THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: MADRAMA, MULYAGONJA AND MUGENYI, JJA

CIVIL APPEAL NO. 171 OF 2015

BETWEEN

MUSISI KONDE ..... APPELLANT

AND

LUSWATA KANAKULYA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Uganda at Jinja (Namundi, J) in Civil Appeal No. 144 of 2012)

JUDGMENT OF MONICA K. MUGENYI, JA

A. Introduction

1. Mr. Musisi Konde ('the Appellant'), as co-administrator of the Estate of Abdukeeri Ssali (deceased), instituted **Civil Suit No. 6 of 2009** in the Chief Magistrates Court of Mukono ('the Trial Court) for the recovery of the two *bibanjas* comprised in Block 162 Plots 65 and 66 from Mr. Rashid Luswata Kanakulya ('the Respondent'). It was his contention that the two properties formed part of the deceased's Estate. The Appellant subsequently abandoned the claim in respect of plot 65 by a formal amendment to the plaint.

2. The trial court decided the matter in favour of the Appellant, *inter alia* finding that the defendant had bought only one plot from the deceased, but only acquired the *kibanja* interest and therefore the certificate of title in respect thereof had been acquired fraudulently and should be cancelled. The Respondent successfully appealed that decision before the High Court ('first appellate court') vide **Civil Appeal No. 144 of 2012**, the appellate court adjudging the trial court to have misdirected itself on the evidence and wrongfully determined the question of fraud in the absence of any pleading or proof thereof.

3. In turn dissatisfied with the High Court's decision, the Appellant lodged this second appeal in this Court, proffering the following grounds of appeal:

    I. **The learned Judge erred in law when he misapplied the submissions in support of evidence as adduced before the trial court thereby coming to a wrong conclusion.**

    II. **The learned Judge erred in law when he failed to re-evaluate the evidence on record as adduced before the trial court thereby coming to a wrong decision.**

4. The Appellant subsequently substituted *Ground 1* above with the following ground of appeal.

    The learned Judge erred in law and fact when he considered an appeal that had been filed out of time.

5. The Appellant was represented at the hearing by Messrs. Jonathan Kiryowa and Muhammed Kikomeko, while the Respondent was self-represented. Both parties elected to rely upon written submissions filed in the matter, with the Respondent filing supplementary submissions in order to address the additional issue that was introduced by the Appellant. The Appeal shall be determined on that basis.

B. **Determination**

Ground 1: *The learned judge erred in law and fact when he considered an Appeal that had been filed out of time.*

6. Learned Counsel for the Appellant relied upon section 79(1)(a) of the Civil Procedure Act (CPA), Cap 71 and Order 43 of the Civil Procedure Rules (CPR) to fault the first appellate court for entertaining an Appeal that had been filed out of time. It is argued that whereas section 79(a) of the CPA restricts the lodging of appeals to '**within thirty days of the date of the decree or order of the court**', the Respondent had on 20th May 2013 filed an appeal in respect of a judgment delivered on 30th October 2012, which was well beyond the prescribed period. Counsel urged this Court to set aside the High Court's judgment in **Civil Appeal No. 144 of 2012**, citing the dictum in **Makula International v His Eminence Cardinal Nsubuga Wamala, Civil Appeal No.4 of 1981** that an illegality once brought to the attention of a court would supersede all procedural considerations.

7. Conversely, the self-represented Respondent invoked the provisions of section 79(1)(b) and (2) of the CPA to portend that the Appeal had been lodged within time. In his view, those provisions sought to cure the length of time often taken to obtain certified copies of a judgment and record of proceedings subject to appeal, which he urged the Court to take into account. Drawing an analogy between the process followed by Appellant in filing the present Appeal, the Respondent observed that in both matters (the first and second appeals hereof) whereas the notices of appeal were filed within thirty days, the memoranda of appeal were filed well beyond the thirty-day limitation period, following receipt of the certified judgment and record of proceedings. He concluded his submissions on this issue with the rhetorical question as to whether that would negate the present second Appeal as well.

8. For ease of reference, I reproduce below the statutory provisions cited by both parties.

Section 79 of the CPA

(1) Except as otherwise specifically provided in any other law, every appeal shall be entered—

a. within thirty days of the date of the decree or order of the court; or

b. within seven days of the date of the order of a registrar, as the case may be, appealed against; but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.

