THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0250 OF 2016

1. KISEMBO EMMANUEL
2. MUGENZI EDWARD
3. WAMANI GODFREY
4. JESCA KYONGO::APPELLANTS

VERSUS

1. TIBEZINDA MOSES
2. ATAGWIREHO IBRAHIM
3. BYENKYA ALEX:::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Masindi before Byabakama, J (as he then was) dated 23rd March, 2016 in Civil Appeal No. 005 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

This appeal is from the decision of the High Court (Byabakama, J (as he then was)) allowing an appeal filed by the respondents and setting aside the decision of the trial Chief Magistrate's Court (H/W Byaruhanga (as he then was)). The trial Court had found in favour of the appellants in a suit they filed in that Court.

Background

The appellants' suit against the respondents and another person not party to this appeal, concerned a dispute over ownership of land situated in Kitamanya Village, Kikwanana Parish, Nyangahya Sub-County in Masindi. Neither party mentioned in their pleadings what the exact size of the land was. The appellants claimed ownership of the suit land, as descendants of Elasto Kibwara, who had acquired the land from Bunyoro Kitara Kingdom in 1939. Kibwara died in 1991. It was the appellants' claim that after his death, the respondents trespassed on the suit land and attempted to obtain

registration as the proprietors thereof. The appellants prayed for a declaration that they were the rightful owners of the suit land, and also for an order of injunction to restrain the respondents from interfering with the suit land, as well as for damages and costs of the suit.

The respondents denied the appellants' claims and stated that they were the rightful owners of the respective portions of land, claimed by the appellants, on which they lived. The respondents stated that they knew the late Kibwara, as a neighbour and the land he owned was different from the one they occupied. The respondents stated they and/or their ancestors had lived on their land for a long time, at least 30 to 80 years, before the appellants began to challenge their ownership. They further claimed that Kibwara was aware of the boundaries to their land, and that during his lifetime, no dispute arose about ownership of land. The respondents stated that in 2006, they embarked on the process of formalizing their ownership and had applied for a certificate of title, but had been unsuccessful, due to the appellants' challenges to their ownership.

After a remarkably long trial spanning at least 8 years, conducted by several trial Magistrates Grade One and Chief Magistrates, on 24th January, 2014, H/W Byaruhanga (as he then was) delivered a judgment allowing the appellants' suit and granting the following reliefs: 1) a declaration that the appellants were the rightful owners of most of the suit land, with the exception of certain portions of land, that the respondents were lawfully occupying. The learned trial Chief Magistrate ordered for the parties to instruct a surveyor to determine the true extent of the respondents' land; 2) an order of permanent injunction restraining the respondents from further trespassing on the part of the suit land that they were unlawfully occupying; 3) an order awarding general damages of Ug. Shs. 9,000,000/= to the appellants; and 4) an order awarding costs of the suit to the appellants.

The respondents appealed to the High Court. In his judgment, the learned first appellate Judge criticized the learned trial Chief Magistrate's handling of the evidence, in several respects, as in his own evaluation, the evidence of the appellants was filled with contradictions, was hearsay in most parts, and was therefore not cogent enough to prove their case on a balance of

probabilities. He therefore set aside the judgment and decree of the learned trial Chief Magistrate, and consequentially dismissed the appellants' suit in the trial Court. He awarded the costs of the appeal and those of the trial proceedings to the respondents.

Being dissatisfied with the decision of the High Court, the appellants now appeal to this Court on the following grounds:

"1. **The learned Judge on appeal erred in law and fact when in evaluation of evidence, he failed to consider and/or ignored the evidence of PW5 (Cecilia Chebet) in support of the appellant's case and thereby came to a wrong conclusion that the appellants had not proved to the required standard that they owned the suit land.**

2. **The learned Judge on appeal erred in law and in fact when in evaluation of evidence, he disregarded the evidence of the appellants to wit PE1 (the Will of the late Yovani Wandera) and PE3 (Certificate of land ownership from Bunyoro – Kitara Kingdom) in support of the appellants' case and thereby came to a wrong conclusion that the appellants had not proved to the required standard that they owned the suit land.**

3. **The learned Judge on appeal erred in law and in fact when he found that the evidence of the appellants regarding ownership of the suit land was hearsay which occasioned a miscarriage of justice to the appellants.**

The appellants prayed that this Court; 1) allows the appeal; 2) sets aside the orders of the High Court and substitutes them with the orders of the trial Chief Magistrate's Court; and 3) grants the appellant the costs of this appeal and those of the proceedings in the Courts below.

The respondents opposed the appeal.

Representation

At the hearing, Mr. Alfred Okello Oryem, learned counsel appeared for the appellants. Mr. Tonny Okwenye, learned counsel appeared for the respondents.

Both sides relied on written submissions filed and adopted in support of the respective parties' cases.

Preliminary objection to the appeal

In his written submissions, counsel for the respondents submitted that the grounds as set out in the appellants' memorandum of appeal, offend **Section 72 (1)** of the **Civil Procedure Act, Cap. 71** and ought to be struck out. Counsel pointed out that the appellants' appeal is a second appeal, and under the highlighted provision, grounds on second appeals should concern only matters of law. However, the grounds set out in the relevant memorandum of appeal relate to matters of mixed fact and law, which renders them liable to be struck out, and thereby rendering the present appeal incompetent.

Counsel noted that the appellants, in their submissions, changed their grounds of appeal to comply with the law, but he submitted that the appellants did not follow the right procedure prescribed under **Rule 17 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10.** The appellants could only have validly amended their grounds after seeking leave of this Court but they did not do so, instead opting to amend via their submissions, which amounted to amendment without leave. Counsel urged this Court to reject the inappropriate amendment of the appellants' memorandum of appeal.

In reply, counsel for the appellants submitted that the grounds set out in the appellants' memorandum of appeal comply with the relevant law. The grounds raise questions of law relating to whether the first appellate Court re-evaluated the evidence on record. Counsel submitted that as decided in the case of **Pandya vs. R [1957] EA 336**, on second appeal, it is a question of law, whether the first appellate Court, on approaching its task applied or failed to properly evaluate the evidence placed before the trial Court. Counsel also relied on the authority of **Muluta Joseph vs. Katama Sylvano, Supreme Court Civil Appeal No. 11 of 1999 (unreported)** in support of his submissions.

