

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 260 OF 2017

(Arising from High Court Civil Suit No. 802 of 2017)

5 **1. WILLS INTERNATIONAL ENGINEERS**
& CONTRACTORS LTD

2. GEORGE WILLIAM KIYEGA :::::::::::::::::::: APPELLANTS

VERSUS

DFCU BANK (U) LTD :::::::::::::::::::: RESPONDENT

10 **CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

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Background

The 1st appellant is a customer to the respondent while the 2nd appellant is the Managing Director of the 1st appellant company. In July 2012, the appellants obtained a loan of UGX.318,000,000/= from the respondent and the loan was secured by a mortgage on Block 265 Plot 7346, which loan was fully repaid. The appellants however, fully repaid the loan but the respondent continued to

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encumber the appellant's title. In May 2014, the 1st appellant sought a Bank Guarantee from the respondent for execution of a contract No. UDC/WRKS/2013-2014/00089 for a duration of four months ending 13th August 2014 using the certificate of Title for Block 265 Plot 7346 as security. Under the same contract, the 1st Appellant applied for a Performance Bond facility secured by the same security Block 265 Plot 7346. The money from performance guarantee was however released by the respondent on 3rd November 2014, long after the expiry of the said contract and after the 2nd appellant had notified the respondent that it was no longer required.

Despite the communication, the respondent entered a mortgage on the land comprised in Block 265 Plot 7347 which the 2nd appellant had only handed to the respondent for safe custody. This caused financial distress to the appellants and they sought another facility of UGX 350,000,000/= for which they used Block 265 Plot 7346 as security. The respondent only released UGX 200,000,000/= to the appellants on the said facility.

On 17th November 2015, the appellants were served with a Notice of Sale for the property comprised in Block 265 Plot 7346 to allegedly recover UGX 416,764,552/= as the outstanding loan. The appellants disputed the claim and filed a suit in the High Court disputing the loan sum, stopping the sale, an order for return of an unencumbered title for Block 265 Plot 7347 and damages. The respondent filed a counterclaim for Ugx.416,764,552 and alleged that it was an error of the Registrar to encumber Block 265 Plot 7347, which allegation the

learned trial Judge disputed. The trial Judge dismissed the counter claim not having been proved. He awarded nominal damages of UGX 20,000,000/= and UGX 2,948,479/= as fees charged on the performance bond.

5 The appellants were dissatisfied with that decision and filed this appeal on five grounds namely:

1. The learned trial Judge erred in law and fact when he dismissed the respondent's counter-claim but denied the appellants costs.
2. The learned trial Judge erred in law and fact when he failed to
10 find fraud/illegality committed by the respondent but simply referred to it as an error but which he doubted in respect of Block 265 Plot 7346 and Plot 7347.
3. The learned trial Judge erred in law and fact when he held that
15 the appellants had not proved that they requested for the title in Plot 7347 to be sold, thereby denying them an award of General Damages.
4. The learned trial Judge erred in law and fact when he failed to
20 consider an award of General Damages even after the respondent had been cited in disobedience/contempt of court orders.
5. The learned trial Judge erred in law and fact when he only
25 awarded Nominal Damages after he found that the respondent had wrongly and deliberately encumbered the titles for Block 265 Plots 7346 and 7347.

Representation

When this appeal came up for hearing, Counsel Mr. MacDosman Kabega appeared for the 1st and 2nd appellants while Counsel Simon
5 Peter Lukwiya Nyero appeared for the respondent on brief for Counsel Edwin Tabaro. Both parties filed written submissions.

Appellant's arguments

Counsel submitted that a counter-claim is a suit of its own in terms of Order 2 rule 1 and Order 8 rule 2 of the Civil Procedure Rules and
10 court ought to have dismissed it with costs to the appellants. Counsel argued that it is a settled principle of law that costs in any action follow the event unless court, for good cause, decides otherwise under section 27(2) of the Civil Procedure Act. That for court to deny costs to a successful litigant, special circumstances must be shown
15 to exist by either party so as to disentitle the successful party. Counsel prayed that the appellants be awarded costs on the counter-claim.

