paragraphs which assert different points under the main assertion that the learned trial judge erred in law and fact in dismissing the Appellants suit without a fair trial or hearing when he based his decision on Order 6 rule 29 of the Civil Procedure Rules. This first averment discloses a procedural question as to whether the preliminary objection was properly determined under the rules of procedure. Even though it is stated as part of ground 1 of the appeal, it is fundamentally a separate ground of appeal and ought to have been numbered separately and not as a subset of the main ground of appeal. The rest of the averments in ground 1 of the appeal give the basis for the assertion in the main ground of appeal which is against the fact of dismissing the Appellants suit without a hearing on the merits. Thirdly ground 1 (c) which complains about cancellation of the Appellants title in the suit to which the Appellant was not a party (the former suit namely Civil Suit No 29 of 2006) complains about an order in a separate suit which is not before this court in that it has not been appealed to this court.

Ground 2 of the appeal is a repetition of the same point that the learned trial judge erred in law and in fact in allowing the Respondents counterclaim against the Appellant without hearing any evidence to prove fraud against the Appellant as required by law. If the certificate of title to the suit property of the Appellant had already been cancelled in the former suit, the counterclaim was superfluous and could not add anything to the decree in the former suit in which the Appellant's title had been cancelled. The details of the former suit are contained at page 4 of the judgment from which this appeal emanates in which the learned trial judge stated that the court on 13th of July 2012 ordered that the names of the 2nd Defendant in High Court Civil

Suit No 29 of 2006 or any other proprietor in whose names it is transferred be cancelled from the register leaving the Plaintiff free to register his land if he so desired. The effect of that order is that only the names of the Respondent who was the Plaintiff in that suit was supposed to be left or in the very least the property transferred in the names of the Respondent who was the Plaintiff in HCCS No 29 of 2006.

Going back to ground 1 of the appeal, the Appellant filed written submissions in which he addressed the court on ground 3 first. Ground 3 is to the effect that the learned trial judge erred in law and fact in holding that the Appellant had no capacity to sue the Defendant in so far as its title had been cancelled in **Civil Suit No 29 of 2006; Khemis Anyaku vs Lucy Azza and another**.

It is therefore apparent that the grounds 1, and 3 are intertwined. The grounds deal with the question of whether the matter was properly decided on a preliminary point of law. The issue of locus standi upon cancellation of the title of the Appellant in another suit is just an amplification of the issue of whether the Appellant had a right of hearing which had been violated.

It is the general duty of this court as a first appellate court to reappraise the evidence on record as stipulated by Rule 30 (1) (a) of the Rules of this court which provides that:

> 30. Power to reappraise evidence and to take additional evidence
> (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—
>
> (a) reappraise the evidence and draw inferences of fact; and ···

In **Peters v Sunday Post Ltd [1958] 1 EA 424** at page 429, the East African Court of Appeal held that it is the duty of a first appellate court to:

> ···review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be

exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.

I have carefully gone through the pleadings of the parties as well as the evidence. The Judgment from which this appeal emanates was decided on a preliminary point of law without any of the parties adducing evidence. It must be supposed that it could only be decided on the basis of the pleadings of the parties. The record of appeal shows that the evidence before the learned trial judge was a judgment in a former suit decided in July 2012, though there is no copy of this judgment on record.

The learned trial judge in his judgment clearly discloses that he had decided a former suit to which the Appellant is not a party namely HCCS No 29 of 2006 involving the same suit property. It was only the Respondent who was a party as Plaintiff against Lucy Azza and Tom Aleru who were the former registered owners of the suit property before it was transferred to the Appellant by the Non-Performing Assets Recovery Trust (NPART). The judgment shows that it was within the knowledge of the learned trial judge that the property had been used as collateral by one Tom Azza and when Tom Azza failed to service the loan, the property was transferred into the hands of the Non-Performing Assets Recovery Trust (NPART) (also hereinafter referred to as the trustees) who were the managers of the assets of the defunct Uganda Commercial Bank. It was the trustees who sold the property to the Appellant whereupon the Appellants sued the Respondent in trespass. By the time of the filing of the suit in January 2012, the Appellant was the registered owner of the suit property. There was a parallel suit which had been filed in 2006 with the Respondent as the Plaintiff and Lucy Azza and Tom Alero, a former registered owner as the Defendants. This was in HCCS No 29/2006. That former suit was heard by the same trial judge who was seized of both facts in the suit from which this appeal emanates and the former suit which he decided in July 2012.