I have given due regard to the preliminary objection to the present appeal. It is now trite law that pursuant to **Sections 72** and **74** of the **Civil Procedure Act, Cap. 71**, the grounds of appeal in second appeals to this

Court must relate to points of law only, and not points of mixed law and fact or of fact. In determining whether the grounds of appeal comply with the highlighted sections, this Court will consider the grounds, as explicitly drafted. **(See: Celtel Uganda Ltd vs. Karungi Susan, Court of Appeal Civil Appeal No. 073 of 2013 (per Kasule, Ag. JA)**

I have considered the grounds set out in the appellants' memorandum of appeal, and hold the view that they all relate to points of law of mixed law and fact, which offends **Section 72** and **74** of the **Civil Procedure Act, Cap. 71.**

I have also noted the attempt by counsel for the appellants, in his submissions, to change the grounds of appeal but I am of the view that the procedure adopted amounts to amending without seeking leave of Court contrary to the rules of this Court. On this point **Rule 17** of the **Rules of this Court** provides:

> **"Form of amendments.**
>
> **(1) Where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.**
>
> **(2) Where any person lodges an amended version of a document, he or she shall show clearly—**
>
> **(a) any words or figures deleted from the original, by including those words or figures and striking them through with red ink, so that what was written remains legible; and**
>
> **(b) any words or figures added to the original, by writing them in red ink or underlining them in red ink.**
>
> **(3) Where any record of appeal includes any amended document, the amendments shall similarly be shown in each copy of the record of appeal."**

Further, **Rule 45 of the Rules of this Court** provides that:

> **"45. Applications for leave to amend.**

(1) Whenever a formal application is made to the court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and if practicable, lodged with the registrar and served on the respondent before the hearing of the application; or if that is not practicable, it shall be handed to the court and to the respondent at the time of the hearing.

(2) The court may consider an application for leave to amend whether made formally as in subrule (1) of this rule or informally during the course of proceedings and may dispose of the application or direct that an informal application be made formally.

(3) Where the court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged, within such time as the court, when giving leave, may specify, and if no time is specified, then within forty-eight hours after the giving of leave; and on failure to comply with the requirements of this subrule, the leave so given shall cease."

In my view, the import of the above provisions, is that a party to any appeal in this Court is required to obtain leave before amending any document, which that party seeks to rely on. In the present case, the appellants did not seek leave to amend their memorandum of appeal but instead went ahead to change the grounds in their submissions. In my view, the procedure adopted by the appellants was in complete disregard of the rules of this Court. I would, therefore, accept the respondents' submissions and reject the alleged amendment of the grounds via the appellants' submissions. I would consider the grounds as set out in the appellants' memorandum of appeal.

I already stated earlier that the grounds as set out in the appellants' memorandum of appeal offend the provisions of **Section 72** and **74** of the **Civil Procedure Act, Cap. 71**. The ordinary consequence for such offending is striking out the grounds of appeal, which would render the appeal incompetent and liable to be struck out as well. However, for reasons I shall give later in this judgment, I would refrain from striking out the appeal, despite the defects in the framing of the grounds of appeal.

I shall proceed to consider the parties' submissions.

Appellants' submissions

Counsel for the appellants argued all the grounds of appeal jointly. He submitted that the case for the appellants is that in several respects, the first appellate Court failed in its duty to properly evaluate the evidence on record.

In ground 1, the appellants complain that the learned first appellate Judge failed to give proper weight and/or ignored the evidence of PW5 Cecilia Cebet, which proved that the suit land belonged to the late Kibwara. PW5 had knowledge of the ownership of the suit land, as she had lived thereon since 1969, when her husband one Yovan Wandera received a portion of the land from Kibwara, as reflected in her husband's Will (Exhibit P1). PW5 was also the mother of the 2nd respondent and she had knowledge about how the other respondents came to occupy portions on the suit land. PW5 testified that the 3rd respondent's father one John Gahwera received a portion of the suit land measuring 35 metres x 35 metres from Kibwara. As for the 1st respondent, it was PW5's evidence that the 1st respondent's father Ali Byegarazo was resident in the same village where the suit land was located but he owned a separate piece of land separate but contiguous with the suit land. Upon demise of Byegarazo, the 1st respondent trespassed to the extent of about 20 metres into the suit land.

Counsel submitted that PW5's evidence was not challenged by the respondents and remained cogent and of great probative value on the question of ownership of the suit land, yet the learned first appellate Judge never considered that evidence in his judgment. He urged this Court to find that the learned first appellate Judge erred in failing to consider PW5's evidence.

On ground 2 of the appeal, counsel submitted that the learned first appellate Judge erred when he disregarded evidence of the last Will of Yovan Wandera (the 2nd respondent's father) which proved that the suit land belonged to Kibwara. Wandera left a Will in which he stated that he and his family had been allowed to settle on Kibwara's land. The Will was not challenged and

yet the learned first appellate Judge refused to rely on it. Further, relying on the authorities of **Habre International Co. Ltd vs. Ebrahim Alarakhia Kassam and Others, Supreme Court Civil Appeal No. 4 of 1999 (unreported) and Muluta Joseph vs. Katama Sylvano, Supreme Court Civil Appeal No. 11 of 1999 (unreported),** counsel advanced the proposition that where a party fails to challenge evidence, that evidence must be taken as true, and submitted that the learned first appellate Judge erred in rejecting the unchallenged evidence of Wandera's will. Counsel pointed out that Wandera's will further supported the appellant's case. Wandera stated in his will that he received a portion measuring about 3 acres from Kibwara, and that his father Mr. Sururu did not own the suit land. Wandera also stated that his son, the 2nd respondent was wrongfully claiming the suit land.

It was further submitted that the learned first appellate Judge erred when he rejected Wandera's Will basing on uncanvassed matter. He pointed out that the learned first appellate Judge found the Will to be a forgery basing on the fact that it contradicted the evidence of some of the appellant's witnesses such as PW7. Counsel faulted the learned first appellate Judge for framing an issue surrounding the alleged forgery of Wandera's Will without hearing the parties and without any evidence of forgery. He invited this Court to re-evaluate the evidence on the authenticity, cogency of the Will and find that it had sufficient probative value.

