THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CONSOLIDATED CIVIL APPEALS NOS. 43 & 47 OF 2009

1. **KAMPALA CITY COUNCIL**
2. **VICTOR KAISINGA**
3. **GENSIA BATETA::APPELLANTS**

VERSUS

NANTUME SHAMIRAH::RESPONDENT

(Appeal arising from the decision of the High Court of Uganda at Kampala before His Lordship Hon. Justice Anup Singh Choudry dated 30.03.2009)

JUDGMENT OF HELLEN OBURA, JA

Introduction

This is an appeal against the decision of Hon. Anup Singh Choudry, J. delivered on 30.03.2009 in which he found in favour of the respondent.

Background to the appeal

The brief facts to this appeal as ascertained from the record are that the respondent, being a minor at the time, sued the 1st appellant Kampala City Council (KCC) together with two other minors, namely; Victor Kaisinga (2nd appellant) and Gensia Bateta (3rd appellant) for breach of a tenancy agreement in respect of lock-up shops in Nakivubo. The respondent claimed that the 1st appellant fraudulently transferred the respondent's lock up shops to the 2nd and 3rd appellants.

On 12/11/2008 the trial court directed counsel for all the parties to file skeleton arguments with authorities addressing the court on the following issues relating to capacity of the parties;

1. Whether City Council could have contracted with a minor to hold a tenancy.
2. Whether a minor can hold a tenancy of a property or shop.
3. Whether a minor can transfer her interest in the tenancy to another minor.
4. Whether any sale agreement or transfer agreement of the Tenancy between minor to minor is binding or not.

On 12/02/2009 when the matter came up, counsel for the appellants informed court that they had filed their respective skeleton arguments in which they had raised a preliminary point of law in respect of the plaintiff's capacity to bring a suit in her name as a minor without complying with Order 32 rule 1 of the Civil Procedure Rules (CPR). They said they had not addressed the 4 issues raised by court because in their view the propriety of the suit needed to first be determined. The trial court said a preliminary point of law could be raised at any time during the proceedings and so if counsel for the appellants wanted to raise another preliminary point they could not be stopped. He therefore told counsel for the respondent to deal with the skeleton arguments of counsel for the appellants and come back to court the following week on 27/02/2009.

The gist of counsel for the appellants' arguments were that the respondent was a minor at the time of filing the plaint and therefore her plaint was incompetent because it was not instituted by her next friend and it lacked signed authority by the next friend. It was also argued that the suit was improperly instituted against the 2nd and 3rd appellants because they being minors, the respondent should have applied to have a guardian ad litem appointed for them in accordance with Order 32 rule 3 of the CPR, but this was not done.

Counsel for the respondent in his reply argued that it would be unjust for court to dismiss the respondent's case on a technicality the parties having agreed to be bound by a hand writing expert's report which established that the documents for sale of the lock up shop to the 2nd and 3rd appellants were forgeries. Counsel further argued that the preliminary point raised on age of

the respondent was both legal and factual. As such it required to be proved by evidence adduced by the person alleging before a legal objection could be raised. He contended that the appellants had neither raised the matter in their pleadings nor adduced evidence in support of the objection. He pointed out that the case had been in court for over 2 years and many steps had been taken by court in the progress of the case and so it would be unjust to allow the appellants to raise the preliminary objection. Counsel concluded that, in any event, the objection was curable by Article 126 (2) (e) of the Constitution which supersedes any provisions cited by the appellants.

The trial court overruled the preliminary objection on the ground that the issue of propriety of the suit should have been challenged when the proceedings were issued and that even then any procedural defect could have been cured under Article 126 (2) (e) of the Constitution which he erroneously indicated as Article 162 (2). The learned trial Judge then proceeded to determine the case based on the handwriting expert's report on the court record and found in favour of the respondent.

The appellants being aggrieved with the decision of the learned trial Judge filed two appeals in this Court vide *Civil Appeal No.43 of 2009* by the 2nd and 3rd appellants and *Civil Appeal No. 47 of 2009* by the 1st appellant.

Grounds of appeal

The grounds upon which this appeal is premised are as follows:

1. *"The learned trial Judge erred in law when he delivered his judgment when the suit had been adjourned for the respondent to make a response to the appellants' preliminary points of law on the propriety of the suit before him.*

2. *The learned trial Judge erred in law and fact when he proceeded to make pronouncements on the main suit without disposing of the preliminary points of law which had been raised by the appellants on the propriety of the main suit.*

3. *The learned trial Judge erred in law when he held that the appellants ought to have challenged issues of propriety when the proceedings were issued and that non attachment of authority of next friend by a minor to the Respondent's plaint was a mere procedural defect which could be cured by Article 162(2) (sic) [126(2) e] of the Constitution.*

4. *The learned trial Judge erred in law and fact when he passed judgment in favour of the respondent without hearing evidence of the appellants thereby denying the appellants a fair trial.*

5. *The learned trial Judge erred in law and fact when he solely relied on the hand writing expert's opinion to hold that the contract between the respondent and the appellants was a forgery and had been fraudulently procured thereby occasioning a miscarriage of justice.*

6. *The learned trial Judge erred in law and fact when he awarded the respondent general damages without first assessing them.*

7. *The learned trial Judge erred in law and fact when he awarded the respondent special damages which had not been specifically pleaded or proved.*

8. *The learned trial Judge erred in law when he awarded excessive general and punitive damages.*

9. *The learned trial Judge erred in law when he adopted as a novel procedure strange to our courts."*

Representations

When this appeal came up for hearing, the 1st appellant was represented by Mr. Dennis Byaruhanga. The 2nd and 3rd appellants were represented by Mr. John Mary Mugisha who was assisted by Mr. Jarvis Owen Lou. The respondent was represented by Mr. Sebuliba Kiwanuka.