While arguing grounds 2 and 5, counsel submitted that there was illegality on the part of the respondent in respect of the mortgages
20 registered on Block 265 Plots 7346 and 7347. The 1st appellant took a loan on 5th February 2013 and fully repaid it but the mortgages were not released from the certificate of Title for Block 265 Plot 7347 by April 2017. Counsel argued that the encumbrances on both titles for Block 265 Plots 7346 and 7347 were entered on the same day but

with different signatures which imputes fraud on the respondent. Counsel relied on the Supreme Court decision in **Senkungu Yakobo and 4 others vs Cresenio Mukasa S.C.C.A No. 14 of 2014** in which fraud was defined to include all acts, omissions, concealments which
5 include breach of legal or equitable duty, trust or confidence.

Counsel relied on the evidence of DW1 and submitted that the mortgages were fake and the bank charges and stamp duty as per Exh. P. 32 were not paid to URA and that the respondent filed forged documents. Counsel argued that these actions were deliberate to
10 deprive the appellants of their property. Further, that the filing of a forged court document in Exh. P. 32 purporting to show that the respondent had paid stamp Duty to URA whereas not and the debiting of the 2nd appellant's account constitutes fraud.

Counsel submitted that the learned trial Judge found that the
15 encumbrances of Block 265 Plot 7347 were not entered in error because the encumbrances on both titles were entered on the same day at the same time and yet the certificate of title for Block 265 Plot 7347 was only deposited for safe custody and not as security for any facility. The actions of the respondent caused the 2nd appellant
20 financial distress and gross hardship for which he prayed for damages.

In regard to ground 3, counsel submitted that the 2nd appellant, in his witness statement, indicated that he required his title without any encumbrances to have it sold to clear the loan. Block 265 Plot
25 7347 was encumbered with three mortgages namely: Inst. No.

565080 of 5th February 2013 purportedly for 240,000,000/= which was not documented; Inst. No. WAK 00038391 of 28th January 2015 for 200,000,000/= (Exh. P4); Inst. No. WAK 00041022 of 27th February 2015 for 73,000,000/= (Exh. P3). Counsel submitted that
5 the 2nd respondent had a buyer for his land but failed to sell it due to the encumbrances placed on the land by the respondent. Counsel argued that it was an error on the part of the learned trial Judge to find that the appellants did not prove that they had requested for the title for purposes of selling the land.

10 While arguing ground 4, counsel submitted that on 10th June 2016, the court in Wills International Engineers & Contractors and another Vs DFCU Bank Ltd Misc. Application No. 1000 of 2015, ordered the respondent to return immediately the appellant's certificate of title for Plot 7347 free of encumbrances. However, the respondent did not
15 comply with this order.

Counsel relied on the decision of this court in **Housing Finance Bank Ltd Vs Edward Musisi C.A Misc. Application No. 158 of 2010** in which this court observed that contempt of court exists where there is existence of a lawful order, potential contemnor's
20 knowledge of the order and potential contemnor's failure to comply with the order. Counsel prayed that this ground succeeds with costs on this court and the court below.

Respondent's arguments

In reply, counsel submitted that under Section 27 (1) of the Civil
25 Procedure Act, costs of and incidental to all suits are in the discretion

of the court to give necessary directions and that the trial Judge in this case exercised his discretion to make no order as to costs. That the learned trial judge considered the total credit balance for both credit facilities and ordered that there must be a reconciliation of accounts and it was upon that basis that the counter-claim was dismissed with no order as to costs.

Counsel submitted further that the appellants failed to lead evidence to prove fraud on the part of the respondents in respect to the mortgages registered in Block 265 Plots 7346 and 7347 whereas not. Counsel argued that the appellants had filed a suit seeking for declaratory orders that the respondent was illegally holding the appellant's title in respect of Block 265 Plot 7347 and encumbered it with a mortgage. The issues addressed by court did not include fraud attributable to the respondent and as such, the learned trial Judge could not have found that the respondents committed fraud in their dealings with the appellant's property.

Counsel relied on the decision in **Julius Rwabinumi Vs Hope Bahimbisomwe S.C.C.A No. 10 of 2009** in which the court cited with approval the decision in **Attorney General Vs Paul Semwogerere and another Constitutional Appeal No. 3 of 2004**, which held that a trial court must base its decision and orders on pleadings and issues contested before it. Founding a court decision or relief on an unpleaded matter or issue not properly placed before it is an error of law. Counsel submitted that the mortgage on Plot 7347 was entered in error instead of 7346 and it was the

responsibility of the Registrar of Titles to release the mortgage upon receiving a notice of release. Counsel submitted that an error does not amount to fraud.

