

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 21 OF 2014**

*(Arising from H.C.C.S No. 0024 of 2010)*

**ASABA JAIDEN ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**1. TEGRAS BYEITIMA**

**2. KUGONZA FRANKLIN ::::::::::::::::::::::::::::::::::: RESPONDENTS**

**3. RAJAB RUGADYA**

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**

**HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

**Background**

The Appellant filed H.C.C.S No. 0024 of 2010 in Masindi High Court against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the 2<sup>nd</sup> Respondent being a police officer and son of the 1<sup>st</sup> Respondent, for trespass having forcefully ploughed his gardens and evicted him from his customary land. In response to the suit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pleaded that the 1<sup>st</sup> Respondent had purchased land including the suit land from Rajab Rugadya and had since surveyed and processed a certificate of title. After scheduling conference, court ordered the District staff Surveyor to open boundaries of the 1<sup>st</sup> Respondent's certificate of title. When the surveyor opened the boundaries on 24<sup>th</sup>

August 2011, the Appellant claimed that the 1<sup>st</sup> Respondent had surveyed more than what he had purchased from Rajab Rugadya (3<sup>rd</sup> Respondent) and filed M.A No. 057 of 2010 to amend his plaint for purposes of adding Rajab Rugadya as a co-defendant and seek  
5 cancellation of the certificate of title on the ground of fraud. Court allowed the application and the 3<sup>rd</sup> Respondent was added as co-defendant but rejected the appellant's prayer to amend his plaint to seek cancellation of title for fraud and advised the appellant to file a separate suit.

10 On 2<sup>nd</sup> March 2012, the Appellant appeared in court as PW1 to testify in H.C.C.S No. 0024 of 2010 but just after taking oath, the defence counsel objected to the hearing because Rajab Rugadya, who had been added as a co-defendant and was present in court had not been served with summons to file a defence and a plaint to enable him file  
15 his written statement of defence since it had been scheduled before he was added as a defendant. A new plaint with summons to the 3<sup>rd</sup> Respondent was filed in court and served on Rugadya Rajab and he filed his defence.

After several adjournments, the suit came up for hearing on 12<sup>th</sup>  
20 November, 2012. Court ordered both parties to file submissions on the surveyor's report and it was on that basis that the court delivered a judgment and dismissed the suit with costs.

The Appellant was dissatisfied with the decision of the court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law when he decided the case against the Appellant without affording him proper hearing.
2. The learned trial Judge erred in law and in fact when he declined to proceed with adducing of evidence and ended up giving a judgment not based on any evidence.
3. The learned trial Judge erred in law and in fact when he relied on a survey report that had not been exhibited in court as evidence.
4. The learned trial Judge erred in law and in fact when he compelled the appellant's counsel to make submissions before hearing the case.
5. The learned trial Judge erred in law and in fact when he held that the Respondents had not trespassed on the Appellant's land.

## **Representation**

At the hearing of the Appeal, Counsel Tugume Moses appeared for the Appellant while Counsel Kituuma Magala and Counsel Kagolo Friday Robert appeared for the Respondents.

## **Appellant's submissions**

Counsel submitted that under Article 28 of the Constitution, a person is entitled to a fair hearing in determination of civil rights and obligations. Counsel argued that there was no hearing at all in this case and the Appellant was condemned unheard. The Appellant should have been given an opportunity to present his evidence regarding his customary interest in the suit land. Counsel relied on

the decision in **Kampala District Land Board & Anor Vs Vanasio Bamweyaka & 5 others S.C.C.A No. 16 of 2002** in which the Supreme Court, while ordering a re-trial, held that a trial in which no evidence was recorded from witnesses was fundamentally defective. The trial court's judgment is based on a report of the District Land Surveyor that was made and filed on the orders of court. That the said District Land Surveyor was neither called in court to testify and exhibit his report nor was the report admitted in court as an exhibit.

Counsel argued that the procedure adopted by the trial Judge of admitting the survey report without following the right procedure of admitting exhibits in court was irregular and occasioned a miscarriage of justice.

#### **Respondent's submissions**

In reply, the Respondent's counsel raised a preliminary objection stating that the Appellant's counsel omitted to extract a decree under Rule 87 (1) of the Judicature Court of Appeal Rules Directions and as such, failed to take an essential step in prosecuting the Appeal and that the Appeal ought to be struck out. Counsel relied on the decision in **The Executrix of the estate of the Late Christine Mary Namatovu Tebajjukira & another Vs Noel Grace Shalita Stananzi Supreme Court Civil Application No. 08 of 1988** in which it was held that no Appeal lies to this court until the decree Appealed from has been extracted.

