

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0245 OF 2018**

HERMAN SSEMAKULA:..... APPELLANT

VERSUS

IVAN ASIIMWE:..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Namundi, J., dated 14th day of March, 2017 in Consolidated High Court Civil Suits No. 0379 of 2007 & No. 0388 of 2007.)

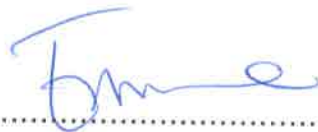
**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.**

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the advantage of reading in draft the lead judgment in this matter prepared by my learned brother Hon. Justice Stephen Musota, JA. I agree with it, with nothing useful to add. I would, therefore, dispose of this appeal in the manner proposed in the lead judgment.

As Hon. Justice Remmy Kasule, Ag. JA., also agrees, this appeal is disposed of in the manner proposed in the lead judgment of Hon. Justice Stephen Musota, JA.

Dated at Kampala this 20th day of July 2020.



Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
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CIVIL APPEAL NO. 245 OF 2018

HERMAN SSEMAKULA:.....APPELLANT

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VERSUS

IVAN ASIIMWE:.....RESPONDENT

CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE REMMY KASULE, AG. JA

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JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

This is a 1st appeal arising from the decision of the Hon. Mr. Justice Godfrey Namundi in Civil Suit No.388 of 2007 dated 14th March, 2017.

Duty of a first appellate court.

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This being a first appeal it is important that the duty of a first appellate court is stated.

The role of this court as a first appellate court is laid down under **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions** 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

(b).....

5 This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

In the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** the Supreme Court on the duty of a first appellate court held thus;

10 ***“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must***
15 ***then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided***
20 ***by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a***

question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya v. R* [1957] EA 336, *Okeno v. Republic* [1972] EA 32 and *Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985* at page 5.

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice...”

Banco Arabe Espanol Vs. Bank of Uganda Supreme Court Civil Appeal No.8 of 1998 The Supreme Court of Uganda applied the Kifamunte standard in a civil matter.

Therefore, the duty of a first appellate court is to review the evidence of the case and to reconsider the materials before the trial judge then make its own conclusion. We shall consider the above principles.

15 **Background**

The appellant (SEMAKULA HERMAN) was sued by the respondent (IVAN ASIIMWE) in the High Court of Uganda for trespass. He sought orders of vacant possession, eviction, permanent injunction, general damages punitive damages, interest and costs. The respondent claimed that he is the registered proprietor of the suit land. He claimed that the appellant in 2004 started illegal construction on land situate adjacent to his land and forcefully created a road on the respondent's land. He also claimed that the appellant had uprooted the fence which the respondent had planted to mark boundaries. The respondent claimed he warned the appellant but to no avail.

That he even reported a case at Bwebajja Police Post under Ref SD 15/12/10/04 but nothing materialized and that is when he decided to sue the appellant.

5 The appellant filed a written statement of defence (WSD) in response to the civil suit filed by the respondent. He in the said WSD denied the trespass and claimed he was a kibanja owner which he bought from Emmanuel Luwaga who also had bought from Ssemwezi Mukasa Joseph. In the written statement of defence there was no counter-claim.

10 In June 2007, the appellant filed another civil suit No, 388 of 2007 against the respondent and the Commissioner Land Registration by which he claimed that the Commissioner Land Registration should recall and cancel the certificate of title issued to the respondent over Block 383 Plot 239, a declaration that the respondent is not entitled to enter, cross or do anything in his land, a permanent injunction, punitive damages, exemplary damages and costs of the suit. He also alleged that the respondent had obtained the certificate of title fraudulently which the respondent denied in his written statement of defence. The two cases were consolidated as indicated by Judge Eva K. Luswata on 24th November 2015 (see page 302 of the record of appeal). The consolidated suit was heard interparty and the Justice 15 Godfrey Namundi gave judgment in favour of the respondent after finding that the appellant was a trespasser. 20