While arguing ground 4, counsel submitted that the respondent is not in contempt of any court order because the said title was returned to the appellants as directed by court and the respondent did not hesitate to release the mortgages once it became apparent that the mortgages had been entered in error.

Consideration of the appeal

I have carefully studied the court record, considered the submissions of counsel for the Appellant, the law applicable and the authorities cited in the determination of this appeal.

This is a first appeal and the principles on first appeal are as follows:

On a first appeal, the law enjoins this court to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30 (i) (a)** of the Rules of this Court.

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) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. I will apply those principles herein. I will resolve the grounds in the way the parties have argued them.

Ground 1

Ground one faults the learned trial Judge for dismissing the respondent's counter-claim but denied costs to the appellants. At the trial Court, the respondent, in its written statement of defence denied the appellant's claim and counter-claimed against the appellants in the sum of UGX.416.764.552/= payable to it by the appellants. The learned trial Judge dismissed the counter-claim but made no order as to costs.

It is trite law that costs follow the event unless court, for good cause, orders otherwise. In deciding the issue of costs, court is guided by the provisions of **Section 27(1)** of the **Civil Procedure Act** which grants court the discretion to grant costs and to what extent costs incident to suits are to be paid. Despite the wide discretion, the general rule is that a successful party in contested proceedings is entitled to an award of costs. It is the accepted general rule of law that in the absence of special circumstances, costs follow the event.

In the case of considering the exercise of discretion **Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873**, Devlin J formulated the relevant principle in exercise of such discretion as follows:

5 *“No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct.”*

10 In the present case, the learned trial Judge found that the appellants were not indebted to the respondents in the amount of Uganda Shillings 416,764,552/= as contained in the counter-claim.

15 The special circumstances envisaged in denial of costs usually involve some sort of misconduct on the part of the successful party. In this case no such misconduct was proved or alluded to against the Appellant to deny them costs. It is my considered view that the trial Judge ought to have dismissed the counter-claim with costs awarded to the appellants. Ground one of the appeal therefore succeeds.

Grounds 2 and 5

20 Grounds 2 and 5 fault the learned trial Judge for failing to find fraud and awarding only nominal damages after having found that the respondent had wrongly encumbered the title in Plot 7347.

 The testimony of DW1 in cross examination was that whereas the 1st appellant took a loan on 5th February 2013 and fully repaid it, the mortgages had not been released from the certificate for Block 265

Plot 7347 by April 2017. Another encumbrance was entered on the same title on 28th January 2015 under Instrument No. WAK00038391 to secure a loan of UGX 200,000,000/=. This same mortgage was entered on Plot 7346 on 28th January 2015 at the instance of the respondent yet the certificate of title for Block 265 Plot 7347 was only given to the respondent for safe custody. From the evidence on the record, it is clear that the mortgages were entered on the wrong titles. Exh. P. 24 and Exh. P. 25 had encumbrances entered on the same day, at the same time but with different signatures.

Further, in Exh. P. 38, a stamp certificate, the respondent purported to have paid stamp duty of UGX 1,100,000/= on behalf of the appellants to URA for the UGX 200,000,000/=. However, PW3 from URA testified that the stamp certificate was not genuine and was never issued by URA. These actions of the respondent were not only a breach of the respondent's fiduciary duty to the Appellant but also fraudulently denied the appellants utilisation of their property.

The Supreme Court in **Fredrick J. K Zaabwe Vs Orient Bank and 5 others S.C.C.A No. 04 of 2006** defined fraud as follows; '*an act with intent to defraud means to act willfully, and with the specific intent to deceive or cheat; ordinary for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself.*'

The respondent's act of debiting the 2nd appellant's account with bank charges on an untaken loan and presenting a forged stamp duty

certificate were actions intended to defraud the appellants. It is my considered view that the respondents' acts were fraudulent and therefore warranted an award of damages on the appellants for the inconveniences caused and the loss incurred therein.

5 Grounds 2 and 5 are also allowed.

Ground 3

Ground 3 faults the learned trial Judge for not awarding general damages to the appellants for reasons that there was no credible evidence that the appellant had made a request for his title to be
10 returned.