Case for the appellants

At the commencement of the proceedings, both counsel for the appellants prayed to court to consolidate Civil Appeal No. 43 of 2009 with Civil Appeal No. 47 of 2009 on grounds that the

two appeals arise from the same suit and have same grounds. The respondent's counsel made no objection to this prayer and court granted it pursuant to rule 101 of the Judicature (Court of Appeal) Rules.

Counsel for the 2nd and 3rd appellants prayed to adopt the conferencing notes he had earlier filed in court. In his submissions, he argued grounds 1 and 2 together, grounds 3 and 4 separately, grounds 5 and 9 together, grounds 6 and 7 together and ground 8 separately.

He submitted on grounds 1 and 2, that the fact that the learned trial Judge made pronouncements without first disposing of the points of law was erroneous. He argued that the learned trial Judge's failure to rule on the point of law which, according to the record of proceedings, he appreciated should have been addressed first, was a grave error.

On ground 3, counsel submitted that the learned trial Judge erred when he held that failure to attach authority of the next friend was a mere procedural irregularity that could be cured by Article 126 (2)(e) of the Constitution. He contended that the failure to comply with the mandatory provisions of Order 32 of the CPR could not be excusable. He relied on the case of ***Utex Industries Ltd vs Attorney General, SCCA No. 52 of 1995*** which held that;

> *"Regarding Article 126(2) (e) and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting Article 126(2)(e). Paragraph (e) contains a caustion against undue regard to technicalities. We think that the article appears to be a reflection of the saying that rules of procedure are handmaids to justice - meaning that they should be applied with due regard to the circumstances of each case." (Sic)*

On ground 4, counsel submitted that the appellants were denied a fair trial as envisaged under Article 28 of the Constitution and as defined by several authorities. He argued that there was no trial at all that would warrant passing of judgment. He pointed out that the learned trial Judge never heard the evidence of the parties. He supported his argument with the decision in ***Twagira vs Uganda, [2003] 2 EA 689.***

In regard to grounds 5 and 9, counsel submitted that the learned trial Judge occasioned a miscarriage of justice to the appellants when he relied on the hand writing expert's opinion to conclude that the contract between the appellants and the respondent was fraudulently procured. He argued that the learned trial Judge needed to have looked at other evidence which was to be adduced at the hearing rather than solely relying on the hand writing expert's opinion to pass his judgement. He also submitted that the learned trial Judge failed to follow the conventional procedure as prescribed by the CPR when he asked the parties to file "skeletal arguments" and when he passed judgment without deciding on the preliminary objection.

On grounds 6 and 7, counsel submitted that the learned trial Judge did not assess the damages as he ought to have done and this was because evidence to prove the same was not heard. He argued that by proceeding to award special damages which had not been specifically pleaded or proved the learned trial Judge erred in law.

On ground 8, counsel submitted that punitive damages can only be awarded where there is highhandedness. He argued that the conditions that must be met before making an award of punitive or exemplary damages were non-existent in the instant matter to justify the award.

Counsel for the 1st appellant associated himself with the above arguments of counsel for the 2nd and 3rd appellants and only made additional submissions on the right to a fair hearing. He submitted that the 1st appellant was condemned to pay damages when no evidence had been adduced and no witnesses had been produced in court to support the respondent's claim for damages. Further, that the 1st appellant was condemned to pay costs in a matter where it had not presented its case yet it was not even a party to the agreement to refer the tenancy agreement to a handwriting expert.

In reply, counsel for the respondent based his arguments on the respondent's conferencing notes filed on 4th September, 2009. On grounds 1 and 2, he submitted that it is a matter of discretion of court as to when to make a ruling on a preliminary objection. The case of ***Attorney***

General vs Major General David Tinyefuza, Constitutional Appeal No. 1 of 1997 was cited for the position that after hearing arguments, if any, from both parties, the court may make a ruling at that stage upholding or rejecting the preliminary objection or the court may differ its ruling on the objection until after hearing of the suit or petition.

On ground 3, the respondent's counsel conceded that there was an error on the record regarding the minor instituting the suit. However, he agreed with the learned trial Judge's decision that this irregularity was cured by Article 126(2) (e) of the Constitution which enjoins courts to administer substantive justice without undue regard to technicalities.

