THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CV-LD-CA-NO.011 OF 2016
(ARISING FROM FPT-00-CV-LD-CS NO.060 OF 2013)

BIRUNGI GORRET ----------APPELLANT

VERSUS

1. **ORIHIKAYO SIMON**
2. **KAMANYIRE ERIC**
3. **KASIGAZI JAMES ----------RESPONDENTS**

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO

JUDGEMENT

Introduction.

This is an appeal against the Judgment and orders of His Worship Ngamije Mbale Faisal, Magistrate Grade 1 sitting at Fort Portal.

The background of the case is that the 2nd Respondent instituted Civil suit No.FPT-00-CV-CS-032 of 2013 against the 1st Respondent seeking to recover UGX 2,700,000/= which had been advanced to him. A decree was entered against the 1st Respondent and execution issued by arrest and detention of the 1st Respondent in Civil prison on 26/6/2013.

The 1st Respondent claimed that after the civil prison he travelled to Bushenyi to raise UGX 2,700,000/= the decretal sum. On his return he found the land sold in execution to recover the judgment debt.

The court issued a warrant of attachment and sale of land to Ndolerire Christopher court Bailiff who sold the land in execution to the third respondent at UGX 6,000,000/=

The appellant a customary wife of the first respondent instituted Civil suit **FPT-00-CV-LD-CS.060 of 2013** claiming ownership of the land sold in execution. That she was not consulted in the mortgage of the land.

During the trial, the following issues were framed;

1. ***Whether or not the suit land was properly sold to the 3rd defendant.***
2. ***Whether the Suitland was properly attached***
3. ***Remedies available to the parties.***

Both parties adduced evidence in support and defence of the above issues.

In his Judgment, the learned trial magistrate found that the 2nd defendant failed to prove to court that repetition of the said land that was attached legally belonged to the 1st defendant and at the same time even the bailiff who applied for attachment, sale and subsequently eviction of the plaintiff did little to ascertain whether the suit land legally belonged to the 1st defendant. The evidence on court record does not disprove or rebut the fact that the plaintiff was using the suit land and this is where she would derive livelihood of her family.

The claim of ownership of the suit land was supported by PW3, Jackline Ruranga who told court that the suit land was given to the plaintiff after the 1st defendant had sold his share that was given to him out of the entire estate of his grandfather,

The court held further that the attachment by the bailiff was erroneous since the 1st defendant was not the legal owner of the suit land and the plaintiff was a major beneficiary and the children were not party to the suit land.

He found that the 1st defendant illegally directed the sale of the land. He held that both the 1st defendant and the 2nd defendant were equally responsible for erroneously informing court to attach the suit land which did not legally belong to the 1st defendant.

The Plaintiff successfully proved to court that the suit land attached by the 2nd defendant and sold to the 3rd defendant was a family land and could not be attached unless she was a party either as a guarantor and or as a witness to defendant. However the 3rd defendant is a bonafide purchaser of the suit land without notice because the Suitland was properly attached and the procedure of attachment was properly and adequately followed.

The learned Trial Magistrate made the following orders;

1. Court finds the suit land is a property of the 3rd defendant having lawfully bought the same and paid value as consideration.
2. The remaining balance of UGX 3,300,000/= that remained after the court Bailiff DW4 paid UGX 2,700,000/= to the 2nd defendant should be subjected to taxation within twenty one (21) days from the delivery of this judgment and after the lapse of 21 days without the bailiff fixing taxation of his bill, the bailiff shall be required to hand over the balance of UGX 3,300,000/= in this court for appropriate orders.
3. The balance after the bailiffs costs are taxed if any shall be handed over to the 1st defendant in court.
4. The 1st and 2nd defendants are directly ordered to pay each of them six million(6,000,000/=) in court totaling to twelve million for the plaintiff to use find and buy an alternative piece of land to replace the suit land that was erroneously attached by the agent of the 2nd defendant on the direction of the 1st defendant.

5. That 1st and 2nd defendant shall pay six million(6,000,000/=) each to the plaintiff through court within sixty(60)days after the delivery of this judgment and failure to pay execution shall issue against if payment has not been made.
6. Court grants permanent injunction against the plaintiff, her family. Relatives, employees, licensees or tenants from further interfering with the 3rd defendants, enjoyment of the suit land.
7. Court is mindful of the general damages the plaintiff has suffered and also the 3rd defendant has suffered too as a result of this suit however no general damages is granted either to the plaintiff nor the defendant.
8. Court awards costs of the suit to only the 3rd defendant against 1st and 2nd defendant. I have not awarded costs to the plaintiff because both the plaintiff and the 1st defendant are inseparable and it is the 1st defendant's behavior that fueled the genesis of this suit.

Hence this appeal.

The appeal was based on the following grounds;-

1. That the learned Trial Magistrate Grade one failed to properly evaluate the evidence on record *vis a vis* the law as set out in Section 39 of the Land Act which wholly invalidated and vitiated the entire mortgage transaction from which the 3rd Respondent purports to claim his interest in the suit land.
2. That the learned Trial Magistrate Grade One erred in law and in fact in finding that the 3rd Respondent was a bonafide purchaser without notice, having first found that the suit land was erroneously attached and illegally sold without the appellants authority or consent making the whole transaction void *ab initio*.