(2) In computing the period of limitation prescribed by this section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

Order 43 rule 1 of the CPR

Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose.

9. On the basis of Order 43 rule 1 of the CPR, it was the Appellant's contention that Appeals are instituted by a Memorandum of Appeal and therefore, in so far as it had been lodged in the High Court out of time, that Appeal should never have been entertained. I am, however, alive to the provision in section 79(2) for the exclusion of the time taken to prepare the record of appeal in computation of the prescribed period of limitation. In the instant case, I find no material on record that establishes for a fact that the Memorandum of Appeal was filed more than thirty days after receipt of the record of proceedings in the Magistrates Court by the Respondent. What I do find on record is a certification of the judgment dated 31st October 2012 but nothing whatsoever in relation to the record of appeal.

10. The Appellant bore the onus of proof of that allegation under section 103 of the Evidence Act, as well as the primary duty to file a complete record of appeal under Rule 83(1)(b) of the Judicature (Court of Appeal Rules) Directions, SI 13 – 10. He discharged neither duty. The ground on time limitation having been introduced at the stage of submissions, the Respondent was only granted time to address the issue in supplementary submissions without recourse to the filing of a supplementary record of appeal in proof of his

compliance with the time prescribed. The availability of that procedural avenue to the Appellant would not, nonetheless, obviate the primary duty that the Appellant bore to file a record of appeal that comprehensively addressed all the matters he considered to be in contention. Failure to do so would suggest that the question of time limitation was but a mere afterthought on his part. I would therefore disallow *Ground 1* of the Appeal.

Ground 2: *The learned Judge erred in law when he failed to re-evaluate the evidence on record as adduced before the trial court thereby coming to a wrong decision.*

11. The first appellate court is faulted for failing to address itself to the supposedly cogent and uncontroverted evidence of Mr. Asuman Masengere (PW3), who had at the trial court attested to the Respondent's occupation of land that he had properly acquired from the deceased, but did not take possession of any portion of the land in contention during the deceased's lifetime. It is further opined that although the Respondent alluded to having paid a balance of Ushs. 300,000/= towards the disputed property to the deceased's children, he was unable to furnish any sale agreement in respect of the alleged property.

12. The Appellant does also contest the appellate judge's finding that the failure by the trial court to visit the *locus in quo* did not occasion a miscarriage of justice as it was never an issue before it. Learned Counsel for the Appellant opined that the trial court ought to have visited the *locus in quo* as stipulated under paragraphs 4 and 5 of *Practice Direction No. 1 of 2007* given that the suit entailed allegations of trespass to land and voluminous evidence had been adduced at trial, yet the evidence adduced by the Respondent was general in nature and inconclusive.

13. On his part, the Respondent supported the appellate court's findings, arguing that he had presented to the trial court a sale agreement (Exhibit ID 2) that had been availed to him by the Appellant and his siblings upon completion of the outstanding purchase price of Ushs. 300,000/=. In addition, he refuted the veracity of PW3's evidence, contending that the witness was neither party to the sale transaction between himself, the deceased and his family nor conversant with the boundaries of the land in dispute as reflected in his concession in evidence that he was unable to show the court the boundaries of the said land. Citing paragraph 5 of the plaint, the Respondent further opined that the matters in

contention between the parties were more about his acquisition of the properties in question rather than their size or location. In his view, therefore, there was no need for the trial court to visit the *locus in quo*. He discredited the testimony of PW2 on the number of properties in contention for being self-contradictory, arguing that only two of the three properties averred to by the Appellant in the trial court were in contention between the parties, the contestation surrounding one of them having been subsequently abandoned.

14. It is trite law that a first appellate court is under a duty to re-evaluate the evidence on record and arrive at its own independent conclusion. See **J. Muluta v S. Katama Civil Appeal No.11 of 1999** (Supreme Court). It is also well settled law that an appellate court will be loath to interfere with a finding of fact arrived at by a trial court and will only do so when, after taking into account that it has not had the advantage of studying the demeanour of the witnesses, it comes to the conclusion that the trial court is plainly wrong. See **Kasifa Namusisi & Others v Francis M.K. Ntabaazi, Civil Appeal No. 4 of 2005** (Supreme Court), **Jiwan v Gohil (1948) 15 EACA 36** and **R. G. Patel v Lalji Makaiji (1957) EA 314**.