The appellant was dissatisfied with the decision and filed this appeal in this court on the following grounds all substantive and non in the alternative;

1. *The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and arrived at a wrong conclusion*

5 2. *The Learned Trial Judge erred in law and fact when he failed to consider the overwhelming evidence of the respondent's fraud in the registration of the suit land into his names*

10 3. *The Learned Trial Judge erred in law and fact when he failed to find that the respondent had both constructive and actual notice of the appellant and his predecessor's interest in the suit land before he caused it to be registered into his names*

4. *The Learned Trial Judge erred in law and fact when he failed to find that there was no property in the suit land which the respondent ought to have purchased/acquired*

15 5. *The Learned Trial Judge erred in law and fact when he awarded a sum of UGX 200,000,000/= in general damages which award is too excessive, unfounded and without any justification or supporting evidence*

20 6. *The Learned Trial Judge erred in law and fact when he decided the suit in the respondent's favour occasioning a miscarriage of Justice.*

The appellant proposes that as a result

1. *This appeal be allowed*

2. *The Judgment and orders of the Learned Trial Judge be set aside*

3. Court declares that the acquisition and registration of the suit land into the names of the respondent was fraudulent.

4. The respondent pays costs of this appeal and the costs of the court below

5 Representation

At the hearing of the appeal, David Ssempala appeared for the appellant and Obed Mwebesa appeared for the respondent. Counsel agreed to adopt their conferencing notes as their submissions.

Consideration of the appeal

10 I shall deal with grounds of appeal starting with ground 2 then 3, 4, 5, 1, and lastly 6.

Ground 2 The Learned Trial Judge erred in law and fact when he failed to consider the overwhelming evidence of the respondent's fraud in the registration of the suit land into his names

15 The issue in this ground is whether or not there was sufficient evidence to prove on the balance of probabilities that the respondent fraudulently obtained registration of the suit land in his names.

The overwhelming evidence which the appellant refers to is in their submissions which have no page numbers. I do not agree with the
20 appellant's case that the trial Judge did not evaluate the evidence on fraud as presented by the appellant at trial. The Judge in his judgment at pages 252-256 of the record of appeal thoroughly evaluated the evidence on fraud and the reason why he did not agree with that evidence is:

- a. That the evidence of fraud presented before the Judge was not attributable to the respondent but rather to the lands office. **(page 256 of the record of appeal)**
- 5 b. There was no evidence adduced to prove that the certificate of title was never issued by the lands office. **(page 256 of the record of appeal)**
- c. The claim that the appellant's predecessor in title should have been the registered proprietor is not supported by any credible evidence **(page 256 of the record of appeal)**
- 10 d. There was no evidence of forensic experts in respect of the questioned signatures **(page 255 of the record of appeal)**
- e. The appellant/defendant only came up with documents of sale of kibanja after a case was reported at Kajjansi Police **(page 255 of the record of appeal)**

15 The fraud pleaded in the pleadings by the appellants is stated in the particulars of fraud of Civil Suit No.388 of 2007 which is at page 7 of the record of appeal. They are

- a. The Fraudulent title is typed yet in 1971 when it purportedly was issued type-writers were not being used in the Land Registry

20 On this particular of fraud there was no evidence at all produced by the appellant to prove this claim.

- b. The signature of Mr. Womaayi (the former Assistant Commissioner for Lands) is on the Fraudulent Title, yet he was not employed by the Lands Ministry in 1971

There was also no proof of this particular allegation of fraud. No employment records were tendered in court or any evidence of the then Lands Ministry staff in order to move the trial Judge to hold that Womaayi was not an employee of the Lands Ministry of Lands at the time of signing the Certificate
5 of Title.

c. The same signature of Mr. Womaayi is shown for all the transactions on the certificate of Title, which transactions occurred between 1971-2003

On this one the trial Judge found that there was no evidence to prove that
10 the certificate of title was not issued by the Ministry of Lands or registrar of titles.

d. The person who purportedly sold the suit property to the plaintiff (Mr. Rashid Muyingo) is not the valid administrator of the estate of the late W. Muwanga

15 On this there was no proof at all that the validity of the grant of letters of administration was by the time the transaction took place conclusively determined by court. Paragraph 10 of the plaint by the appellant (see page 7 of the record of appeal) included annexure D which was a cancelation of the letters of administration issued to Muyingo Rashid dated 13th July 2005.