It was further submitted that even assuming that the learned first appellate Judge could disregard Wandera's Will as a forgery, the reasons he gave for doing so were erroneous. First, it was erroneous for the learned first appellate Judge to find that the Will was a forgery because PW6 George Isingoma who testified to having witnessed the making of the Will, had not informed Wandera's family of the existence of the Will at the time of his burial. In counsel's view, failure of a witness to mention existence of a Will at the earliest possible time does not per se render the Will a forgery. Secondly, the learned first appellate Judge had erred to question the authenticity of the Will on grounds that the appellants' evidence was contradictory as to when Kibwara acquired the suit land, with some

witnesses saying it was in 1939, while others stated that it was in 1941. In counsel's view, there was no contradiction on this point as the evidence clearly showed that Kibwara settled on the land in 1939 and acquired certificate to his title in 1941. Thirdly, the learned first appellate Judge based on faulty reasoning that because the Will mentioned that land was given to Wandera by the family of Kibwara, this meant that it did not belong to Kibwara but his family. Counsel submitted that reference to the family meant Kibwara, who was the head of his household. It was submitted that the learned first appellate Judge's questionable reasoning in handling the Will was due to the absence of a trial to verify the issues. The learned first appellate Judge ended up asking and answering questions that should have come up in cross examination, which was erroneous.

Further on ground 2, counsel for the appellants faulted the learned first appellate Judge for his handling of the evidence of the certificate of title granted to Kibwara by Bunyoro Kitara Kingdom (Exhibit PE3). Counsel pointed out that the learned first appellate Judge ignored Exhibit PE3 on grounds that it did not show the size of the suit land. The learned Judge also found that there was no evidence of the precise land given to Wandera by Kibwara. Counsel contended that Exhibit PE3 was exhibited to prove that Kibwara had possession and eventual grant as shown therein. It was further the appellants' evidence that some of the land indicated in Exhibit PE3 was given out by Kibwara to Wandera, and some other land to the appellants' ancestors. The appellants' evidence was consistent and was also vividly demonstrated at the locus in quo, where the witnesses showed that the land was demarcated by eucalyptus trees.

With regard to ground 3, counsel submitted that the learned first appellate Judge erroneously characterized crucial evidence for the appellants as hearsay. Most of this evidence, which was referred to earlier was not hearsay evidence as the appellants' witness did not testify about facts relayed to persons no called to testify. The appellants testified concerning facts they had personal knowledge about. The appellants were born and grew up on the suit land, and thus properly appreciated the portions of the suit land that were rightfully occupied by the respondents and those that the latter illegally

encroached upon. The evidence of PW5, for example, was not hearsay as it came from her personal knowledge of the suit land as a resident in the area from 1969. Counsel contended that it was erroneous for the learned first appellate Judge to characterize PW5's evidence as hearsay.

It was also submitted that the respondent's evidence was contradictory and had no truth in it. The 1st respondent claimed his interest from multiple persons, first from one Tabula, and then from Ibrahim Byembadwa his biological father. In counsel's view, this showed untruthfulness on his part. The 3rd respondent claimed an interest on the suit land from his father Gahwera John, but the appellants' evidence was that Gahwera occupied a portion of land measuring 35 metres x 35 Metres. The 3rd respondent failed to call Gahwera to contradict the appellants' evidence.

It was further submitted that during the locus visit, the 1st respondent testifying as DW1 showed graves of his family members that were situated outside the suit land. This corroborated evidence of the appellants' witnesses that the 1st respondent had no interest in the suit land but had just illegally settled there. The 1st respondent's house on the suit land was newly constructed further showing that he had just moved there.

Counsel further submitted that the evidence of the 2nd respondent testifying as DW2 was heavily discredited at the locus in quo when he purported to show the Court a grave belonging to his grandfather Sururu. However, Sururu's grave was over 10 acres from the suit land. Moreover, there was evidence of one John Sebigere given at the locus stating that the suit land belonged to Kibwara. Further counsel pointed to evidence that there were 14 families on the suit land, out of which 10, excluding the appellants, recognized Kibwara as the owner of the suit land. Counsel contended that the recognition by those 10 families showed that the land belonged to the appellants. In conclusion, on this point, counsel submitted that the learned first appellate Judge erroneously ignored evidence given by the appellants proving that they were the true owners of the suit land.

In view of the above submissions, counsel invited this Court to find that all 3 grounds must succeed, allow the appeal, and set aside the judgment and

decree of the first appellate Court and restore the judgment and decree of the trial Court. Counsel also prayed that the appellants be awarded the costs of this appeal and of the proceedings in the Courts below.

Respondents' submissions

In reply counsel for the respondents argued grounds 1 and 2 jointly followed by ground 3 separately.

Grounds 1 and 2

With regard to the allegations in ground 1 that the learned first appellate Judge disregarded the evidence of PW5 Jebit Wandera, counsel for the respondents disagreed and submitted that the learned first appellate Judge duly considered that evidence. The learned Judge considered that PW5's evidence was that the size of the land given to Wandera, the father to the 2nd respondent was 3 acres. PW5 repeated the same allegations at the locus in quo. Further, PW5's evidence contradicted the evidence of PW3, with the latter testifying that Wandera was given a piece of land measuring 20 metres x 20 metres. Counsel submitted that it was against that backdrop that the learned first appellate Judge considered the evidence of PW5 as being contradictory as regards the size of land given to the 2nd respondent's father.

It was further submitted that the purported Wandera's Will also contradicted the evidence of PW5 and PW3. Whereas PW5 stated that Wandera was given 3 acres on the suit land, the Will purported that Wandera only received usufructuary rights thereon. PW3 on the other hand claimed that Wandera was given a portion measuring 20 x 20 metres. In counsel's view, the highlighted contradictions amounted to an attempt by those witnesses to mislead the trial Court and the first appellate Court rightfully rejected their testimonies.

In relation to the 1st respondent, counsel submitted that he owned land different from that of the 2nd and 3rd respondents, and therefore it was not true as submitted for the appellants that all respondents owned the same piece of land.