On grounds 5 and 9, the respondent's counsel submitted that the record before the trial court suggests that the appellants consented to the procedure that the learned trial Judge adopted to determine the case. He argued that the 2nd and 3rd appellants' counsel submitted additional documents to be considered by the handwriting expert and undertook to be bound by the findings of that report.

The respondent's counsel made a general submission on the rest of the grounds and agreed with the decision of the trial court in so far as it did not deal with special damages. He contended that the learned trial Judge ably conducted the proceedings, and ruled on a preliminary objection raised by counsel for the 2nd and 3rd appellants regarding the filing of the suit in a wrong division of the High Court and found that the suit was properly filed.

In rejoinder, counsel for the appellant submitted on the issue of the learned trial Judge relying on the handwriting expert report to resolve the matter, that it was still incumbent upon the learned trial Judge to entertain evidence *viva voce* to resolve the issue of illegality.

On the issue of competence of the suit, counsel reiterated that this was not a matter that could be cured by Article 126 (2) (e) of the Constitution. He argued that under Order 32 the word "shall" therein is mandatory because failure to comply with it attracts a sanction.

Court's consideration.

The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusion as was held in the case of ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.*** I have carefully studied the court record and considered the submissions of counsel. With the above duty in mind, I shall consider the grounds of this appeal in the order argued by counsel for the 2nd and 3rd appellants.

In regard to grounds 1 and 2, the appellants fault the learned trial Judge for delivering judgment without first disposing of the preliminary points of law that had been raised by the appellants, having adjourned the suit to allow the respondent file his response. On the first complaint, I find it important to refer to the record of proceedings on pages 67-68 of the record of appeal where it is stated as follows:

> *"Mugisha: My lord the gist of our argument is that before even the parties address that, they should first of all look at the propriety of the plaintiff and we are saying that the plaintiff is improperly before your Lordship. Why? Because she has not complied with Order 32.*
>
> *So my Lord we are saying to be fair to our counterpart, let him address that issue. We have filed out skeleton arguments as a preliminary point of law. According to the Supreme Court authorities you can raise this point at any time. (sic).*
>
> *Court: Where is Order 32?*
>
> *Mugisha: Yeah the one on minors my Lord, we are saying this is Order 32 rules 1 and 2.*
>
> *Court: I think that if everybody filed skeleton arguments then you can come and make your submissions at the next hearing because that may narrow the issues or it may completely decide that the action is not worthy of proceeding.*

Sebuta: *Most obliged my Lord. Now if I may understand my Lord what issue am I to address?*

Sendege: *We are going to serve him with copies of our preliminary arguments.*

Court: *You will probably address the order of 14th November which I made, you need to address basically issues on capacity.*

Sebuta: *So I address what they have raised and then the issues on capacity.*

Court: *Yeah you can do that; you need to help the Court.*

Mugisha: *Much obliged. My Lord in order to further assist ourselves there is a preliminary objection we are raising; we are saying before we go to the substance to determine the capacity of the parties, we should first of all determine the propriety of the suit; we are saying we have not complied with Order 32. So you should address Order 32 we get a ruling and then we proceed from there.*

Court: *A preliminary point can be raised at any time during the proceedings, so if they want to raise another preliminary point you cannot stop any of the parties. So I think you better deal with their skeleton arguments and then come back next week. Case adjourned to 27th February 2009 at 10:00am."*

While the appellants complained that judgment was delivered when the suit had been adjourned for the respondent to make a response on the appellant's preliminary points of law on propriety of the suit as indicated in the court proceedings above, I note from the court record that the court did not sit on 27th February 2009 but instead when the matter next came up on 30th March 2009 as indicated at page 69 of the court record, judgment was delivered in open court.

Before then, the respondent's counsel had prepared written submissions on selected points of law and filed the same in the Court on 6th March 2009 or thereabout. The respondent's written submission is on page 80 of the record of appeal and particularly at page 81 in the 4th and 5th paragraphs the respondents made submissions in response to the preliminary objection that

had been raised by the appellants on the propriety of the suit. The appellants raised their preliminary objection in their skeleton arguments and the respondent replied to them before a decision which included a ruling on the preliminary objection was rendered on 30th March 2009. I do not therefore find any basis for the assertion that judgment was delivered before the respondent could make a response to the appellants' preliminary points of law on the propriety of the suit.

The second limb of the appellants' complaint was that the learned trial Judge made pronouncements on the main suit without disposing of the preliminary points of law which had been raised by the appellants on the propriety of the main suit. I find it pertinent to reproduce the decision of the learned trial Judge at page 88 of the record of appeal lines 10-15 where he stated as follows:

> *"Both defendants' counsels put forward skeleton arguments and submitted that the plaintiff was 17 years and 9 months old when she filed the claim on 16th July 2007 as a minor.*
>
> *Order 32 R 1(1) of the Civil Procedure Rules SI 71-1 provides that every suit by a minor should be instituted in her/his next of friend and the suit should be struck out in accordance with Order 32 r 2 of the CPR.*
>
> *This is a bad point. The minor never disaffirmed the agreement before or after the age of 18 (Under Sec. 2 of the Children's Act Cap. 59 a child is a person under the age of 18) and in fact she ratified the agreement by going ahead with the suit. The defendants ought to have challenged issues of propriety when the proceedings were issued and even then any procedural defect could have been cured under Article 162(2).(SIC)"*