3. That the learned Trial Magistrate Grade one wrongly exercised his discretion and misdirected himself in not awarding costs and damages to the appellant thereby causing a miscarriage of justice to the appellant.
4. In the alternative but without prejudice to the above, the learned Trial magistrate Grade One erred in law and in fact in ordering that the appellant be paid UGX 12,000,000/= for the loss of the suit land without taking into account the current market value of the land and damage occasioned by loss of the developments thereon by causing a miscarriage of justice.

Both counsel filled written submissions which I have considered in this Judgment. Before I consider the submissions of counsel I have to re-recho the duty of this court as a first appellate court. In ***Hellen Oyeru VS Florence Namuli Matovu Supreme Court Civil Appeal No.7 of 2008***, it was stated as follows;

> *" it has long been accepted that a first appeal is in the nature of rehearing and if a first appellate court feels certain that a trial Judge has come to a wrong conclusion because of failure to take into due account important facts or has drawn incorrect references from the evidence adduced, it should reverse the decision".*

It is the cardinal duty of this court to decide whether the learned trial Magistrate came to a wrong conclusion because of failure to evaluate evidence or take into account important facts or drew in correct inferences from the evidence adduced.

In re-evaluating the evidence and subjecting it to a fresh scrutiny, I will keep in mind the issue raised at trial and the evidence adduced by all

parties in order to resolve the grounds presented in the memorandum of Appeal.

Before I delve into the grounds of appeal the respondent raised a preliminary point of law in opposition of the amended memorandum of appeal that it should be shuck out because no leave was sought or granted as required by **Order 43 Rule 2(1) of the Civil Procedure Rules** which provides that the appellant shall not except by leave of court, argue or be heard in support of any ground of objection not set forth in the memorandum of appeal.

In his reply learned counsel for the appellant argued that **Order 43 rule 2(1) Civil Procedure Rules** does not provide a Substantive right. Failure to seek leave to file an amended memorandum of appeal was an irregularity but this appeal ought to be considered on its merits in accordance with the discretion vested in court under **Article 126 (2) (e) of the Constitution**. The omission to seek leave of court was a mistake of counsel and it is now trite law that a mistake of counsel should not be visited on his client. He prayed that the appellant should not be punished for her counsel's mistake as to do so would be a fetter to the appellant's right to a fair hearing.

Secondarily failure to seek leave to file the amended memorandum, though irregular, was not an illegality as it did not cause an injustice to the Respondents.

The respondents made submissions on the amended grounds and as was held in ***Mawji Vs Arusha general stores (1970) EZ137*** which was applied and followed by Oyuko A Ojok, J in ***Byaruhanga Yozefu Vs Kahemura Patick***, no prejudice was caused to the Respondents.

The irregularity would therefore be overlooked and disregarded by **Article 126(2) (e) of the Constitution** and the general principal that rules of procedure are handmaidens of justice and should not be used to defeat justice. He requested court to overlook the irregularity of procedure and decide the appeal on its merits.

Court consideration.

Order 43 Rule 2 of the civil Procedure Rules provides that;

> "*The appellant not except by leave of the court, urge, or be heard in support of an general of objection not set further in the memorandum of appeals, but the High court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rules except that its decision on any other ground affected by the decision had sufficient opportunity of contrasting the case on that ground''*

In the instant appeal, the first memorandum of Appeal was filed on 9th February 2016 by the appellant raising three grounds of appeal. On 14th march 2016 an amended memorandum of appeal was filed without leave of court. **Order 6 Rule 19 of the Civil Procedure Rules** allows amendments to pleadings at any stage of the proceedings.

Where pleadings have been closed, parties have to seek the leave of court to amend the pleadings. In this case where an amended memorandum of appeal was filed without leave of court renders the amended memorandum of Appeal "incompetent". In this appeal the amended memorandum of appeal filed on 14th March 2016 is incompetent.

Order 43 Rule 2 of the Civil Procedure Rules is very clear that leave must be sought to amend the memorandum of appeal. Learned counsel for

the appellant recognizes that it was irregular but calls upon court to invoke Act 126 of the constitution.

> *"A litigant who relies on the provisions of Article 126(2) (e) of the constitution must satisfy the court that in the circumstances of a particular case before the court, it was not desirable to pay undue regard to the relevant technicality. Article 126(2) (e) is not a magic word in the hands of defaulting litigants."*

Refer to ***Kasirye Byaruhanga and Co. Advocates Vs Uganda Development Bank, SC Civil Application No. 2/97***.

Article **126 (2) (e) of the Constitution** has not done away with the requirement that litigants must comply with the Rules of procedure in litigation. The Article merely gives constitutional force to the well settled common law principal that rules of procedure act as handmaidens of justice. The framers of the Constitution were alive to this fact. That is why they provided that the principles in **Article 126** including administration of substantive justice without undue regard to technicalities must be applied "***Subject to the law".*** Such laws include the Rules of procedure. Refer to Utex industries Ltd vs Attorney General SCCA No.52 of 1997, Kiasirye Byaruhanga & Co. Advocates Vs Uganda Development Bank SCCA no,2 of 1997 and Itiriza Coaches Vs Edward Rurangaranga SCCA No.18 of 2009, Mulindwa Kisubila (Civil Appeal No.12 of 2014(2018) UGSC 38(02 August 2018)."

Accordingly the amended memorandum of appeal is therefore stuck out for non-compliance with the law and this preliminary objection is upheld.

The appeal stands dismissed with costs.

Dated at Fort Portal this 17th day of December 2021.

Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties

Vincent Emmy Mugabo

Judge

17th December 2021.