In reply to the appellant's submissions on ground 2, counsel for the respondents submitted that the learned first appellate Judge duly considered Exhibits PE1 (Wandera's Will) and PE3 (a Certificate of land ownership for Kibwara). Counsel contended that Wandera's Will was dubious, as it was prepared after the institution of the appellants' suit in the trial Court. Nonetheless, the learned first appellate Judge weighed the contents of the Will against the evidence of the rest of the appellants' witnesses. PW6 who purported to have witnessed the making of the Will did not at the time of Wandera's burial, notify the deceased's family about the existence of that Will. Further, whereas the Will purported that Sururu, Wandera's father did not own land in Kitamanya, PW7 testified that he actually did. Further still, whereas the Will alleged that Wandera started living on the suit land in 1982, PW7 testified that Wandera started living thereon earlier in 1941 upon demise of his father Sururu. Counsel submitted that the contradictions between the Will and the rest of the appellants' evidence led to its rejection.

Counsel further criticized the purported Wandera Will as having been vague and therefore void under **Section 76** of the **Succession Act, Cap. 162**. The Will stated that Kibwara allowed Wandera to stay on approximately 3 acres of the former's land. The Will was open to different interpretations as to whether staying meant giving out the land or not. Counsel submitted that such a Will cannot be relied on as its contents are not clear.

It was further submitted that the purported Wandera Will was suspicious and a ploy to defeat the interests of the respondents for the following reasons. First, the Will was dated 12th July, 2008 and yet the appellants' suit was filed in 2006. Secondly, PW6 the purported witness to the Will only declared its existence during trial of the appellant's suit which means that it was merely created to defeat the respondents' interests. Thirdly, the Will omitted information ordinarily contained in a Will prepared by an advocate, such as the list of the deceased's properties, the names or ages of the children, the wife or wives and distribution of property. Fourth, the thumb print on the Will was not clear. Fifth, while PW6 the witness testified that the Will was drawn by counsel Tugume, the Will itself indicated that it was drawn by a firm called Musinguzi and Co. Advocates yet counsel Tugume was not part

of that firm. Sixth, while the Will ran up to five (5) pages, the first four pages did not contain a thumbprint of the deceased and therefore could have been doctored. Seventh, while PW6 stated that Wandera the maker of the Will did not know how to read and write, the Will did not contain a certificate of translation as required under **Sections 3 and 4** of the **Illiterates Protection Act**. Eighth, the 1st appellant was an executor of the impugned Will, which cast more doubt on it. In view of those reasons, counsel submitted that the purported Wandera Will was not worthy of being a Will and was just a document without sufficient evidential value.

As for the appellants' allegations that the learned first appellate Judge ignored Exhibit PE3, a purported certificate of title showing that Kibwara acquired the suit land from Bunyoro Kingdom, counsel submitted that those allegations were untrue. The learned Judge re-evaluated the evidence regarding Exhibit PE3, and found that it showed that Kibwara acquired the land in 1941, contrary to the assertions by PW7 that he had done so in 1939. It was further submitted that PW7's further evidence was that in 1939, Kibwara gave a portion of the suit land measuring 20 x 20 metres to Sururu (father to the Wandera and grandfather to the 2nd appellant), which caused further confusion in the appellants' case.

It was further submitted that Exhibit PE3 indicated a different piece of land in Kabengere, Kyema, Musale, Buruli County, while the respondents' land was situated in Kitamanya Parish, Nyangahya Sub-County in Masindi. The appellants failed to adduce evidence linking the land decried in Exhibit PE3 to the actual suit land or evidence that the names of the villages on Exhibit PE3 had changed.

Counsel further submitted that moreover, the purported certificate from Bunyoro Kingdom is not a recognized instrument under the Registration of Titles Act, Cap. 230 or the Lands Act, Cap. 227. The only documents that confer title are Freehold, Mailo, or Customary titles. No evidence was adduced to prove that the appellants brought the suit land under the operation of the Registration of Titles Act, Cap. 230. There was also no

evidence that Kibwara had fulfilled the condition in PE3 to develop the suit land.

It was further submitted that the "Mituba" trees constituting the boundaries to the suit land as indicated on Exhibit PE3 were not seen during the locus visit. Instead the appellants stated that there were eucalyptus trees marking the boundaries of the suit land.

All in all, counsel submitted that the learned first appellate Judge considered the evidence of the Wandera Will (Exhibit PE1) and that of the Certificate of Bunyoro Kingdom (Exhibit PE3) which the appellants' case was heavily based, but he found those documents unreliable and unworthy of being relied on to enter judgment in the appellants' favour.

Counsel submitted that grounds 1 and 2 be resolved in the respondents' favour.

Ground 3

Counsel submitted that some of the appellants' evidence was properly deemed to be hearsay by the learned first appellate Judge. He relied on the definition of hearsay evidence in the textbook **Sankar Law of Evidence** at **page 25,** as information gathered by one person from another person concerning some event, condition or thing of which the first person had no direct experience. It was pointed out that the evidence of PW3 Jesca Kyongo and PW4 Magezi Edward was that they were told by Kibwara that he gave out certain portions of land to the respondents' ancestors, and that evidence amounted to hearsay evidence. The evidence of PW3 and PW4 also indicated that they were not sure about what they were narrating in Court. It was with that background that the first appellate Court found those witness' evidence to be hearsay.

Counsel prayed that this Court disallows ground 3.

Appellants' submissions in rejoinder

Counsel for the appellants made the following rejoinder to the respondents' submissions. In relation to the respondents' submission that the Wandera Will was fabricated to defeat the respondents' interests, counsel rejoined that the respondents had no interest in the suit land that could be defeated by the Wandera Will to begin with. Further, the respondents were not present when Kibwara gave land to Wandera and therefore, were not best suited to contradict the evidence of PW5 who was herself present nor could they dispute the Wandera Will because they had no knowledge of what happened during the making of that Will.

Further, counsel disagreed with the respondents' submission that the Wandera Will was void for uncertainty, and submitted that the said Will stated in clear terms that the disputed land was not given to Wandera. Moreover, the Wandera Will could not be contradicted by oral evidence as **Sections 93 and 94 of the Evidence Act, Cap. 6** prohibit reliance on other evidence to explain or amend ambiguous documents. Thus, the learned first appellate Judge erred in relying on the evidence of PW5, PW6 and PW7 to contradict the Wandera Will.

In further rejoinder, counsel submitted that the respondents' submissions were misguided in so far as they question the Wandera Will, considering that the Will was admitted in evidence without objection. In counsel's view, upon admission of the Will into evidence, neither the respondents nor the learned first appellate Judge could discount the Will's probative value.