From the above excerpt of the learned trial Judge's judgment, I do not accept the submission of the appellants' counsel that the learned trial Judge failed to rule on the preliminary point of law before making pronouncements on the main suit. A ruling on the preliminary point of law on the propriety of the suit was made when the trial court held that the appellants ought to have challenged issues of propriety when the proceedings were issued and that even then any

procedural defect could have been cured under Article 126 (2) (e) of the Constitution. In effect, the trial court overruled the preliminary objection for those reasons. It was after that finding that the trial court proceeded to consider the other issues relating to capacity of the minors to enter into a contract and the consequential orders he made on damages and costs of the suit.

In the premises, I find that a pronouncement was made on the preliminary points of law and as such grounds 1 and 2 are without merit.

With regard to ground 3, the appellants faulted the learned trial Judge for his position that the issues of propriety ought to have been challenged when the proceedings were issued and for holding that failure to comply with Order 32 rules 1 & 2 of the CPR was curable under Article 126 (2) (e) of the Constitution.

As regards the first leg of the complaint regarding the finding that the issue of propriety ought to have been challenged when the proceedings were issued, I have made recourse to the learned trial Judge's own statement during the proceedings which he ended up contradicting by this finding. While directing his conclusion to counsel for the respondent on 12/02/2020, the learned trial Judge said at page 68 as follows;

> *"A preliminary point can be raised at any time during the proceedings, so if they want to raise another point you cannot stop any of the parties. So I think you better deal with their skeleton arguments and then come back next week..."*

A preliminary point of law as rightly stated above by the learned trial Judge can be raised at any time during the proceedings. I therefore find that he erred in his findings that it ought to have been raised when the proceedings were issued. This first leg of the ground therefore succeeds.

On the second leg of the grounds, it was argued for the appellants that it was mandatory for the respondent to comply with the procedure set out in Order 32 rules 1 & 3 (1) of the CPR and failure to do so was not curable by Article 126(2) (e) of the Constitution since this is a mandatory provision.

In their submissions in the lower court, the appellants' respective counsel had argued based on the passport of the respondent which indicated that her date of birth was 4th April 1989. They contended that the respondent having been born on 4th April 1989 was only 17 years and 9 months on 16th January 2007 when the plaint was filed.

Although in her plaint that was filed on 16th January 2007 it was averred in the 1st paragraph that the plaintiff was a female adult Ugandan, when the issue of the respondent's capacity to file a suit was raised, the respondent's counsel did not dispute the fact that the respondent was a minor at the time of filing the plaint. Even during the hearing of this appeal, the respondent's counsel conceded that there was an error by his client instituting her suit without following the provisions of Order 32 rules 1 of the CPR. Counsel however supported the learned trial Judge's finding that the error was cured by Article 126(2) (e) of the Constitution.

To my mind, the issue for resolution is whether non-compliance with the provisions of Order 32 rule 1(1) of the CPR is curable under Article 126(2) (e) of the Constitution. In resolving this issue I will also consider whether the word "shall" as used in Order 32 rule 1(1) of the CPR is mandatory.

Order 32 rule 1 (1) of the CPR provides as follows:

> *Every suit by a minor **shall** be instituted in his or her name by a person who in the suit shall be called the next friend of the minor. (Emphasis added).*

Order 32 rule 2 (1) of the CPR provides as follows:

> *Where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the advocate or other person by whom it was presented.*

This Court discussed the mandatory character of the word "shall" in the case of ***Asiimwe Francis vs Tumwongyeirwe Aflod, Misc. Application No. 103 of 2011*** as follows:

"While, prima facie, the use of the word ***"shall"*** *in a statutory provision is mandatory in character, courts have held that in some circumstances all that is meant by the word is in a directory sense. Where a statutory requirement results in a sanction for non-compliance, the mandatory nature of the word* ***"shall"*** *can be drawn. But this is not the only determinant, because quite often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non-compliance. It is also not always right, to restrict the directory interpretation of the word* ***"shall"*** *to only where it is shown that interpreting it as a mandatory command would lead to absurdity or to inconsistency with some other law, or would cause injustice. There is no precedent or authority for such: See* ***Supreme Court Election Petition Appeal No.26 of 2007 Sitenda Sebalu V Sam.K. Njuba & Another.***

The position of the law is that there is no rule of the thumb or a universal rule of interpretation for determining if in a given statutory provision the word ***"shall"*** *is used in a mandatory or a directory sense: See* ***Edward Byaruhanga Katumba Vs Daniel Kiwalabye Musoke: Civil Appeal No.2/98 (SC)*** *and* ***Besweri Lubuye Kibuuka Vs Electoral Commission & Another, Constitutional Petition No.8/98.***

Over time Courts have developed guidelines to determine whether the legislature intended a particular provision of legislation to be mandatory or merely directory. See: ***The Secretary of State for trade and Industry Vs Langridge [1991] 3 Aller 591*** *where the Court of Appeal (England) appears to have approved as the proper test of the learned author of* ***"SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION" 4TH EDITION 1980*** *that:-*

"The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."