Counsel submitted that the learned trial Judge determined the suit after giving the parties an opportunity to be heard. That upon opening of the boundaries by the District Staff Surveyor, the Appellant applied to amend his plaint and the amendment was  
5 granted. The Appellant testified on oath and after the report on opening of the boundaries on the suit land, the Judge gave both parties an opportunity to submit on the report and gave a ruling.

Counsel argued further that the Appellant had a burden of proof to prove the existence of his customary ownership which burden of  
10 proof he failed to discharge.

### **Appellant's rejoinder**

In reply to the preliminary objection raised by the Respondent, counsel submitted that the authorities relied on by the Respondent are distinguishable from this case and under Rule 87(1) of the Rules  
15 of this court, a decree is not a legal requirement to lodge an appeal. The case of **Executrix of the Estate of the late Christine Mary Namatovu Tebajjukira & another Vs Noel Grace Shalita Stananzi Supreme Court Civil Application No. 08 of 1988** relied on by the Respondent's counsel was decided before the promulgation of the  
20 1995 Constitution and the passing of the Judicature (Court of Appeal Rules) Directions.

Counsel argued that extraction of a formal decree is no longer a requirement in the institution of an Appeal and it is a mere technicality which does not take away the right of the parties to be

heard on the merits of the Appeal in light of Article 126(2) (e) of the Constitution.

### **Consideration of the appeal**

I have carefully examined the submissions of both counsel and the  
5 authorities relied on.

This being a first Appeal, we have a duty to reappraise the evidence and draw inferences of fact under **Rule 30** of the **Judicature (Court of Appeal Rules) Directions**. See also the cases of **Pandya v. R [1957] EA 336** and **Kifamunte Henry v. Uganda SCCA No. 10 of**  
10 **1997** on the duty of a first appellate Court to re-appraise the evidence and come to an independent conclusion.

The Respondent's counsel raised a preliminary objection that the appellant's counsel omitted to extract a decree under Rule 87 (1) of the Judicature Court of Appeal Rules Directions and as such, failed  
15 to take an essential step in prosecuting the Appeal and that the Appeal ought to be struck out.

**Rule 87(1)** of the **Judicature (Court of Appeal Rules) Directions** provides;

#### **87. Contents of record of appeal.**

20 (1) *For the purpose of an appeal from the High Court, in its original jurisdiction, the record of appeal shall, subject to subrule (3) of this rule, contain copies of the following documents—*

*(a) an index of all the documents in the record with the numbers of the pages at which they appear;*

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service, then as required by rule 78 of these Rules, his or her last known address and proof of service on him or her of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken or any other notes howsoever recorded at the trial;

(f) the affidavits read and all documents put in evidence at the hearing, or if those documents are not in the English language, certified translations of them;

(g) the judgment or reasoned order;

(h) the order, if any, giving leave to appeal;

(i) the notice of appeal; and

(j) any other documents necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant.

From the above Rule, a decree is not mentioned as part of the contents of a Record of Appeal. I note that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a

preliminary point, may dispose of the suit. (See **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**).

I agree with the appellant's argument that the case of **Executrix of the Estate of the late Christine Mary Namatovu Tebajjukira & another Vs Noel Grace Shalita Stananzi Supreme Court Civil Application No. 08 of 1988** was decided in 1988 long before the Court of Appeal Rules were put in place. The preliminary objection raised by the Respondent is therefore overruled for reasons that the Appellant's Record of Appeal complied with Rule 87(1) of the Rules of this court.

I now proceed to resolve the issue of whether the Appellant was accorded a proper hearing by the learned trial Judge.

I have considered the submission of the Appellant and the Respondent on this issue. I have also considered the provisions of **Article 28 of the Constitution** on the right to a fair hearing. It provides;

*(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

The Constitution further provides in **Article 44** that it is prohibited to derogate from the right to a fair hearing.



44. *Prohibition of derogation from particular human rights and freedoms.*

*Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—*

(a) ...

(b) ...

(c) *The right to fair hearing;*

At the trial court, the Appellant filed a suit against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for trespass and in their written statements of defence, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's pleaded that the 1<sup>st</sup> Respondent had purchased the suit land from one Rajab Rugadya (3<sup>rd</sup> Respondent) and had processed a certificate of title. After scheduling of the case was completed, the trial Judge ordered that the District Staff Surveyor for Masindi opens boundaries of the 1<sup>st</sup> Respondent's certificate of title. When the surveyor opened boundaries, the report showed that the 1<sup>st</sup> Respondent had surveyed more than what was purchased from the 3<sup>rd</sup> Respondent and the Appellant filed an application vide Misc. Application No. 057 of 2010 to add the 3<sup>rd</sup> Respondent as co-defendant and seek cancellation of the certificate of title on grounds of fraud.