In relation to the respondents' submission on the unreliability of the certificate issued by Bunyoro Kitara (Exhibit PE3), counsel contended that the certificate was reliable and corroborated the appellants' evidence of ownership of the suit land. The case for the appellants was not that the certificate was issued under the Registration of Titles Act, Cap. 230, but rather that it gave recognition of ownership and occupation of the suit land by Kibwara. The appellants' evidence was that Kibwara gave some of his land to the respondents, although the respondents encroached to portions of the land beyond what was given to them.

With regard to the respondents' submission on the nature of the trees that marked the boundaries to the suit land, counsel submitted that whether the trees were bark trees or eucalyptus trees, the fact remained that there were trees marking the boundaries to the suit land. The eucalyptus trees were planted by Kabagambe Justus of the Mugabo clan, to which Kibwara belonged.

Counsel also disagreed with the respondent's submission that the evidence of PW3 and PW4 was hearsay evidence, and submitted that their evidence was direct evidence given by those witnesses concerning facts they heard from Kibwara.

Resolution of the Appeal

I have carefully considered the Court record and the submissions of counsel for both sides, and the law and authorities cited in support thereof. I have also considered other relevant law and authorities not cited.

I stated earlier in the judgment that I would give reasons why I refrained from striking out the appellants' appeal, despite the fact that the grounds of appeal appear to offend the provisions of **Sections 72** and **74** the **Civil Procedure Act, Cap. 71**, rendering the appeal liable to be struck out. I do so now. Firstly, experience has shown that striking out appeals because the grounds relied on explicitly offend the highlighted provisions is rarely productive, as the parties will likely be denied an adjudication of the appeal, on the merits. Secondly, it will be noted that the duty of a second appellate Court is to determine whether the first appellate Court, on approaching its task, applied or failed to apply the principles as it was expected to do, namely, to properly reappraise all the evidence and come up with its own conclusions. If the first appellate Court failed to properly reappraise the evidence, the second appellate Court will proceed to do so and come up with its own findings. **(See: Masembe v Sugar Corporation and another [2002] 2 EA 434)**. In my view, in order to conform to the highlighted duty, it is necessary for this Court to reappraise the evidence and decide whether the first appellate Court properly reappraised the same, especially, where, as in the present case, the two lower courts reached different conclusions

on the evidence. Thirdly, it will also be noted that it is a point of law, albeit an implicit one, if the first appellate Court is found to have made a finding(s) that are not supported by the evidence. **(See: Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported).** In the present case, all the grounds of appeal allege that the first appellate Court made findings that are not supported by the evidence. It can therefore be stated that they contain points of law, in that regard. For these reasons, I would refrain from striking out the appeal and proceed to reappraise the evidence.

The appellants instituted a suit against the respondents in the Land Tribunal at Masindi, but it was consequently transferred to the Chief Magistrate's Court at Masindi. The suit concerned ownership of a piece of land at Kitamanya Village, Kikwanana Parish in Masindi District. The appellants stated in paragraph 6 of their statement of claim as follows:

> **"6. The cause of action arose as hereunder:**
>
> **(i) This [the disputed land] is customary type of land the claimants inherited from their late father the late Erasto Kibwara who died in the year 1991.**
>
> **(ii) In the year 1939, the late Elasto Kibwara acquired a certificate of land ownership from Bunyoro Kitara Kingdom.**
>
> **(iii) After the death of the claimants' father they (claimants) decided to lease the land but the whole process was halted by the death of the surveyor."**

The first witness called for the appellants was the 1st appellant who testified as PW1. He testified that he was born in 1958 and his father was John Banebuka, a son to Kibwara. He further stated that Kibwara purchased a piece of land in Kitamanya Village in 1939, measuring 90 acres. He stated that the respondents had each unlawfully settled on portions of that land.

In cross examination at page 17 of the record, the 1st appellant stated that he did not know the size of Kibwara's land. He also stated that he did not

know the size of the portions of land on Kibwara's land unlawfully occupied by the 1st, 2nd and 3rd respondents. He further testified that the 1st respondent settled on the relevant land in 1990, while the 2nd and 3rd respondents had been on their land since their childhood. He also stated that Kibwara acquired the suit land in 1939, before he (the 1st appellant) was born.

The second witness called for the appellants was the 3rd appellant Wamani Godfrey who testified as PW2. He testified that he was a descendant of Kibwara and was at all material times living on his land. He stated that while living on the land, the respondents had unlawfully settled on the suit land and started utilizing it. The 2nd appellant was a son of Yovan Wandera, who was given a part of the disputed land by Kibwara. He was staying on the suit land by the time PW2 testified. The 3rd appellant was the son of John Gahwera who was also still living on the suit land at the time of the trial. PW2 testified that in 2006, Kibwara's family had approached the authorities for boundary opening but they were told that the land could not be surveyed as it was being claimed by the respondents.

In cross-examination at page 19 of the record, PW2 stated that he was born on the suit land in 1980, and his father was Bagamba Willima, a son of Kibwara. He testified that the 1st respondent was living on a neighbouring piece of land belonging to one Ezironi and not on Kibwara's land. He stated further that none of the respondents had a house on the suit land. He also stated that he did not know the size of the suit land.

The third witness was the 4th appellant who testified as PW3. She stated that she was a daughter to Kibwara and a beneficiary to his estate, which included the suit land. She stated that Kibwara acquired the land in 1939 from Bunyoro Kitara Kingdom. She grew up staying on the land and so did the 1st, 2nd and 3rd appellants. She further stated that she knew the extent of the respondents' interest on the suit land. The 2nd respondent derived an interest in a portion that Kibwara allowed the 2nd respondent's father Wandera Yovan to settle on. However, PW2 testified that the 2nd respondent

had occupied an additional 30 metres beyond what was allocated to his father.

With regard to the 3rd respondent, PW3 testified that he was entitled to a portion of Kibwara's land measuring 30 metres that was donated to his father John Gawera. However, that the 3rd respondent had subsequently gone beyond the allocated land and started occupying more land. PW3 stated that the dispute with the 2nd and 3rd respondents was that they occupied more than was donated to their parents.

In cross examination at page 40 of the record, PW3 stated that the 1st respondent was staying in a house on the suit land that "they gave" to Maimuna. Maimuna was given a portion on Kibwara's land measuring ¼ an acre. However, the appellant had been staying on more than about an acre of land since 2004. PW3 further stated that the 1st respondent was a son of Ali Byegarazo, who owned land neighbouring Kibwara's land.