In 2005, ***the House of Lords, (Lord Steyn)*** *added their weight to the above approach in* ***REGINA VS SONEJI AND ANOTHER: [2005] UKHL 49 (HK publications on Internet);*** *asserting that:*

".....the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity."

The above was also the view of the Australian High Court as expressed in ***PROJECT BLUE SKY INC. VS. AUSTRALIAN BROADCASTING AUTHORITY [1998] 194 CLR 355.***

*The **Supreme Court of Uganda** adopted and applied the above approach in the **SITENDA SEBALU VS SAM. K. NJUBA & ANOTHER ELECTION PETITION APPEAL NO.26 of 2007."***

In this appeal, I have applied the above principles and to that end, I have looked at the scope and the purpose of Order 32 of the CPR in the context of section 2 of the Children Act Cap. 59 which defines a child as a person below the age of 18 years old. A minor is under a disability at law which disability prevents him or her from enjoying certain rights and obligations that an adult may enjoy. I believe the purpose of Order 32 is twofold; first to protect children from instituting suits which they lack capacity to present in court and also to shield them from being directly sued due to the orders that may arise from the suit which they would not be able to comply with. Secondly, to protect persons who may be sued by a child and become successful in the suit and yet the child may not be able to comply with the orders especially for costs.

The rationale is that while a party should in the normal course of things not be prevented from pursuing his or her rights, it is also necessary to put in place mechanisms that safeguard a party from liability that they may not be able to meet such as costs of a suit. Failure to institute a suit by a minor through a next friend is penalised by taking the plaint off the file under Order 32 rule 2 of the CPR. It is therefore my firm view that due to that sanction, the requirement under Order 32 rule 1(1) of the CPR is mandatory in nature and non-compliance with it cannot be treated as a mere technicality.

I must also point out that courts have held that Article 126 (2) (e) of the Constitution was not intended to wipe out the rules of procedure but rather a reflection of the saying that *'rules of procedure are handmaids of Justice'* which means that they should be applied with due regard to the circumstances of each case. ***See: Utex Industries Ltd vs Attorney General (supra).***

I therefore find the respondent's failure to comply with the requirements of Order 32 rule 1(1) of the CPR a fatal procedural defect that could not be cured by Article 126 (2)(e) of the Constitution of the Republic of Uganda, 1995.

Had the learned trial Judge properly addressed his mind to order 32 rules 1 and 2, he would have upheld the preliminary objection and taken off the plaint from the file. Equally important to note is the fact that the appellants who were defendants in the suit were also minors when they were sued without a guardian ad litem being appointed for them as required under Order 32 rule 3 (1) of the CPR which provides thus:

Order 32 rule 3 (1) of the CPR provides that:

> *"3. **Guardian for the suit to be appointed by court for minor defendant.***
>
> *(1) Where the defendant is a minor, the court, on being satisfied of the fact of his or her minority, **shall** appoint a proper person to be guardian ad litem of the minor." (Emphasis added).*

Under Order 32 rule 3 (2) an application for appointment of a guardian ad litem may be obtained in the name and on behalf of the minor or by the plaintiff.

Order 32 rule 5 (2) of the CPR provides that;

> *"Every order made in a suit or any application before the court in or by which a minor is in any way concerned or affected, without the minor being represented by a next friend or guardian ad litem, as the case may be, may be discharged, and, where the advocate of the party at whose instance the order was obtained knew, or might reasonably have known, the fact of minority, with costs to be paid by the advocate."*

In this appeal all the parties were minors and they were not represented by a next friend or guardian ad litem. In the premises, I would be inclined to discharge the orders made by the trial Judge in the suit. In conclusion I find merit in ground 3 of this appeal and it is accordingly allowed. This ground alone would, in my view, resolve this appeal. However, there are some other pertinent issues that were raised by the appellants in the remaining grounds that I feel obliged to resolve as well.

On ground 4, the appellants' complaint is that they were denied a fair trial as envisaged under Article 28 of the Constitution. I find it pertinent to resolve grounds 6, 7, 8 and 9 together with ground 4 as they also relate to the concept of fair hearing.

The appellants complained that there was no trial at all to warrant passing of judgment. The respondent's counsel contended that the learned trial Judge ably conducted the proceedings. I have had the benefit of carefully perusing the proceedings of the trial court. I note that a scheduling conference was conducted on different occasions and some issues were framed for determination. Among the questions that arose during the scheduling conference was whether the respondent sold her interest in the lease property to the 2nd and 3rd appellants.

It was contended for the respondent that she did not sign the memoranda of agreement transferring her interest in the property to the 2nd and 3rd appellants while the 2nd and 3rd appellants claimed that they had transacted with her and even paid consideration. At that stage of the scheduling conference the learned trial Judge directed and the parties agreed that a mutual hand writing expert be appointed to examine the signature of the respondent on the memoranda of agreement that were said to have been executed between her and the 2nd and 3rd appellants.