In dismissing the Appellants suit, this is what the learned trial judge said:

> In that suit evidence came to me that the disputed property had been transferred to another person. It was highly probable that the judgment would affect such person. So, in determining the matter conclusively and avoid multiple suits in court the order had to cover such proprietor. I based my reason on the cases of the Supreme Court as cited.
>
> Allowing the present suit to continue would be defeating the purpose of section 33 of the Judicature Act on the issue of making decisions by the High Court with the intent of reducing multiplicity of suits.
>
> Secondly it would be contradictory for this court to declare the current Defendant the owner of the suit property and then turn around and hear the suit seeking orders that he be declared a trespasser and be evicted. The two cannot be achieved at the same time.
>
> Thirdly this court ordered the cancellation of the 2nd Defendant or any current proprietor from the register book and if the Plaintiff in HCCS No 29 of 2006 wishes to apply for a lease, he proceeds to do so.
>
> By virtue of that order alone, the current Plaintiff has no local capacity to institute a suit when its registration is cancelled by a court order. Paragraph 4 (ii) of the plaint states that the Plaintiff is the registered proprietor of the suit land and sought to rely on the title attached as Annexure "A". This Annexure is a photocopy of the leasehold title under LRV 1597 Folio 9. Where the Plaintiff appears as the registered owner.
>
> It is the above registration that this court ordered to be cancelled. That is why the Plaintiff's suit should have no basis upon which it is brought when the proprietorship is cancelled. As a result, I hold that although it is true under the law that the Plaintiff has the right to be heard, allowing him to proceed with the case when knowing the results would have no legal consequence in light of this court's decision in HCCS No 29 of 2006 would defeat S. 33 of the Judicature Act.

I will start with the procedural issues disclosed by ground 1 of the appeal. This is whether the suit of the Appellant was lawfully dismissed under Order 6 Rule 29 of the Civil Procedure Rules.

Generally, a suit can be decided on the basis of the pleadings or on a point of law after adducing some evidence or after agreeing on the facts. We extensively dealt with this issue in **Herbert Walusimbi, Mpanga Tony, St. Noa Junior Boarding School and St Noa Girls Secondary School versus Senyimba Charles t/a Charleston General Auctioneers, Ssebagala Richard, Robert Ssekidde and Margaret Ssekidde; Court of Appeal Civil Appeal No 86 Of 2013.** In that decision, the court noted that Order 6 rule 29 of the Civil Procedure Rules as disclosed in the head note is about dismissal of a suit. A suit is dismissed when facts averred show that it is not maintainable. Order 6 rule 29 of the Civil Procedure Rules provides that:

> If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.

Order 6 rule 29 of the CPR is preceded by Rule 28 which deals with the pleadings of a point of law and provides that:

> Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing.

Order 6 rule 29 of the CPR presupposes that the plaint discloses a cause of action because the provision that a plaint be rejected for disclosing no cause of action is mandatory. A plaint is rejected under Order 7 rule 11 of the Civil Procedure Rules and upon a perusal of the plaint and anything attached to

it forming part of the plaint. It does not require perusal of the written statement of defence. In **Kiggundu v Attorney General Civil Appeal NO 27 of 1993,** the Court of Appeal of Uganda, held that a distinction has to be made between the rejection of a plaint and a point of law set down as a preliminary point of law that the suit cannot be maintained.

In **Major General David Tinyefunza v the Attorney General of Uganda**; **Constitutional Appeal No. 1 of 1997** Wambuzi C. J held that the question of whether a plaint discloses a cause of action is considered upon a perusal of the plaint only as stated in numerous other authorities.

In **Attorney General v Oluoch [1972] EA 392**, it was held that the question whether a plaint discloses a cause of action is determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any allegations or implied allegations of fact in it are true. In **Jeraj Shariff v Fancy Stores [1960] 1 EA 374,** the East African Court of Appeal per Windham JA held that:

> The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.

The Supreme Court in **Ismail Serugo vs Kampala City Council & the Attorney General; Constitutional Appeal No. 2 of 1998** in the judgment of Wambuzi CJ at pages 2 and 3 considered the provisions of Order 7 rule 11 and Order 6 rule 29 of the Civil Procedure Rules and held that:

> I agree that in either case, that is whether or not there is a cause of action under Order 7 Rule 11 or a reasonable cause of action under Order 6 Rule 29 only the plaint can be looked at...

Mulenga JSC also distinguished between Order 7 rule 11 of the Civil Procedure Rules and Order 6 rule 29 and cited with approval the decision of

the East African Court of Appeal in **Nurdin Ali Dewji & others v G.M.M Meghji & Co. and Others (1953) 20 EACA 132** for the distinction.