Further in cross examination, PW3 stated that the 2nd respondent's father Wandera Yovan was given a portion measuring 20 x 20 metres on Kibwara's land, but had later started utilizing a larger portion of land.

The 2nd respondent testified as PW4. He stated that he was Kibwara's grandson and had lived on Kibwara's land for 24 years, during which time he had interacted with Kibwara about the disputed land. He used to patrol the land with Kibwara, and observed that it was approximately 90 acres. PW4 further stated that Kibwara told him that Wandera had requested for land and was given a portion on Kibwara's land measuring approximately 20 x 20 metres. He also testified that Wandera was the 2nd respondent's father, and it was from him that the 2nd respondent derived an interest in the suit land. The 2nd respondent had however started utilizing a portion of land measuring ½ an acre that was not allocated to Wandera. PW4 like PW3 testified that the 3rd respondent had started utilizing a portion of Kibwara's land, more than was allocated his father John Gahwera, and that the 1st respondent who derived an interest from Maimuna started to occupy a bigger portion of land than allocated to Maimuna.

Jebti Wandera testified as PW5. She was Wandera Yovan's wife and the mother of the 2nd respondent. She stated that she had lived on Kibwara's land since 1969 when she was taken there by Wandera and was therefore conversant with its ownership. PW5 stated that Wandera was allocated a piece of land on Kibwara's land measuring about 20 x 20 metres for settlement, and was given permission to cultivate on another piece of land, although that land was "not given to us". PW5 further testified that her son the 2nd respondent had however started unlawfully utilizing a portion of land on the Kibwara's land, the size of a football pitch. PW5 testified that Wandera died in 2008 and he was buried on the 20 x 20 metres land.

In cross examination at page 48 of the record. PW5 stated that the land that was given to her husband Wandera measured 3 acres. She also stated that when she came to Kibwara's land in 1969, the 1st respondent was very young and was staying with his mother on a separate piece of land. The 1st respondent's father was also staying on a separate piece of land.

It must be noted that the evidence of PW3, PW4 and PW5 was the primary evidence in support of the appellants' case. Those witnesses' evidence was that Kibwara acquired the suit land in 1939 from Bunyoro Kitara Kingdom. The exact size of Kibwara's land was not known by the witnesses, but their evidence was that it was a significant piece of land. It was further the evidence of those witnesses that Kibwara allocated portions of land to the ancestors of the 2nd and 3rd respondents. The 2nd respondent's ancestor Wandera Yovan was allocated a piece of land measuring either 20 x 20 metres or 3 acres according to PW5. While PW3 and PW4 stated that it was 20 x 20 metres, PW5 contradicted herself by saying that the land allocated to Wandera Yovan was 3 acres. I shall say more about this contradiction later in the judgment. As for the 1st respondent, it was the evidence of PW3 and PW4 that he derived his interest from one Maimuna who was allocated about ¼ acre of land. It was not clear what relationship the 1st respondent had with Maimuna.

It also emerged from the evidence of PW3, PW4 and PW5 that 1st, 2nd and 3rd respondents started occupying more land than was allocated to their ancestors, and it was for that reason that the respondents were sued.

The respondents denied the appellants' claims, and their case was that their respective portions of land neighboured Kibwara's land. They obtained their interest in the said land from their ancestors. They claimed that their ancestors and thereafter themselves had lived peacefully as neighbours of Kibwara, during the latter's lifetime, and he acknowledged their interest. Evidence was adduced in support of the appellants' claims.

The first witness for the respondents was the 1st respondent who testified as DW1. He stated that he was conversant with the history of the disputed land having been told about it by his father Ali Byegarazo. The disputed land was owned by his grandfather Ibrahim Byembadwa, and thereafter by his father upon death of his grandfather, from 1958. DW1 stated that when Kibwara went on the land, he found Byembadwa already settling on it. He did not specify when that happened. DW1 further stated that after demise of his father, he began settling on the land. The land was about 10 acres, although he occupied only 3 acres. The other land was occupied by other families.

In cross examination at page 59 of the record, DW1 stated that Kibwara came on the suit land in the 1930s as a Muluka Chief. He maintained that he was told that Kibwara was given land by Sururu.

The 2nd respondent testified as DW2. He stated that he claimed about 40 acres of land. The land was family land, first owned by his father Sururu and then his grandfather Yovan Wandera. Sururu obtained the land in 1920 and upon his demise in 1942, Wandera started occupying the land until 2008 when he died. DW2 stated that he inherited his interest from his father Yovan Wandera, and had started living on the land.

In cross examination at page 69 of the record, DW2 stated that his estimation of the size of the suit land included the land owned by two of his other co-defendants (about 3 families in total). He also stated that his ancestors had been buried on the land. He further testified that PW5, his

mother, had told lies that the land he was living on was owned by Kibwara's family and that Yovan Wandera had only been given a portion measuring 20 x 20 metres. He acknowledged that he did not have any documentary evidence that Sururu owned the suit land.

The 3rd respondent testified as DW3. He stated that he inherited the land from his father John Gahwera a son of Sururu, and that both the grandfather and his father had occupied their land for long periods. He stated that he was born on the land in 1972. Like DW2, DW3 stated that the portion of land he was occupying was part of a larger piece of land measuring 40 acres that had several other families living on it.

The evidence led for the respondents, especially that of DW1 and DW2 was a departure from their pleadings. While the defendants pleaded that Kibwara owned a piece of land neighbouring theirs, the evidence of DW1 and DW2 was that Kibwara did not own any land in the village. DW1 and DW2's evidence was that the land they occupied was previously owned by their respective grandfathers and fathers, for DW1 Byembadwa and Byegarazo and for DW2 Sururu and Wandera. The evidence of DW3 contradicted that of DW1. DW2 stated that Kibwara occupied land neighbouring the one he claimed.

I note that both sides claimed land that was owned by an earlier generation of their ancestors – Kibwara for the appellants, Byembadwa and Byegarazo for the 1st respondent, Sururu and Yovan Wandera for the 2nd respondent and Sururu and John Gahwera for the 3rd respondent. The ancestors started occupying the respective pieces of land way before any of the parties were born, and this is clear from the fact that the respective key witnesses, namely PW3, PW4 for the appellants and DW1, DW2 and DW3 for the respondents all stated that the source of their information about the history of ownership of the disputed land was from the named ancestors who had passed away by the time of the trial.