A laboratory report indicating the findings of the Principal Government Analyst or handwriting expert was filed but it appears when the matter came up for hearing on the 12/11/2008 both counsel for the appellants had not yet had the benefit of looking at copies thereof. On that 12/11/2008, the learned trial court ordered counsel for the parties to file skeleton arguments on the 4 issues he had raised on the capacity of a minor. Counsel for the 1st appellant did point out that he did not have a copy of the respondent's passport which pointed to her exact date of birth. The learned trial Judge directed that copies of all the documents be made available to all the parties and adjourned the matter to 13/01/2009.

What transpired later is what I have already highlighted in the background of this appeal but it suffices to say that upon the skeleton arguments being filed and that of the appellants only addressing the propriety of the suit which is already discussed in ground 3 of the appeal, a ruling was delivered which disposed of the entire suit. It was the handwriting expert's report that formed the basis of the decision of the learned trial Judge when he cancelled the sale agreement between the respondent and the 2nd and 3rd appellants having found that the respondent did not sign the memoranda of agreement.

Article 28(1) of the Constitution of the Republic of Uganda, 1995 guarantees the right to a fair hearing while Article 44(c) of the same Constitution prohibits the derogation of the enjoyment of the right to a fair hearing.

Order 18 of the CPR also clearly lays down the procedure for hearing suits and examination of witnesses. It provides, inter alia, for the right to begin, statement and production of evidence, evidence where there are several issues, witnesses to be examined in open court, examination of witnesses, how evidence is to be recorded, summary of evidence in certain cases, particular questions and answer which may be taken down, remarks on demeanour of witness and power to examine witness immediately.

The Supreme Court of Uganda defined the principle of a fair trial in the case of ***Twagira vs Uganda (supra)*** as follows:

> *"Fair trial or Fair hearing, under Article 28 means that a party should be afforded opportunity to inter alia, hear the witnesses of the other side testify openly; that he should, if he chooses, challenge those witnesses by way of cross examination; that he should be given opportunity to give his own evidence in his defence; that he should, if he so wishes, call witnesses to support his case."*

In ***Rebecca Nagidde vs Charles Steven Mwasa, Court of Appeal Civil No. 160 of 2018*** this Court, while considering a similar issue as to whether there was a hearing of the divorce petition by the trial court, at page 11 of its judgment stated thus;

> *"It is clear from the foregoing that the learned trial judge reached the decision to grant a decree nisi without holding a hearing and receiving evidence from the appellant who was the petitioner and from the respondent. There was no evidence before the trial judge to conclude that the petitioner had proved the grounds set forth for dissolution of her marriage. Indeed the decree nisi does not cite any ground upon which the marriage was dissolved. There was no trial conducted in respect of that matter or any other matter as the parties were directed to file written submissions without adducing any evidence with regard to the issue of custody of children or division of matrimonial property."*

This Court then succinctly stated in that case at page 12 as follows;

> *"Both the constitution and or the rules of natural justice under the common law require that courts of law or any other bodies charged with the duty of adjudicating upon disputes between parties should act fairly, in good faith and without bias to give each party the opportunity to adequately state their case, correct or contradict any relevant testimony prejudicial to their case. The right to be heard includes the right to appear and present one's case, that is, give oral testimony during the trial and the right to cross examine adversarial witnesses in order to determine the veracity and reliability of their evidence whether it be in a criminal or civil matter."*

See also ***Kashongole Godfrey vs Kafeero Francis & 3 others, Court of Appeal Civil Appeal No. 93 of 2011*** where a similar issue of whether the court below had heard the case was considered.

In the instant case, I appreciate that the parties had agreed to be bound by the findings of the hand writing expert and as such there was no need to challenge it by cross-examination. However, I am of the view that the author of the laboratory report should have been produced in court to formally present the report and have it admitted in evidence. It is also important to note that the respondents did not adduce any other evidence to be considered together with the

hand writing expert's report. Neither did the appellants get the opportunity to present any evidence in their defence nor did they call witnesses to support their case. Counsel for the 2nd and 3rd appellants kept alluding to the need to call witnesses to testify on the transaction but from the onset it appears the learned trial Judge was of the view that the findings of the handwriting expert would resolve the dispute without the need to call witnesses. During the scheduling conference that was conducted on 16/10/2008, counsel Mugisha for the 2nd and 3rd appellants told court that he had witnesses and the learned trial Judge stated at page 55 of the record of proceedings;

> *"Well we do not want witnesses, it is a straight forward transaction you tell us from which Bank account you paid the monies, if you paid cash, how it was paid that sort of thing."*

With due respect to the learned trial Judge, I have failed to comprehend where the evidence of payments was going to come from since he said there was no need for witnesses. Was it to come from the bar?

I must also point out that on 12/02/2009, the learned trial Judge upon directing the parties to file skeleton arguments stated on page 67 of the record as follows;

> *"I think that if everybody files skeleton arguments then you can come and make your submissions at the next hearing because that may narrow the issues or it may just completely decide that the action is not worth of proceedings."*

By so saying, the learned trial Judge gave the impression that more submissions were to be made orally perhaps to supplement the written skeleton arguments. However, when the matter came up on the adjourned date, a ruling was made which disposed of the suit.