15. I might also make mention of the position advanced in **Henry Kifamunte vs Uganda, Criminal Appeal No. 10 of 1997** (Supreme Court) that even where the appellate court unearths errors by the trial court, it should only interfere with the trial court's judgment where the errors have occasioned a miscarriage of justice. That case also proposed that where the cogency of the evidence hinges on the manner and demeanour of a witness(es), deference should be made to the trial judge's impression of the credibility of the witness; otherwise, other factors may be considered to determine the credibility of evidence and warrant a departure from the trial judge's position even on a question of fact arising from evidence the appellate court did not see. The reasoning in **Henry Kifamunte vs Uganda** (supra) was adopted in **Banco Arab Espanol v Bank of Uganda, Civil Appeal No. 8 of 1998** (Supreme Court), the evidential principles outlined in the **Henry Kifamunte** case being held to be applicable to the re-appraisal of both oral and affidavit evidence save that the trial court's impressions on the demeanour of witnesses would be inapplicable to affidavit evidence.

16. In addition, **Banco Arab Espanol v Bank of Uganda** (supra) restated the principle advanced in **Henry Kifamunte v Uganda** (supra) that a second appellate court (as is this

Court presently) would not be required to re-evaluate the evidence as is the case with a first appellate court, but is restricted to a determination of whether the first appellate court did indeed abide the judicial duty expected of it. It further affirmed the observation in the **Kifamunte** case that a second appellate court would '**consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in the appeal, ...** (and) **can interfere with the conclusions of the** (first appellate court) **if it appears that in its consideration of the appeal as a first appellate court, it misapplied or failed to apply the principles as set out.**' I do accordingly interrogate the present Appeal on that premise.

17. In terms of the re-evaluation of the evidence, the first appellate court rendered itself as follows.

> *The evidence of both the Plaintiff and his mother Bitujuma and that of the Defendant and his witnesses some of whom are the Plaintiff's own brothers is that the late Ssali's land had several Bibanja Holders (bona fide occupants) on it. Secondly, that he had given some of his children pieces of land much as there had been no transfer of those interests. It is these same people like Gwantamu, DW3 – Hassan Kisulo, who sold their Bibanja interests to the Defendant. It appears to me that the Plaintiff seeks to take advantage of being Title Holder as Administrator of the Estate, to dispossess the Bibanja holders (bona fide occupants) of their pieces of land.*

18. The learned appellate judge faulted the trial magistrate for believing the present Appellant's side of the story yet he had not discharged the burden of proof upon him. He did also fault her finding of fraud against the Respondent for holding titles to the suit land yet he had only acquired a *kibanja* interest therein in the absence of any pleading or proof of fraud. He thereupon concluded:

> *It is therefore my finding that the Magistrate failed to properly evaluate the evidence and accordingly came to the wrong decision/ findings.*

19. With regard to the failure by the Magistrate to visit the *locus in quo*, the appellate court discharged itself as follows:

> *This was never an issue before the trial court. I have looked at the record of the lower court, the dispute was about acquisition of the suit property by the Defendant. There was*

no dispute about boundaries. It is my finding that the said failure has not occasioned a miscarriage of justice.

20. From the foregoing extracts of the judgment, it becomes apparent that the appellate court did in fact re-evaluate the evidence adduced before the trial court and arrived at its own independent conclusions. It discounted the trial court's reliance on one-sided evidence and, upon consideration of the defence evidence, arrived at the independent conclusion that it was the more credible evidence. Having considered the material on record, I would agree that the Appellant's evidence before the trial court was fraught with numerous blatant contradictions and inconsistencies on the number of *bibanjas* allegedly grabbed by the Respondent, as well as the gifting of land to one Majwala, who then licensed the Respondent to use the land. The Appellant's witnesses did in fact support the defence evidence in some material aspects, such as the concession by the Appellant himself that his brother had sold to the Respondent the land on which the latter set up a school, and PW2's conceding under cross examination to having sold a *kibanja* in Kisenyi to the Respondent. PW3, on the other hand, was the most incredible witness who not only did not know the boundaries of the land he purported to attest to, but even contradicted all the witnesses on the year the deceased died.

21. Furthermore, the appellate court considered the bona fides of the lower court's decision with regard to the finding on fraud and reversed it for not having been pleaded or subjected to proof. Having scrutinised the plaint, I cannot fault this conclusion given that fraud was not explicitly pleaded or any particulars thereof delineated as would have put the Respondent on notice as to the specific claims against him. A general statement in paragraphs 4 and 5 of the plaint alluding to land grabbing by the Respondent would not, in my view, suffice for the specificity with which fraud should be pleaded.