In **Nurdin Ali Dewji and others v G.M.M Meghji & Co and Others** the East African Court of Appeal held that the learned trial judge overlooked the distinction between rejection of a plaint under Order 7 rule 11 of the Civil Procedure Rules and the dismissal on an issue of law under Order 14 rule 2 (equivalent to Order 15 rule 2 of the Ugandan Civil Procedure Rules). He noted that the Defendant had pleaded that the plaint disclosed no cause of action and the learned trial judge allowed this to be taken as a preliminary point at the commencement of the trial. However, there was an objection to the suit on a point of law and the final result was that the learned judge rejected the plaint not on the ground of an inherent defect in the plaint but because he thought that the suit was unmaintainable.

It follows that any point of law will not survive for argument if it can be shown that the plaint discloses no cause of action. Arguing a point of law under Order 6 rule 29 presupposes that the plaint discloses a cause of action in case the plaint is not rejected and the suit may be dismissed on a point of law. Such a point of law can be raised in the written statement of defence of the Defendant. In contrast a plaint can be rejected under Order 7 rule 11 (d) on the ground that it is barred and proceeds from a perusal of the plaint alone while arguments that the suit cannot be maintained proceed under Order 6 rule 29 and Order 15 rule 2 of the Civil Procedure Rules.

The point of law envisaged in Order 6 rule 29 of the Civil Procedure Rules is a point of law averred in the pleadings of any of the parties or any point of law set down by consent of parties or by order of the court. Rule 29 gives the court power to ascertain and determine whether any point of law raised by any of the parties would wholly or substantially dispose of the whole suit

whereupon the court would try it first under Order 15 rule 2 of the Civil Procedure Rules.

The point of law not determined on the basis of plaint under Order 7 rule 11 of the CPR ought to be raised by formal application by notice of motion or by order of court or by consent of parties.

In this case the two suits HCCS No. 29 of 2006 and HCCS No. 002 of 2012 were not consolidated yet they involved the same subject matter and one of the parties was a party to both suits. The Respondent to this appeal was the Plaintiff in the former suit as well as a Defendant in the suit from which this appeal emanates. Consolidation of suits under the provisions of Order 11 of the Civil Procedure Rules is meant to avoid a multiplicity of suits and also avoid a miscarriage of justice where one suit would affect the other. Order 11 rule 1 of the Civil Procedure Rules provides as follows:

> 1. Consolidation of suits.
>
> Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit—
>
> (a) order a consolidation of those suits; and
>
> (b) direct that further proceedings in any of the suits be stayed until further order.

In the circumstances of this case, the Appellant claimed to be the registered proprietor of the suit property and that was the foundation of the suit for trespass and eviction of the Respondent. On the other hand, it is on record that the former suit HCCS No 29 of 2006 had the Respondent as the Plaintiff against 3rd parties who had been registered thereon as proprietors.

Noteworthy is the fact that a suit for cancelation of title proceeds against the registered proprietor who according to the evidence before court is the

Appellant. The Respondent sought cancellation of title to the suit property in another suit and in theory the suit could not get him a remedy as cancellation proceedings on the ground of fraud under section 176 of the Registration of Titles Act and fraud has to be alleged against the transferee in title according to the Supreme Court Decision in **Kampala Bottlers v Damanico** (supra). Order 11 rule 1 of the Civil Procedure Rules allows the court on its own motion to order consolidation of suits. It was apparent to the learned trial judge that the question of proprietorship was in dispute in the former suit and in the suit from which the appeal emanates. In those circumstances it was unjust to proceed to hear the former suit and determine rights to proprietorship which was the foundation of the suit for trespass against the Respondent in the suit from which the appeal emanates without a hearing.

Having said that, I agree with the Appellants Counsel that at the time the Appellant filed this suit, HCCS No. 29 of 2006 had not been determined and it was within the power of the learned trial judge to hear both suits or to order on his own motion the consolidation of the suits. In any case the question of locus standi could not arise because the Appellant relied on its registered proprietorship having acquired title from the Non-Performing Assets Recovery Trust when it filed the suit. Moreover, it was the upon the Respondent to sue the Appellant rather than for the Appellant to apply to be joined as a party to HCCS No 29 of 2006. At the very best, the determination of the current suit from which the appeal emanates ought to have been stayed pending any application by the Appellant for review of the Judgment in HCCS No. 29 of 2006 but there was no application for review of the judgment. That was the only way in which the rights of the Appellant could be determined vis-à-vis the rights of the Respondent to the same suit property. On the other hand, to determine the rights of the Appellant on the basis of a decision in a suit in which he was not a party and which decision

was made after the Appellant had filed his suit and about 6 months later occasioned a miscarriage of justice and robbed the Appellant of his right of hearing vis-à-vis the Respondents assertion that he is the true owner of the suit property. Moreover, the question of the true ownership of the property by the Respondent was in issue as asserted in the counterclaim in which the Respondent prayed for cancellation of the Appellants title. Such cancellation could only proceed on the basis of the Respondents counterclaim and after hearing the suit. Yet the cancellation is said to have proceeded in another suit to which the Appellant is not a party.