I find that given what transpired in court as highlighted above, clearly there was no hearing at all and as such there was no fair trial in this matter.

In ***Kasirye Byaruhanga & Co. Advocates vs Mugerwa Pius Mugalaasi, CACA No. 87 of 2008*** this Court set aside orders that arose from an application in which the appellant was denied the right to be heard.

In ***Uganda Co-operative Transport Union Ltd vs Roko Construction Ltd, SCCA No. 35 of 1995*** the Supreme Court also set aside judgment of a lower court in which the evidence relied upon by the trial Judge was not given publicly and was not tested in cross examination.

In view of the above authorities and the events that transpired in this case, I find that the learned trial Judge erred when he denied the appellants a fair hearing prior to ordering the cancellation of the agreement between the respondent and the 2nd and 3rd appellants.

In relation to grounds 6, 7 and 8 of the appeal the learned trial Judge condemned the appellants to pay the respondent general damages, special damages and punitive damages.

It is trite law that general damages are awarded at the discretion of court. I am aware of the circumstances under which an appellate court can interfere with the exercise of discretion of a learned trial Judge. The appellate court should not interfere with the exercise of discretion of a learned trial Judge unless it is satisfied that the learned trial Judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the learned trial Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *See:* ***Mbogo & another vs Shah, [1968] EA 93.***

In the instant appeal, the discretion of the court could not have been properly exercised in the absence of evidence of any inconvenience, injury or damage suffered by the respondent who was seeking the general damages. It is upon adducing evidence of inconvenience, injury or damage that the trial court can properly assess the compensation due to a claimant. In the absence of evidence that the respondent suffered any inconvenience, I find that the learned trial Judge was not furnished with sufficient material to be able to assess the general damages due.

Accordingly, I find that the learned trial Judge erred in exercising his discretion to award general damages in the absence of evidence supporting the award.

In regard to special damages, it is settled law that they must be specifically pleaded and strictly proved. Upon perusal of the plaint and amended plaint filed by the respondent, the respondent pleaded as follows:

"PARTICULARS OF LOSS/EXPENSES

(a) Total market value of the lock up shops Valued at Ug. Shillings. 80,000,000/= (Uganda Shillings Eighty Million only)

(b) *Cost of engaging auctioneers Ug. Shs. 300,000/= (Uganda Shillings Three hundred thousand only).*

In her plaint and amended plaint, the respondent's prayer was in the following terms:

(a)...

(b) An order for compensation for the loss of lock up shops of Ug. Shs. 80,000,000/= (Uganda Shillings Eighty Million only)."

However upon a careful perusal of the proceedings I do not find any evidence to prove the above expenses.

The quantum of special damages to which the respondent was entitled to ought to have been proved by the respondent and properly assessed by the trial court. Therefore the respondent had the duty to prove the special damages to the required standard. Having found that no witnesses testified as to the loss or expenses incurred by the respondent, it is my finding that the learned trial Judge erred when he awarded special damages that had not been proved. I am fortified in this finding by the decision of the Supreme Court in the case of ***Uganda Breweries Ltd vs Uganda Railways Corporation, SCCA No. 6 of 2001.***

As far as punitive damages are concerned, I take guidance from the House of Lords decision in ***Rookes vs Barnard and ors, [1964] A.C 1129*** as was cited by Law J.A in the case of ***Obongo and anor vs Municipal Council of Kisumu, [1971] E.A 91*** where it was held as follows:

> *"Exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff..."*

In the instant case I found no evidence on the court record showing that either there was oppressive, arbitrary and unconstitutional action by the servants of government or the conduct of the appellants was calculated to make a profit for themselves which would exceed the compensation payable to the respondent.

In the premises, it is my finding that there was no fair trial to support the decision of the trial court. The learned trial Judge therefore erred when he determined the whole suit without hearing evidence. He did not follow the principles of natural justice on hearing evidence before arriving at his decision. Similarly there was no evidence adduced by the respondent to support the award of general, special and punitive damages. The learned trial Judge therefore erred when he made the award for general, special and punitive damages without basis.

In the result, grounds 4, 6, 7, 8 and 9 of the appeal have merit and they are allowed.

In regard to ground 5, the appellants' complaint was that the learned trial Judge occasioned a miscarriage of justice to them when he solely relied on the hand writing expert's opinion to conclude that the contract between the respondent and the appellants was a forgery and had been fraudulently procured.

In her amended plaint the respondent pleaded fraud. Forging an agreement of sale between the respondent and the 2nd and 3rd appellants as well as forging the respondent's signature on that agreement were some of the particulars of fraud.

While relying on the report of the Principal Government Analyst/Handwriting Expert, the learned trial Judge made a finding that the plaintiff's signature was forged and the sale agreement between the plaintiff and the 2nd and 3rd defendants was fraudulently procured.