22. Meanwhile, visits to *loci in quo* are governed by the *Practice Direction on the issue of orders relating to registered land which affect or impact on tenants by occupancy, Practice Direction No. 1 of 2007*. As can be deduced from its long title, that Practice Direction pertains to orders in respect of registered land. No evidence was adduced before the trial court as would suggest that the land in issue presently was registered land. The evidence on record is that plot 65 was indeed registered land but, following an amendment to the

plaint, that piece of land is no longer in issue presently. It seems to me therefore that in so far as the applicability of the *Practice Direction* to the present case was not established, the question of a visit to the *locus in quo* would not necessarily arise in the present case. Whereas it might arguably be good practice for a court faced with a dispute pertaining to boundaries of land to consider visiting the *locus in quo* even where the property in issue is unregistered land, in my considered view, the omission to do so where a court does not deem it necessary to do so would not in itself impeach the resultant judgment.

23. For the avoidance of doubt, I reproduce below clause 4 of the Practice Directions as invoked by the Appellant to illustrate their inapplicability to the present case.

> **Orders relating to ownership of land**
>
> (a) **Great care should be taken in making orders which affect or impact on the rights of the tenants by occupancy where they have not been parties to the suit, or where they have not been given an opportunity to be heard.**
>
> (b) **Where a dispute is between a previous and current registered owner of land, and involves determining an issue of ownership, or title to land, avoid making blanket orders, for example;**
>
> i. **For eviction of an unsuccessful party, or putting the successful party in possession, when there is no evidence before court whether or not there are no tenants occupying the land.**
>
> ii. **For demolition of structures on the land when you have no evidence of who put up or owns the structures.**

24. Without belabouring the point, the definition of a tenant by occupancy under section 31(2) of the Land Act (as amended) simply entrenches the inapplicability of *Practice Direction No. 1 of 2007* to unregistered land. The tenant by occupancy is defined as follows:

> **The tenant by occupancy referred to in subsection (1) shall be deemed to be a tenant of the registered owner to be known as a tenant by occupancy, subject to such terms and conditions as are set out in this Act or as may be prescribed.** *(my emphasis)*

25. Finally, general damages are generally aimed at making good losses and restoring a claimant to the position s/he would have been in but for the act of the defendant that is complained of. Consequently, having found no tortious act or omission on the part of the Respondent, I cannot fault the appellate court's decision to reverse the award of general damages by the trial court. As a first appellate court, the Hight Court was well within its

remit to overturn the trial court's award of damages having been satisfied that the lower court arrived at a wrong decision therefore it was clearly wrong in exercising its discretion to award general damages. Consequently, as a second appellate court, I find no reason to interfere with the conclusions of the first appellate court. I do therefore disallow *Ground 2* of the Appeal.

Conclusion

26. In the result, I would dismiss the Appeal in its entirety. It is trite law that costs should follow the event unless a court for good reason decides otherwise. Therefore, as the successful party the Respondent would be entitled to the costs of the Appeal. Finding no reason to depart from that general rule, this Appeal is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Kampala this 25th **day of** Jan **, 2022.**

Mugenyi.

Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: MADRAMA, MULYAGONJA, MUGENYI, JJA)

CIVIL APPEAL NO 171 OF 2015

MUSISI KONDE} ..... APPELLANT

VERSUS

LUSWATA KANAKULYA} .....RESPONDENT

(Appeal from the Judgment of the High Court at Kampala (Namundi, J) In Civil Appeal No 144 of 2012 dated 30th October 2013)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Monica K. Mugenyi, JA.

I agree with her that the appeal ought to fail for the reasons she set out in her judgment and have nothing useful to add. Since Hon. Lady Justice Irene Mulyagonja, JA also agrees, this appeal stands dismissed with costs to the Respondent.

Dated at Kampala the 28th day of July 2022

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

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(Coram; Madrama, Mugenyi, Mulyagonja, JJA)

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LUSWATA KANAKULYA.....RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Monica Mugenyi, JA.

I entirely agree that the appeal be dismissed in its entirety with costs to the respondent, as proposed.

Dated at Kampala this 25th **day of** June **2022**

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Irene Mulyagonja
Justice of Appeal/Constitutional Court