However, PW7 Gabriel Insigoma testified that he was present when Kibwara settled on the suit land. He stated that he was born in 1924 and knew Kibwara and that the latter had settled on the disputed land in 1939. PW7

stated that Kibwara did not own any other separate land. PW7 stated that in 1939 Kibwara had shown him a certificate showing that he had acquired the suit land from Bunyoro Kingdom for 5 shillings. He further stated that there were some people living on the land at the time Kibwara purchase it, and these included Sururu who was given a portion measuring 20 x 20 metres by Kibwara. He testified that he knew the 1st respondent's father Byegarazo and his brother Tabula. He stated that Byegarazo did not own any piece of land on the suit land but he had lived on Kibwara's land and was even buried there. He did not state the duration when Byegarazo stayed on the land.

In cross examination at page 53 of the record PW7 testified that Byegarazo had a sister called Maimuna who had been staying on Kibwara's land since childhood.

I have considered PW7's evidence and found it contradictory with the evidence of PW3, PW4 and PW5 in some respects. PW7 testified that at the time Kibwara acquired the suit land, there were some people staying thereon, including Sururu, as alleged by the 1st and 2nd respondents. In other parts of PW7's evidence, it was stated that Sururu was given a portion of land measuring about 20 x 20 metres by Kibwara. This contradicted PW3, PW4 and PW5's evidence that the 20 x 20 metres portion claimed by Yovan Wandera's family was given to Yovan Wandera himself.

I further note that the appellants tendered in evidence a certificate showing that Kibwara acquired the disputed land in 1939. An earlier attempt by the appellants to have the certificate tendered in evidence by the 1st appellant testifying as PW1 had been rejected by then presiding Magistrate Ayo Miriam Okello on grounds that PW1 was not suitable to tender in that document. A subsequent presiding Chief Magistrate, H/W Byaruhanga, however allowed the certificate in evidence and it was exhibited as PE3. I am prepared to agree with H/W Byaruhanga that the certificate related to the disputed land and therefore showed that Kibwara acquired the disputed land as stated in the evidence of PW7. However, finding so does not conclusively clarify the contradictory aspects in the evidence of PW7 that Sururu occupied the suit land before Kibwara was given that certificate of title. PW7's evidence in that

regard is consistent with the evidence of DW2 and DW3 as to when Sururu occupied the disputed land.

However, the allegations that Sururu occupied the disputed land are contradicted by evidence that Yovan Wandera who was Sururu's son left a Will refuting that Sururu owned land at all. It was stated in Wandera's Will that the land he and his family settled on had been given to him by Kibwara. The learned first appellate Judge considered Wandera's Will a forgery and he declined to rely on it, and he has been criticized by the appellants for doing so. The Will which was exhibited as PEI was tendered in evidence by PW6 George W.K Isingoma who claimed to have been a witness when it was made. In the Will, found at pages 82 to 86 of the record, Yovan Wandera stated that in 1982, he was allowed by the family of the late Kibwara to stay on part of the disputed land measuring about 3 acres. He said that he was not given the land but was only allowed to stay on it. He also stated that the land claimed by his son the 2nd respondent belonged to Kibwara. Wandera also stated in that Will that his father Sururu did not own any land as contended by the 2nd respondent. The Will was admitted in evidence without objection from the respondents' counsel, although while testifying, the 2nd respondent stated that the Will was a forgery. In my view, if taken to be true, the Will lent support to the evidence of PW5 in so far as the witness stated that Wandera was allowed by Kibwara to stay on a piece of land measuring about 3 acres.

I am prepared to accept the submissions of counsel for the appellants that the Wandera Will was exhibited without objection from the respondents and could not be doubted by the learned first appellate Judge. PW6 who tendered the Will for the appellants stated that he was present when it was made, thereby vouching for its authenticity. There was no cross-examination on the point. However, I do not accept the further submission of counsel for the appellants that the Will having been tendered in as evidence, it automatically should have been believed even if it contradicted other evidence given by the appellants. In my view, before a Court reaches any findings of fact, it is expected to weigh all the evidence on record, whether documentary or oral evidence, in a wholesome and not a segmented money. On this point, I refer

to the case of **Nguyen vs. Tran [2018] NSWCA 215** decided by the New South Wales Court of Appeal at para 54, where it was stated:

> **"The fact finding exercise which is required to be undertaken by the tribunal of fact, whether that be judge or jury, is not properly approached in that [a] segmented way. The tribunal of fact, after hearing the witnesses, making assessments as to the credit and reliability of their evidence and examining the documentary evidence, if any, must weigh the whole of the evidence to determine whether the party bearing the legal onus has proved his or her case."**

It is apparent that the learned first appellate Judge weighed the Wandera Will against the other appellants' evidence, and found that there were some contradictions, especially on whether Sururu owned part of the disputed land or not. Having re-evaluated the evidence, myself, I find that he was entitled to reach that finding. There was uncertainty in the appellants' case. Even assuming without deciding, that all the appellants' witnesses gave admissible evidence, their evidence was contradictory in several respects, not least on the Sururu ownership issue. The appellants' evidence was contradictory on the 1st respondent's interest in the land, PW3 and PW4 for example stated that the 1st respondent derived his interest from Maimuna while PW7 stated that the 1st respondent's father had occupied the suit land for some time. This conflict in evidence affected the appellants' case.

I do not agree that the learned first appellate Judge ignored the evidence of PW5 as contended for the appellants. In my view, the learned Judge considered it and weighed it with the other evidence as he was expected to do. Accepting PW5's evidence and overlooking other contradictory evidence as counsel for the appellants invites us to do is not legally sound. I would disallow ground 1.

I also do not accept the allegations in ground 2 that the learned first appellate Judge did not consider the documentary evidence contained in Exhibits PE1 (the Will of the late Yovan Wandera) and Exhibit PE3 (a certificate of land ownership granted by Bunyoro to Kibwara). True, the learned first appellate Judge should not have doubted the authenticity of that Will in the absence of evidence impeaching it. However, even accepting

that Will, it had to be weighed against all the other evidence adduced for the appellants, as the learned first appellate Judge rightly did. The evidence of the Wandera Will contradicted that of PW7, for example. The consequence of that contradiction, in my view, is that the appellants failed to discharge the burden of proving their case on a balance of probabilities. This was the finding of the learned first appellate Judge and I find it impossible to disagree with him.