Further, the Appellant's rights were determined on the basis of the knowledge of the learned trial judge and therefore on the basis of evidence that was adduced in another suit to which the Appellant is not a party.

Without much ado, the right of the Appellant to a hearing was violated. It follows that grounds 1, 3, of the appeal have merit and are allowed. Ground 1 substantially deals with the dismissal of the Appellants suit without a hearing. Ground 3 substantially deals with the holding that the Appellant had no capacity to sue the Defendant in so far as his title had been cancelled in Civil Suit No. 29 of 2006. The Appellants title was cancelled without a hearing when it was the foundation of the suit. The title was cancelled when the suit was pending and therefore it could not be held that the Appellant had no locus standi because it was the registered proprietor at the time it commenced the suit. It was the learned trial judge who cancelled the title without hearing the Appellant when he was aware that the Appellant was the registered proprietor. The learned trial judge proceeded to cancel the title which formed the foundation of the Appellants suit in HCCS No. 002 of 2012. Moreover, the Appellant sought an eviction order as the registered proprietor of the suit property.

I have carefully considered the fact that the question of proprietorship is crucial in determining the rights of the parties. Secondly, I have carefully considered the fact that the former suit was decided after the learned trial judge was aware of the current suit from which the appeal emanates. Thirdly, the Appellant was robbed of a chance to prove bona fides (if any) it may have in purchasing the suit property. The facts which were available to the learned trial judge showed that the suit property had been sold by trustees of the defunct UCB to the Appellant.

Documents attached to the counterclaim in the suit from which this appeal emanates indicate that the property was registered in the names of one Tom Alero in 1987 and it is a leasehold issued by the controlling authority then for 49 years. The lessor is Arua Municipal Council. The encumbrance page shows that there was a caveat by the Non-Performing Assets Recovery Trust lodged on the suit property on 25th of June 1997. On 23rd of July 2004 the title shows that there is registered therein another caveat by the Respondent. On 28th of August 2006 there is yet another caveat by DFCU bank Ltd. Secondly, the Respondent in the counterclaim included attachments among which is a letter dated 22nd of June 2004 indicating that the suit property had been sold by the Non-Performing Assets Recovery Trust to the Appellant. The Respondent in the counterclaim also attached a caveat dated 19th of July 2004 in which he claimed interest as the rightful owner of the land in dispute.

In the statutory declaration in support of the caveat the Respondent stated as follows:

> 2. That I am the rightful proprietor of the above-mentioned land and staying on the same land.
>
> 3. That I was granted the above property by the controlling authority in 1975 and went ahead to develop it fully.

4. That in or around 1980 I fell mentally sick while in Sudan and in exile;

5. That in 1989 I was confronted with documents of sale of my land, whose contents took me by surprise, and I reported the matter to the ICS, Bibia Village I.C.I committees court which resolved that the property be returned to me as the sale was fraudulent since I had been of unsound mind at the time of signing. The copy of the proceedings is hereto attached.

6. That in 1991 while I suffered from unsound mind the alleged "Purchaser" Tom Alero fraudulently obtained a loan, which are used to build a school on security of my learned, which he had failed to pay to date.···

The documents clearly disclose on the face of the pleadings that the property had been sold by the Non-Performing Assets Recovery Trust to the Appellant. The documents also disclose prima facie that Tom Alero had borrowed money on the security of the property which was registered in his names since 1987. Finally, the record clearly indicates on the face of the registered title attached by the Respondent in his pleadings that the encumbrance of a caveat by the Non-Performing Assets Recovery Trust was cancelled because it was satisfied by sale. The controlling authority which leased the property was not a party to the suit in which the Appellants title was cancelled. Non-Performing Assets Recovery Trust was not a party to the said suit. The Non-Performing Assets Recovery Trust is a corporation formed under the Non-Performing Assets Recovery Trust Act Cap 95 laws of Uganda 2000 to inter alia hold all assets of the defunct Uganda Commercial Bank in trust for the Government of Uganda.

