

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

HCT-03-CV-CA-0113-2016

(ARISING FROM CIVIL SUIT NO.011 OF 2012)

1. RUTH KAKAIRE

2. WAISWA GODFREY:.....APPELLANTS

VERSUS

NGUBI ASA:.....RESPONDENT

Land Appeal-

1. **Held:** *On the whole, the first ground of Appeal FAILS.*
2. *The second and third ground of Appeal have been found to be valid and they all SUCCEED.*
3. *The Judgement and Orders of the learned Trial Magistrate Grade 1 Kaliro is hereby quashed and set aside in their entirety.*
4. *The Chief Magistrate Iganga is directed to re allocate the case and have it heard denovo.*
5. *Each party shall bear its own costs in this appeal and the costs in the lower court shall abide in the outcome of the fresh Judgment.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

JUDGMENT ON APPEAL

The Appellants being dissatisfied and aggrieved by the decision/Judgment of Her Worship Karamagi Pamela, a Magistrate Grade One of the Chief Magistrate's Court of Kaliro, delivered on the 28th of September 2016, appealed to this Honorable Court against the whole decision/Judgment and Orders on the following grounds: -

1. That the Learned Trial Magistrate erred in law and fact to dispose of the suit, particularly the Defendants case, before disposing of **Miscellaneous Application No.009 of 2016** for leave to amend the Defendants' Written Statement of Defence which was pending before her, thus occasioning a miscarriage of justice.
2. That the Learned Trial Magistrate erred in law and fact to dispose of the suit without the 2nd Defendant testifying in his defence, thus being denied a right to a fair trial.
3. That the procedure adopted by the Magistrate, though the Defendants' counsel, was to blame, was so irregular, that it amounted to a mistrial.

They prayed that:-

The Appeal be allowed with costs, the Trial Magistrates decision and orders be set aside and be substituted with an order for a retrial

REPRESENTATION

When this matter came before me for hearing, the Appellants were represented by learned Counsel Mr. Onesmus Tuyiringire of M/S. Tuyiringire & Co. Advocates, while the Respondent was represented by Learned counsel Sanywa Shaban of M/S. Sanywa, Wabwire & Co. Advocates. Both sides were directed by Court to file Written Submissions and they each complied.

BACKGROUND

The brief facts according to learned counsel for the Appellant is that the Respondent herein sued the Appellants to recover a piece of land estimated to be measuring 58 feet by 200 feet situate at Bulumba Parish, Bumanaya Sub-county , Kaliro District, which piece of land the Respondent/Plaintiff had acquired from his father one Constant Henry Baraza as a gift *inter vivos* in 1991 and has possession thereof till 21/2/2012 when he saw the 1st Appellant together with the Area LC1 Chairperson viewing the said land and showing it to the 2nd Defendant /2nd Appellant who had purportedly purchased it from the 1st Defendant/ 1st Appellant.

He sought orders of court declaring him to be the owner of the suit land and the Defendant were trespassers on the suit land.

In their joint Written Statement of Defence, dated 7/5/2012 filed through M/S. Liiga & Co. Advocates, the 1st Defendant stated that in 1991, one Baraza Henry Constantine, the Plaintiff/ Respondent's father gave as a gift *inter vivos* to the 1st Defendant his sister, his piece of land measuring 29 by 100 situated in Bulumba trading Centre.

That the late Baraza Henry Constantine did in 1994, leaving the Plaintiff and the 1st Defendant, each in quiet possession and enjoyment of his/her piece of land /plot. That the Plaintiff /Respondent started claiming the first defendant's plot when he saw a porter -2nd Defendant ferrying building materials to 1st Defendants /1st Appellant's plot but the 1st Defendant has never sold her plot to the 2nd Defendants. That the 2nd Defendant sates that the 1st Defendant has never sold her plot of land to the 2nd Defendant and the plaint did not disclose a cause of action.

On the other hand, the background according to learned Counsel for the Respondents is that the Respondent /Plaintiff on 30/3/2012, filed Land **Suit No.11 OF 2012**.

From my own analysis, the Plaintiff's case is that the Plaintiff/Respondent filed **Civil Suit No. 011 of 2012**, wherein the Plaintiff/Respondent sued the Defendants/Appellants for recovery of land estimated to be measuring 58ft by 200 ft, situated in Bulumba Trading Centre, Bulumba Parish, Mumana Sub-County, Kaliro District which the 1st Defendant/1st Appellant sold to the 2nd Defendant/2nd Appellant.

The Plaintiff/Respondent averred that the land in dispute belonged to the Plaintiff's/Respondents father, the Late Constantine Henry Baraza Baraza who gave it to him as a gift *intervivos* in 1991; and that he went on and took possession of the land, built thereon a house and was in quiet possession until the 21/2/2012 when he noticed the 1st Defendant/1st Appellant and the LC1 Chairman of Bulumba Trading Centre showing the 2nd Defendant/2nd Appellant the suit land.

That when he inquired what was taking place he was informed that the 1st defendant/1st Appellant was selling off the suit land to 2nd Defendant/2nd Appellant. That the Plaintiff's/Respondent objected to the sale but nonetheless it fell on deaf ears and the 2nd Defendant/2nd Appellant since 5/3/2012 has been ferrying construction materials on the suit land despite protests from the Plaintiff's/Respondent.