20 However, at page 40 of the record of appeal there is a letter signed by all the beneficiaries of the estate of the deceased confirming that they consented to the sale of the suit land to the respondent Mr. Ivan Asiimwe. Further at page 38 of the record of appeal there is a fresh grant of letters of administration to the said Muyingo Rashid dated 21st August, 2007 issued by the High Court

of Uganda at Nakawa which have never been challenged. I therefore find that there was no sufficient evidence before the Judge to prove that the said Musingo Rashid was not the true lawful administrator of the estate from which the respondent bought the suit land.

5 e. Further Particulars shall be adduced at the hearing

This particular of fraud is non-existent. Fraud must be specifically pleaded and strictly proved. Therefore this kind of pleading is unacceptable before the court. The less I say about it the better.

The Supreme Court decision of Frederick J. K. Zaabwe versus Orient Bank & 5 Others; SCCA NO. 4/2006; gave us the definition of fraud thus:

10 *“Fraud, according to Black’s Law Dictionary means an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him/her or to surrender a legal right and*
15 *fraudulent means acting wilfully and with specific intent to deceive or cheat, ordinarily for purposes of either causing some financial loss to another or bringing about some financial gain to oneself”.*

This case further defined fraud to mean:

20 *“Anything calculated to deceive, whether by a single act culmination, or by suppression of truth, or suggestion of what is false, whether it is by a single, direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture a generic term embracing all multifarious*

means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated.....”

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The standard of proof of fraud is higher than on a mere balance of probabilities though not to the standard of beyond reasonable doubt. The above definition is what this Court will adopt in this case and find that the appellant fell far short of this standard to prove the fraud which was pleaded.

10 The other particulars of fraud which were not pleaded by the appellant could not and should not have been considered by the trial Judge. Parties are bound by their pleadings and in this case the appellant has to be bound by the pleadings which they filed in the trial court. **See: *Interfreight Forwarders vs East Africa Development Bank Supreme Court Civil Appeal No. 33 of 1992.*** These are clear in the record of appeal between
15 pages 5 -32 of the record of appeal.

There was no particulars of fraud pleaded claiming that the respondent obtained title to defeat the equitable interest of the appellant. Therefore even if the appellant were to produce evidence on this, it could not be considered
20 by the Judge. The Supreme Court in ***Interfreight Forwarders vs East Africa Development Bank (supra) restated that:***

“A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a

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case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.

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

10 I therefore find that the Learned Trial Judge rightly found that the appellant had failed to prove fraud which was attributable to the respondent. Ground 2 of the appeal therefore fails.

15 **Ground 3 The Learned Trial Judge erred in law and fact when he failed to find that the respondent had both constructive and actual notice of the appellant and his predecessor's interest in the suit land before he caused it to be registered into his names**

20 As I have found in deciding ground 2 of the appeal the appellant did not plead this particular of fraud and cannot be allowed to succeed on it. It does not matter how much evidence there is before the trial judge. The reason for this is to ensure that there is a fair hearing of both parties especially on such serious allegations of fraud. Accordingly, I find that I cannot fault the trial Judge for his finding on this matter.