The 2nd appellant's witness statement indicates that he made a request for his title to have it sold to clear the loan. Block 265 Plot 7347 was encumbered with three mortgages namely; Inst. No. KLA 565080 with 240,000,000/=, Inst. No. WAK 00038391 of 28th
15 January 2015 for 200,000,000/= and Inst. WAK 00041022 of 27th February 2015 for 73,000,000/=. The 2nd appellant demonstrated during cross examination that he had a buyer for the plot of land but failed to sell because it was encumbered. In Exhibit P.30, the appellants requested for a mortgage release of Plot 7347 Block 265
20 from the respondent, which, had been kept with the respondent for safe custody. It is clear from ExhP30 that the Appellants requested for the title to be availed to them to be sold.

This evidence was never challenged. I too find therefore with greatest respect to the trial Judge that it was wrong on his part to find that

the Appellant never requested for the title to be sold I agree with the appellant's submissions that the false encumbering and holding of the appellant's title ought to have attracted an award of General damages against the respondent. I therefore find for the appellants
5 on ground 3 of the memorandum of appeal.

Ground 4

On 10th June 2016, in Wills International Engineers & Contractors and another Vs DFCU Bank Ltd Misc. Application No. 1000 of 2015 court ordered the respondent to immediately return the certificate of
10 title for Plot 7347 free of any encumbrances to the appellants, which order the respondent did not comply with. This court in Housing
Finance Bank Ltd and another Vs Edward Musisi Miscellaneous Application No. 158 of 2010 held that contempt of court exists where there is;

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- a) Existence of a lawful court order,
 - b) Potential contemnor's knowledge of the order,
 - c) Potential contemnor's failure to comply with the order

In this case, DW1 testified that he received the court order directing the respondent to return the appellants' title with all encumbrances
20 removed, but the respondent did not comply with the order. For the respondent, it is contended that the release of mortgage on the property was made and the land title handed over to the appellants by a letter dated 4th August 2016.

Exhibit P9, a statement of search as at 5th September 2016 indicates that Block 265 Plot 7347 had three encumbrances registered on it by DFCU Bank namely Inst. No. KLA 565080 registered on 5th February 2013, Inst. No. WAK 00038391 registered on 28th January 2015 and
5 Inst. WAK 00041022 registered on 27th February 2015. This clearly indicates that the encumbrances still existed on the certificate of title as at 5th September 2016. There is no doubt from the evidence of DW1 that the Respondent did not obey the order. The appellants prayed to this court to penalize the Respondent. As such, I find for
10 the appellants on ground four of the memorandum of appeal. Consequently, I would award Ugx. 80,000,000 for each of the five (5) illegal mortgages for each year they remained on the property.

Lastly in both Grounds 2 and 5 the appellants submitted that they were entitled to General Damages as against an award of Ugx. 20,000,000 which was nominal. This court has stated in a number
15 of authorities that it would interfere where the High Court has made an award which is either too low or too high in the circumstances. See **Mbogo Shah (1968) EA 93 and Kabandize John Baptist & 21Others -vs- Kampala Capital City Authority C.A. No.36 of**
20 **2016.**

Taking into account the circumstances of this case I would with respect disagree with an award of Ugx. 20,000,000 by the learned trial Judge for being too low. The actions of the respondent were deliberate, illegal and fraudulent. I would therefore award General

Damages of Ugx.120,000,000 with interest at 12% from the date of judgement till payment in full.

The Respondent shall pay the costs of this court and the court below.

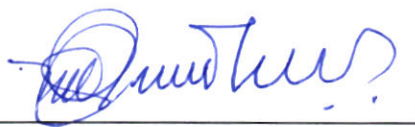
As such, I find for the appellants on ground four of the memorandum
5 of appeal.

I would allow the appeal and make the following consequential orders;

1. The Respondent pays the Appellant costs of the Counter Claim.
2. The Appellants are not indebted to the Respondent since the
10 counter claim was dismissed.
3. The Respondent's act of incumbering the Appellants titles with mortgages was illegal and fraudulent.
4. The Respondent shall release titles for Block 265 Plot 7346 and 7347 free of all encumbrances.
- 15 5. The Respondent do pay the Appellants the sum of Ugx.80,000,000 for each illegal mortgages for each year they remained on the property.
6. The Appellants are awarded General Damages of Ugx.120,000,000 with interest at 12% from the date of
20 judgement till payment in full for unlawful encumbrances on all the titles.
7. The Appellants are awarded costs of this Appeal and the Court below.