Court allowed Misc. Application No. 057 of 2010 in part and the 3<sup>rd</sup> Respondent was added as a co-defendant but declined to grant the Appellant's prayer to amend his plaint seeking for cancellation of the

title. The trial Judge advised the Appellant to file a separate suit as the intended amendment would introduce a new cause of action.

On 2<sup>nd</sup> March 2012, the Appellant appeared in court as PW1 and after taking oath, the defence counsel objected to the hearing because the  
5 3<sup>rd</sup> Respondent, who was the 3<sup>rd</sup> defendant at the trial court, and was present in court had not been served with summons to file a defence and a plaint to enable him file his written statement of defence.

A new plaint with summons to the 3<sup>rd</sup> Respondent was filed and served on the 3<sup>rd</sup> Respondent and he filed a defence. After several  
10 adjournments, the suit came up for hearing on 12<sup>th</sup> November 2012 and court ordered that both counsel make submissions on the surveyor's report and on the basis of those submissions, court delivered a judgment, from which this appeal emanates.

From the above background, it appears to me that the learned trial  
15 Judge made a decision based on the District Land Surveyor's report without hearing the case on either side or giving an opportunity to the Appellant to call his witnesses to prove his customary ownership on the land. In addition, the survey report was improperly admitted as the District Land Surveyor did not appear in court to tender in the  
20 report or give any evidence on the report under Order 14 of the Civil Procedure Rules.

It is my considered view that the Appellant was not accorded an opportunity to be heard as envisaged under Articles 28 and 44 of the Constitution. I therefore set aside the decision and orders of the High  
25 Court in H.C.C.S No. 024 of 2010.

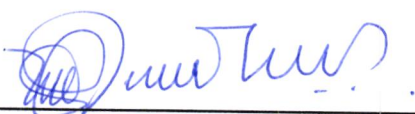
I would have ordered a retrial of H.C.C.S No. 024 of 2010 to accord both parties an opportunity to present their case before court. However, at the trial court when the Appellant was advised by the trial Judge to file a separate suit for cancellation of title on grounds  
5 of fraud, the Appellant went ahead and filed Civil Suit No. 0003 of 2012 against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents seeking among other orders, cancellation of the certificate of title for the suit land at Block 49 Plot 4, Masindi. A decision was made in that case and an Appeal filed in this court vide Civil Appeal No. 19 of 2022 and the same was  
10 heard and is pending judgment on notice.

I take judicial notice of the fact that this dispute was filed in a separate suit, heard and determined and an Appeal filed in this court and is pending judgment on notice.

This appeal is therefore allowed, the orders of this court shall abide  
15 the findings of this court in Civil Appeal No. 19 of 2022 Tegras Byeitima and another Vs Asaba Jaiden.

I so order.

Dated this 05<sup>th</sup> day of January 2022



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**Stephen Musota**  
**JUSTICE OF APPEAL**



**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CIVIL APPEAL NO. 21 OF 2014**

**ASABA JAIDEN:.....APPELLANT**

**VERSUS**

**1. TEGRAS BYEITIMA**

**2. KUGONZA FRANKLIN**

**3. RAJAB RUGADYA:.....RESPONDENTS**

*(Appeal from the decision of the High Court of Uganda at Masindi dated before Ochan, J. dated 4<sup>th</sup> February, 2012 in Civil Suit No. 024 of 2010)*

**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 prepared by my learned brother Musota, JA, and I agree with it. For the reasons which he gives I would allow the appeal and make the order he has proposed.

Since Bamugemereire, JA also agrees, the Court unanimously allows the appeal and enters judgment for the appellant on the terms stated in Musota, JA's judgment.

**It is so ordered.**

Dated at Kampala this .....05<sup>th</sup>..... day of.....January.....2023.



.....  
**Elizabeth Musoke**

Justice of Appeal



**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO 21 OF 2014**

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

**ASABA JAIDEN :::::::::::::::::::::::::::::::::::APPELLANT**  
**VERSUS**

**1. TEGRAS BYEITIMA**  
**2. KUGONZA FRANKLIN ::::::::::::::::::::::::::::::::::: RESPONDENTS**  
**3. RAJAB RUGADYA**

**(Appeal arising from the decision of the High Court of Uganda at Masindi in HCCS No. 24 of 2010)**

**JUDGMENT OF CATHERINE BAMUGEMEREIRE, JA**

I have had the privilege of reading in draft the Judgment of my learned brother Stephen Musota, JA. I agree with the reasoning, decision and orders made.

Dated at Kampala this 05<sup>th</sup> day of January 2022



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**Catherine Bamugemereire**  
**Justice of Appeal**