But even if the same had been pleaded, the evidence adduced did not prove the nature of interest of the appellant in the suit land. It was not clear whether

the appellant was claiming a pre-emptive right to purchase or a bonafide occupancy. There was no proof of payment of busuulu as the appellant conveniently claimed the same had been lost. As a purchaser of the Bonafide occupancy, he ought to have proved the kibanja of the person who sold to him which in this case he failed to do. The appellants indeed proved that there was possession of the land. But they did not prove to what extent, from when, under whom and by what nature of interest the land was possessed. All the evidence referred to by the appellant's counsel in their submissions on this issue do not demonstrate the legal requirements of Kibanja and if at all it was a kibanja what type of kibanja/tenancy by occupancy? Was the appellant a lawful occupant, or was he a bonafide occupant. Even the pleadings are unclear on this matter. Why would the appellant expect the Judge to rule in his favour when his own evidence and pleadings were unclear on what nature of interest under the law he had in the land?

It appears the appellant thought it enough and sufficient to show court that his predecessor in title was in possession. But this is not enough when it comes to bonafide occupancy. The conditions which the appellant ought to have proved are in section 29 of the Land Act which states that;

“29. Meaning of “lawful occupant” and “bona fide occupant”.

(1) “Lawful occupant” means—

(a) a person occupying land by virtue of the repealed—

(i) Busuulu and Envujjo Law of 1928;

(ii) Toro Landlord and Tenant Law of 1937;

(iii) Ankole Landlord and Tenant Law of 1937;

(b) a person who entered the land with the consent of the registered owner, and includes a purchaser; or

5 **(c) a person who had occupied land as a customary tenant but whose tenancy was not disclosed or compensated for by the registered owner at the time of acquiring the leasehold certificate of title.**

(2) "Bona fide occupant" means a person who before the coming into force of the Constitution—

10 **(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or**

(b) had been settled on land by the Government or an agent of the Government, which may include a local authority.(3) In the case of subsection (2)(b)—

15 **(a) the Government shall compensate the registered owner whose land has been occupied by persons resettled by the Government or an agent of the Government under the resettlement scheme;**

20 **(b) persons resettled on registered land may be enabled to acquire registrable interest in the land on which they are settled; and**

(c) the Government shall pay compensation to the registered owner within five years after the coming into force of this Act.

5 *(4) For the avoidance of doubt, a person on land on the basis of a licence from the registered owner shall not be taken to be a lawful or bona fide occupant under this section.*

10 *(5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bona fide occupant under this section shall be taken to be a bona fide occupant for the purposes of this Act.”*

The appellant only proved possession but did not prove time, proof of payment of busuulu was not produced and this left the appellant's case less probable than the respondent's case.

15 As for the claim that the appellant ought to have been offered the first option to purchase, this could only be the finding of court after the appellant had proved satisfactorily on a balance of probabilities that he was a tenant by occupancy which he failed to do and immediately became a trespasser.

20 Exhibit at page 54 of the record of appeal also shows that the appellant bought the suit land after the respondent had already been registered as proprietor.

I accordingly find that there was no sufficient evidence of fraud so as to put the respondent's certificate of title into question. Accordingly there was no need for the Judge to delve into matters of bonafide purchaser for valuable

consideration without notice of fraud. As such the Judge did not err. There is accordingly no merit in ground 3 of the appeal.

Ground 4 The Learned Trial Judge erred in law and fact when he failed to find that there was no property in the suit land which the respondent ought to have purchased/acquired

There was a certificate of title for land which the respondent, as evidence showed at page 33 of the record of appeal, purchased with the consent of the beneficiaries of the estate of the deceased. The certificate of title was thereafter transferred into the names of the respondent.

I accordingly find that there was no basis for the learned trial judge to make the finding that the appellant claims that the learned trial Judge ought to have made in this ground of appeal. This ground of appeal thus fails.

Ground 5 The Learned Trial Judge erred in law and fact when he awarded a sum of UGX 200,000,000/= in general damages which award is too excessive, unfounded and without any justification or supporting evidence

I agree with the appellant on this ground of appeal. The learned trial judge did not give reasons as to why he was awarding such a colossal sum of general damages. He did not show on which evidence he relied and the extent of damage the respondent had suffered before awarding such a sum of money. Lengthy trial in itself is no ground for awarding huge sums of general damages. It can only be factored in at the time of taxation of costs. Therefore the Judge considered wrong principles and had no valid basis in awarding such an exorbitant sum of damages.