It becomes unnecessary to decide ground 3, although while evaluating the evidence, I considered all the appellants' evidence.

In conclusion, I would in agreement with the learned first appellate Judge, find that the appellants' evidence was insufficient to discharge their burden of proving the case against the respondents. I would dismiss this appeal and grant the costs of the appeal and those of the proceedings in the Courts below to the respondents.

Since Bamugemereire and Musota, JJA both agree with the result, the appeal fails and is hereby dismissed. The respondents are granted costs of the appeal and in the lower Courts.

Dated at Kampala this ....21st.... day of....December....2022.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA
COURT OF APPEAL
CIVIL APPEAL NO. 0250 OF 2016

Coram: (Musoke JA, Bamugemereire JA, Musota JA.)

1. **KISEMBO EMMANUEL**
2. **MUGENZI EDWARD**
3. **WAMANO GODFREY**
4. **JESCA KYONGO :::::::::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

1. **TIBEZINDA MOSES**
2. **ATAGWIREHO IBRAHIM**
3. **BYENKYA ALEX :::::::::::::::::::::::::::::::::::::: RESPONDENTS**

Judgment of Catherine Bamugemereire JA

I have had the priviledge of reading the draft Judgment of my learned sister Elizabeth Musoke, JA.

I am in agreement with her reasoning, conclusions and orders. I would have dismissed this appeal with costs.

21/12/2022

Catherine Bamugemereire
Justice Court of Appeal

THE REPUBLIC UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0250 OF 2016

1. **KISEMBO EMMANUEL**
2. **MUGENZI EDWARD**
3. **WAMANI GODFREY**
4. **JESCA KYONGO :::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

1. **TIBEZINDA MOSES**
2. **ATAGWIREHO IBRAHIM**
3. **BYENKA ALEX :::::::::::::::::::::::::::::::: RESPONDENTS**

(Appeal from the decision of the High Court of Uganda at Masindi before Byabakama, J (as he then was) dated 23rd March, 2016 in Civil Appeal No. 005 of 2014 on appeal from the decision of the Masindi Chief Magistrate's Court before H/W Byaruhanga (as he then was) in Civil Suit No. 09 of 2006)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment of my learned sister Hon. Justice Elizabeth Musoke, JA. She has already set out the background to this Appeal and the grounds of Appeal. I will not reproduce the same here.

I do not agree that this court should refrain from striking out the Appellant's grounds of Appeal despite the fact that the same appear to offend the provisions of S. 72 and 74 of the Civil Procedure Act, Cap 71 because it is rarely productive because parties will be denied

an adjudication on the merits of the Appeal. Denial of adjudication on merits should not arise since there is a window that can be explored by parties caught on the wrong side of the law through which they can apply for leave to amend the offending memorandum of Appeal as I will explain below.

The Respondents' Counsel raised a preliminary objection that the grounds as set out in the Appellants' Memorandum of Appeal, offend **Section 72 (1)** of the **Civil Procedure Act, Cap. 71** and ought to be struck out. Counsel for the Respondents pointed out that the Appellants' Appeal is a second Appeal, and under the above provision, grounds on second Appeals should concern only matters of law and not mixed fact and law. Counsel argued that the Appellants, in their submissions, changed their grounds of Appeal to comply with the law but did not follow the right procedure prescribed under **Rule 17 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10.** The Appellants could only have validly amended their grounds after seeking leave of this Court but they did not do so. Instead, they opted to amend via their submissions, which amounted to amendment without leave.

In reply, counsel for the Appellants submitted that the grounds set out in the Appellants' memorandum of Appeal comply with the relevant law. The grounds raise questions of law relating to whether the first Appellate Court re-evaluated the evidence on record.

Sections 72 and **74** of the **Civil Procedure Act, Cap. 71** provide that the grounds of Appeal in second Appeals to this Court must

relate to points of law only, and not points of mixed law and fact or of fact. **(See: Celtel Uganda Ltd vs. Karungi Susan, Court of Appeal Civil Appeal No. 073 of 2013 (per Kasule, Ag. JA)**

I have considered the grounds set out in the Appellants' Memorandum of Appeal, and find that they all relate to points of mixed law and fact, which offends **Section 72** and **74** of the **Civil Procedure Act, Cap. 71.**

Whereas the Appellants' counsel, in his submissions, purported to change the grounds of Appeal, it is my considered view that the procedure adopted amounts to amending without seeking leave of Court contrary to the rules of this Court. On this point **Rule 17** of the **Rules of this Court** provides:

> *"Form of amendments.*
>
> *(1) Where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.*
>
> *(2) Where any person lodges an amended version of a document, he or she shall show clearly—*
>
> *(a) any words or figures deleted from the original, by including those words or figures and striking them through with red ink, so that what was written remains legible; and*
>
> *(b) any words or figures added to the original, by writing them in red ink or underlining them in red ink.*

(3) Where any record of appeal includes any amended document, the amendments shall similarly be shown in each copy of the record of appeal."

In addition, **Rule 45 of the Rules of this Court** provides that:

"45. Applications for leave to amend.

(1) Whenever a formal application is made to the court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and if practicable, lodged with the registrar and served on the respondent before the hearing of the application; or if that is not practicable, it shall be handed to the court and to the respondent at the time of the hearing.

(2) The court may consider an application for leave to amend whether made formally as in sub rule (1) of this rule or informally during the course of proceedings and may dispose of the application or direct that an informal application be made formally.

(3) Where the court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged, within such time as the court, when giving leave, may specify, and if no time is specified, then within forty-eight hours after the giving of leave; and on failure to comply with the requirements of this sub rule, the leave so given shall cease."

A party to any Appeal in this Court is required to obtain leave before amending the pleadings. In the present case, the Appellants did not seek leave to amend their Memorandum of Appeal but instead went ahead to change the grounds in their submissions. The procedure adopted by the Appellants was in complete disregard of the rules of this Court.

I would, therefore, strike out the Appellant's Memorandum of Appeal for offending **Section 72 (1)** of the **Civil Procedure Act, Cap. 71.** The appeal is therefore incompetent and I accordingly dismiss it with costs.

I so order.

Dated this 21st day of December 2022

Stephen Musota
JUSTICE OF APPEAL