Dated this 24th day of Feb _____ 2022

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Stephen Musota
JUSTICE OF APPEAL

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**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0260 OF 2017**

**1. WILLS INTERNATIONAL ENGINEERS
AND CONTRACTORS LTD**

2. GEORGE WILLIAM KIYEGA:.....:APPELLANTS

VERSUS

DFCU BANK (U) LTD:.....:RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Commercial Division) before Madrama, J. (as he then was) in Civil Suit No. 802 of 2017)

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

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft, the judgment of my learned brother Musota, JA with whom Bamugemereire, JA agrees. I was unable to agree with the conclusions reached by Musota, JA and in this judgment I briefly set out my reasons why.

The facts of the appeal are set out in the judgment of Musota, JA, and I need not go over them at length. It must be noted that the learned trial Judge found that the respondent wrongfully registered a mortgage on certain land belonging to the 2nd appellant, yet that land had not been presented as security for any mortgage. This finding by the learned trial Judge has not been challenged. The appellant challenges the learned trial Judge's decision to find that only nominal damages could be awarded for the improper mortgage by the respondent. He also challenges certain other parts of the decision of the learned trial Judge, as will come out as I consider the grounds of appeal.

In relation to ground 1, wherein the appellants challenge the learned trial Judge's order of costs in the counter-claim, my view is that that the learned

trial Judge gave good reasons for not awarding those costs to the appellants. The learned trial Judge found that the appellants owed money to the respondent although it was necessary to make a reconciliation to ascertain the actual amount, meaning that he felt that it was necessary for the respondent to sue for recovery of those outstanding monies. In other words, the learned trial Judge reasoned that the appellant's failure to service the loan facilities advanced by the respondent had led to the respondent filing a suit for recovery of that money. This appears to be a sound reason for refusing costs and I would not interfere with the learned trial Judge's discretion.

With regard to ground 2, I would not fault the learned trial Judge for not making a finding of fraud against the respondent. I noted that the appellants did not plead fraud and therefore no finding of fraud could be made, as it is trite law that fraud must be pleaded and proved.

As for the learned trial Judge's decision to award nominal instead of general damages (ground 5), I read the judgment of the learned trial Judge and found his reasoning for denying general damages to be sound. Since he was exercising his discretion, I would be reluctant to interfere since he did not act very unreasonably.

With regard to ground 3, even if this Court were to find that the appellants had requested for their title, that as of itself, does not in my view justify awarding the amount of damages proposed by Musota, JA. General damages cannot be presumed to flow from DFCU's failure to remove the encumbrances on the relevant title. There was need for the appellants to adduce evidence to show the loss they suffered so as to justify the award of general damages. No such evidence was adduced.

In refusing to award general damages, the learned trial Judge reasoned that although DFCU had illegally encumbered the appellant's title, there was no evidence that the appellants suffered any damage beyond the charges and fees paid in relation to that encumbrance. He only awarded nominal damages.

As for ground 4, I noted that the ground relates to contempt of court, and yet the decision appealed from related to a suit for declarations regarding the illegal mortgaging of the appellants' land. In my view, the allegations of contempt of court raised in this appeal, should have been raised in an application in the trial Court.

It was for those reasons that I would disallow all grounds and dismiss the appeal.

However, as the majority (Musota and Bamugemereire, JJA) reached a different conclusion, by majority decision (Musoke, JA dissenting), this Court allows the appeal and enters judgment for the appellants in the terms set out in Musota, JA's judgment.

It is so ordered.

Dated at Kampala this^{24th} day of ^{Feb}.....2022.



.....
Elizabeth Musoke

Justice of Appeal

**THE REPUBLIC OF UGANDA
THE COURT OF APPEAL OF UGANDA
CIVIL APPEAL NO.260 OF 2017**

CORAM:

**HON. LADY JUSTICE ELIZABETH MUSOKE JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE JA
HON. MR. STEPHEN MUSOTA JA**

1. WILLS INTERNATIONAL ENGINEERS AND CONTRACTORS LTD
2. GEORGE WILLIAM KIYEGA:.....APPELLANTS

VERSUS

DFCU BANK (U) LTD:.....RESPONDENTS
(Arising out of High Court Civil Suit No. 802 of 2017)

Judgment of Hon. Lady Justice Catherine Bamugemereire JA

I have had the privilege of reading in draft the lead opinion of my learned brother Stephen Musota JA. On the crucial points which have to be decided in order to dispose of the appeal there is, as I see it, a striking unanimity, in which I respectfully concur. I therefore agree that the appeal be allowed.



24th Feb 2022

Catherine Bamugemereire
Justice of Appeal