The question of the sale of the assets of the Appellant could not be tried in the Appellants suit for trespass and from which this appeal emanates but rather ought to be tried in the suit in which the proprietorship of the

borrowers was in issue. This is in HCCS No. 29 of 2006. In any case the remedy of cancellation has to proceed against a registered proprietor i.e. the appellant in whose names the certificate of title had been transferred.

The suit, HCCS No 29 of 2006, ought not to be for consideration in this appeal. However, it was used to determine the Appellant's suit by the learned trial judge. Without going into the merits of the suit, the facts disclosed in the pleadings of the Respondent in the record of appeal by way of counterclaim demonstrate that the suit property was sold by the Non-Performing Assets Recovery Trust and the facts of the former suit disclosed in the pleadings show that the Non-Performing Assets Recovery Trust was not a party to HCCS No. 29 of 2006.

I have carefully considered ground 2 of the appeal which challenges the holding of the learned trial judge allowing the counterclaim of the Respondent without any evidence to prove fraud against him.

It is reported in the judgment of the learned trial judge that the title of the Appellant was cancelled in HCCS No. 29 of 2006. In the premises the matter cannot be handled in this appeal and ground 2 of the appeal has no basis in the judgment appealed against.

Having determined grounds 1, 2, and 3 of the appeal, there is no need to determine ground 4 of the appeal on whether the learned trial judge followed the principles of law stated in **the Supreme Court decision of F.J.K Zabwe v Orient Bank & 5 Others; SCCA No. 4 of 2006**. Suffice it to state that I agree with the Appellant's Counsel that the Respondents against whom a decision was made in **F.J.K Zabwe** (supra) were parties to the appeal. The decision is therefore distinguishable from the facts of this appeal where the Appellant who was a registered proprietor was not heard and was not a party by the time its title to the suit property was cancelled. The right of hearing cannot be derogated from under article 28 (1) of the Constitution of the

Republic of Uganda as well as article 44 (c) of the Constitution of the Republic of Uganda.

Ground 5 of the appeal is about the award of costs in the lower court against the Appellant. Costs follow the event unless otherwise ordered by court. Upon setting aside the decision of the High Court, the costs ordered against the Appellant will be considered in this appeal and I will consider it last.

I would allow the appeal and consequently the question of costs can be dealt with. I hold that the judgment of the learned trial judge is hereby set aside. However, the learned trial judge was right to hold that the suit of the Appellant had been affected by the decision in HCCS No. 29 of 2006 in which the title of the Appellant to the suit property had been cancelled. The judgment in HCCS No. 29 of 2006 purported to determine the right of the Appellant to proprietorship in the current suit when it was not a party and when its suit had been filed before that decision. Secondly, the matter was decided by the same judge who was seized of the facts of proprietorship in both suits before making a decision in one of them.

The best course open to the Appellant would have been to apply for review of HCCS No. 29 of 2006 but the Appellant's suit was filed before HCCS No. 29 of 2006 was decided and therefore it would be unjust to leave the situation as it is.

This court has jurisdiction under section 2 (2) of the Rules of this court to make such orders as may be necessary for obtaining the ends of justice or to prevent abuse of the process of court or to set aside judgments that have been proved to be null and void.

The Respondent who was the Plaintiff in HCCS No 29 of 2006 is a party to this appeal and is not prejudiced if an order is made in relation to HCCS No 29 of 2006 as between him and the Appellant since he obtained an order

against the Appellant in that suit without the Appellant being a party to the suit or being heard. In any case he had counterclaimed for cancellation of the Appellant's title in the suit leading to the instant appeal.

In the circumstances, it is in the interest of justice that the judgment in HCCS No 29 of 2006 in so far as it cancels the title of the Appellant and was decided in disregard of the proprietorship of the Appellant and rights allegedly vested in and the sale by NPART is hereby set aside. For emphasis, any part of the judgment which affects the rights of the Appellant to proprietorship of the suit property is hereby set aside pending hearing of the Appellants suit afresh.

Exercising the jurisdiction of this court under section 11 of the Judicature Act, I order that the remainder of HCCS No 29 of 2006 be consolidated with HCCS No 002 of 2012 and the parties shall be allowed to amend their pleadings accordingly under the direction of the High Court.

Each party will bear its/his own costs of and suit in the High Court and the Appellant is awarded the costs of this appeal.

Dated at Kampala the 24th day of June 2020

Christopher Madrama Izama

Justice of Appeal