The position of the law is that for allegations of fraud, the plaintiff must prove the fraud alleged beyond a balance of probabilities. In the case of ***Kampala Bottlers Ltd vs Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992 reported on ULII as [1993] UGSC 1*** Wambuzi CJ (as he then was) held that fraud must be proved strictly, the burden being heavier than on the balance of probabilities generally applied in civil cases.

The Principles of dealing with a handwriting expert were laid down in the case of ***Kimani vs Republic, (2000) E.A 417*** where it was stated as follows:

> *"....it is now trite law that while courts must give proper respect to the opinion of experts, such opinions are not as it were, binding on the Courts...such evidence must be considered along with all other available evidence..."*

In order to meet the standard of proof for fraud, the respondent had a duty to adduce oral evidence in addition to the handwriting expert's report and the appellants had a right to adduce their own evidence to counter that of the respondent. The trial court would have then considered the respondent's additional evidence together with the handwriting expert's report and the appellants evidence to make a finding as to whether there was forgery or not.

The Supreme Court in the case of ***Kampala District Land Board & Another vs Venansio Babweyaka & others, Civil Appeal No. 16 of 2002*** found that the trial, in which the trial court had relied on documentary evidence and written submissions to make judgment, was fundamentally defective.

In the instant case, the trial court having relied on the expert opinion alone to make a finding of fraud without considering any other evidence to prove fraud to the required standard amounted to a fundamental flaw.

In the premises it is my finding that the learned trial Judge erred when he solely relied on the hand writing expert's opinion to conclude that the contract between the respondent and the appellants was a forgery and had been fraudulently procured. In the premises, ground 5 also succeeds.

On the whole, I would allow this appeal. If it was not for the finding on ground 3 that the suit was improperly brought in the name of a minor in non-compliance with Order 32 rules 1 and 2, I would propose an order for a retrial. However, since Order 32 rule 1 was not complied with, I find that there was a fundamental procedural flaw which warranted removal of the plaint from the file in pursuant to Order 32 rule 2 and I would so order.

On the issue of costs, I am guided by Order 32 rule 5 (2) of the CPR already quoted above but the part relevant to the issue of costs can be paraphrased that; where the advocate of the party at whose instance the order was obtained knew or might reasonably have known the fact of the minority, the advocate would pay the costs.

In the instant case, counsel for the respondent was in possession of the respondent's passport which he presented to the handwriting expert for comparison of her signature. The passport clearly stated the respondent's age and therefore counsel ought to have known that she was a minor. Similarly, in the amended plaint filed on 11th march 2008, paragraph 3 thereof described the 2nd and 3rd appellants who were defendants in the suit, as persons presumed to be of sound mind and children of Fulgence Mungereza. They were not said to be adults of sound minds which means it was within counsel's knowledge that they were not adults. The fact of the 2nd and 3rd appellant's minority was made abundantly clear in paragraph 1 (a) (i) of the written statement of defence (WSD) wherein counsel for the 2nd and 3rd respondents stated that the plaint was incurable defective and should be rejected as it was filed without the plaintiff applying to court to have someone appointed as a guardian ad litem as required by law. That averment

in the WSD should have caused counsel to apply to court to correct the anomaly if he cared but he proceeded as if there was no fatal omission.

In the circumstances, I would order counsel, who filed the suit in the name of the minor without her being represented by a next friend and moreover against two minors in their names without applying for them to be represented by a guardian ad litem, to pay 70% of the appellants' taxed cost since grounds 1 and 2 were not successful.

Dated at **Kampala** this 17th day of July 2020.

Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

Civil Appeals No. 43 and 47 of 2009

(Arising from High Court Civil Suit No. 33 of 2007)

BETWEEN

Kampala City Council ========== Appellant No.1
Victoria Kaisinga ========== Appellant No.2
Gensia Bateta ========== Appellant No.3

AND

Nantume Shamirah ========== Respondent

(Appeal from the Judgment of the High Court of Uganda (Singh, J.) sitting at Kampala and delivered on 30th March 2009)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have had the opportunity to read in draft the Judgment of my sister, Hellen Obura, JA. I agree with it and have nothing useful to add.

[2] As Musoke, JA, agrees, this appeal is allowed with the orders proposed by Hellen Obura, JA.

Dated, signed, and delivered at Kampala this 17th day of July 2020

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CIVIL APPEALS NOS. 0043 & 0047 OF 2009

1. KAMPALA CITY COUNCIL
2. VICTOR KAISINGA
3. GENSIA BATETA:: APPELLANTS

VERSUS

NANTUME SHAMIRAH:: RESPONDENT
(Appeal from the decision of the High Court of Uganda at Kampala before Anup Singh Choudry,J. dated 30th March, 2009 in Civil Suit No. 0033 of 2007.)

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

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the advantage of reading in draft the lead judgment in this matter prepared by my learned sister Hon. Justice Hellen Obura, JA. I agree with it, and would therefore allow this appeal for the reasons she gives.

I would also order that costs are paid in the manner proposed in the lead judgment.

Dated at Kampala this 17th day of July 2020.

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Elizabeth Musoke

Justice of Appeal