I agree with counsel for the respondents that the award of damages is discretionary and the appellate court can only interfere with it where the trial Judge acted on wrong principles or injudiciously. I also agree with the holding in **Ecta (U) Ltd vs Geraldine S. Namirimu & Anor SCCA 29 of 1994** where
5 it was held that

***“In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law or that the amount
10 awarded was so extremely high or so very small as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled”***

The circumstances of this case show that the respondent only purchased the suit land in 2003 and that is when he was registered on the certificate of title
15 as proprietor. Two years later is when the civil suit was filed in 2005. Therefore before the civil suit was filed the respondent had only been in possession for two years and it was after the 1st year of possession that in 2004 the respondent bought the suit land as per exhibit D7 (B) at page 54 of the record of appeal.

20 For those reasons I find that the award of Ug. Shs. 200,000,000 as general damages was manifestly excessive as to amount to a miscarriage of justice. I hereby set the same aside. I substitute the same with an award of Ug. Shs.10,000,000= as sufficient for trespass.

Ground 5 of the appeal is thus allowed.

Ground 1 The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and arrived at a wrong conclusion

AND

5 **Ground 6 The Learned Trial Judge erred in law and fact when he decided the suit in the respondent's favour occasioning a miscarriage of Justice.**

Save for the ground on the award of general damages the learned trial Judge properly evaluated the evidence and arrived at the right conclusions.

10 Accordingly save for the excessive damages there was no miscarriage of justice occasioned by the trial Judge's decisions and findings.

Accordingly there are no merits in grounds 1 and 6 except only as each one relates to ground 5 on the issue of quantum of damages awarded.

15 This appeal accordingly partially succeeds on only one ground 5 on the issue of quantum of damages with the following orders;

- a. The appeal is partially allowed on the ground that the award of damages was manifestly excessive
- b. The Judgment and orders of the High Court on the award of the general damages are quashed and substituted with an award of 10,000,000 UGX as general damages
- c. The rest of the Judgment and orders of the Trial Judge are hereby maintained
- d. The respondent shall pay the appellant $\frac{1}{4}$ of the taxed costs of this appeal.

Dated at Kampala this 20th day of July 2020



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Stephen Musota, JA

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THE REPUBLIC OF UGANDA
In the Court of Appeal of Uganda
At Kampala

Civil Appeal No. 245 of 2018

*(Arising from the Judgment of Namundi, J. in HCCS No. 379 of 2005 and No. 388 of 2007
(Consolidated) dated 14th March, 2017)*

Herman Ssemakula ::: Appellant

Versus

Ivan Asiimwe ::: Respondent

Coram: Hon. Justice Elizabeth Musoke, JA
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

I have had the advantage of reading through the lead draft Judgment of my brother Justice Stephen Musota, JA. I agree with the reasoning and the conclusions he has reached in the appeal. I too find no merit in grounds 1,2,3,4 and 6 of the appeal and to that extent I agree with my brother Justice Stephen Musota that the appeal be dismissed as relate to those grounds.

As to ground 5 of the appeal, I too agree that the award of Ug. Shs. 200,000,000= (two hundred million shillings only) general damages was too exorbitant and was not justified by the evidence adduced at trial. The same ought therefore to be set aside. I too agree that the appropriate amount of general damages for trespass payable by the appellant to the respondent be Ug. Shs. 10,000,000= (ten million shillings only).

I agree with the rest of the orders proposed by my brother Hon. Justice Stephen Musota, JA, including the one that the respondent is to pay to the appellant $\frac{1}{4}$ of the taxed costs of this appeal.

The order of the trial Court as to who is to meet the costs of the trial of the two consolidated Civil Suits remains unaltered by this Court.

It is so ordered.

Dated at Kampala this 20th Day of July 2020


Remmy Kasule
Ag. Justice of Appeal