The Plaintiff's/Respondent contended that the sale was illegal and fraudulent. The Plaintiff's/Respondent alleged fraud and illegality that;

- a) The 1st defendant/1st Appellant knew that the Plaintiff's/Respondent had been given the suit land as a gift *inter vivos* by his father and she never contested the same for over 20 years.
- b) That after seeing that the Plaintiff's/Respondent's father had died, the 1st defendant/1st Appellant Then decided to sell off the suit land despite protests from the Plaintiff/Respondent.
- c) That the 2nd Defendant/2nd Appellant neighbor to the Respondent disregarded the fact that the Plaintiff's/Respondent had objected to the sale and he went on to buy the property.

d) That the Appellants carried on the transaction without informing any of the neighbors.

Defendant's case

In reply, the 1st Defendant/Appellant contended that in 1991 one Baraza Constantine Henry the Plaintiff's/Respondent's father gave them a gift *inter vivos* to the 1st Defendant/1st Appellant, his sister, his piece of land measuring 29by 100 situated in Bulumba Trading Centre. That the late also gave the Plaintiff/Respondent the remaining plot also measuring 29by 100 and the two plots share a common boundary. That the said Baraza Constantine Henry died in 1994 leaving the Plaintiff/Respondent and 1st Defendant/Appellant each in quiet possession and enjoyment of their pieces of land.

That the Plaintiff/Respondent started claiming 1st Defendant/Appellant's plot when he saw a porter, the 1st Defendant/Appellant's ferrying building materials to 1st Defendant/Appellant plot of land but the 1st Defendant/Appellant had never sold her plot to 1st Defendant/Appellant and therefore the Plaintiff didn't disclose cause of action and that there was no fraud as alleged by the Plaintiff/Respondent.

THE LAW

It is now settled law that it is the duty of the Plaintiff to prove his or her case on the balance of probabilities. In relation to the onus of proof in civil matters, the burden of proof lies on he who alleges a fact and the standard is on the balance of probabilities, and not beyond reasonable doubt as in criminal case. It is provided for in **Sections 101, 102, and 104 Evidence Act** and is discharged on the balance of probabilities. The standard of proof is made if the preposition is more likely to be true than not true.

The standard of proof is satisfied if there is greater than 50% that the preposition is true and not 100%. As per Lord Denning in ***Miller v Minister of Pension [1947] ALLER 373***; he simply described it as 'more probable than not.' This means that errors, omission and irregularities that do not occasion a miscarriage of justice are too minor to prompt the appellate court to overturn a lower court decision. See ***Festo Androa & Anor vs Uganda SCCA 1/1998***.

It is also the position of the law that in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or

evidence as per **Section 58 Evidence Act and Section 33 Evidence Act.**
A fact under evidence Act means and includes: -

- (i) Anything, state of thing, or relation of thing capable of being perceived by senses as per **Section 2 1(e) (i) Evidence Act.**

On the duty of the first appellant court, the first appellate Court is mandated to subject the proceedings and Judgment of the lower Court to fresh scrutiny and if necessary make its own findings. ***Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996,*** where Supreme Court held that “*The appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanor and manner of witnesses, the first appellate Court must be guided by the trial Judge's impression.*”

This being the first appellant court, it is duty bound to evaluate evidence and arrive on its own conclusion, bearing in mind that it did not have benefit of the observing the demeanor of the witnesses. The duty of the first appellate court is to re-evaluate, assess and scrutinize the evidence on the record. This duty was well stated in ***Selle vs. Associated Motor Boat Co. [1968] E.A 123*** and followed in ***Sanyu Lwanga Musoke vs. Galiwango, S.C Civ. Appeal No.48 of 1995; Banco Arabe Espanol vs. Bank of Uganda S.C.C. Appeal No.8 of 1998.***

A failure to re-evaluate the evidence of the lower court record is an error in law. The appellate court has a duty to re-evaluate the evidence as a whole and subject to a fresh scrutiny and reach its own conclusion. ***See Muwonge Peter vs Musonge Moses Musa CACA 77; Charles Bitwire vs Uganda SCCA 23/95; Kifamunte Henry vs Uganda SCCA No. 10/1997.***

It is also trite law that the appellate court can only interfere and alter the findings of the trial court in instances where misdirection to law or fact or an error by the lower court goes to the root of the matter and occasioned a miscarriage of justice. ***See Kifamunte Henry vs Uganda SCCA No. 10/1997.***

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to a first appellate court, I will now turn to the substantive matters as raised in the Memorandum of Appeal and proceed to re-evaluate the evidence on record.

RESOLUTION OF THE GROUNDS IN THIS APPEAL

Ground 1: That the Learned Trial Magistrate erred in law and fact to dispose of the suit, particularly the Defendants case, before disposing of Miscellaneous Application No.009 of 2016 for leave to amend the Defendants Written Statement of Defence which was pending before her, thus occasioning a miscarriage of justice.

In resolving this ground, I have carefully examined the typed and certified record of proceedings and judgment of the lower court as availed to and taken into account the submissions of both learned counsel.

It was submitted by Learned counsel for the Appellants that regrettably, ***Miscellaneous Application No.009 of 2016***, was filed in court on 16th March 2016, it was seeking orders of court that leave be granted to Ruth Kakaire- the applicant /first defendant, to enable her, to amend her written statement of Defence, to aver, that she gave wrong information to her counsel concerning the measurements of the piece of land the subject of the suit and about the 2nd Defendant.

Further, that the 2nd Defendant was not the applicant's/1st defendant's porter, but rather the purchaser of the piece of land in issue, from one Alitusabira, who had acquired the piece of land from her aunt, the 1st Defendant /Applicant.

In addition, that this information is found in the notice of motion and in paragraphs 3 & 4 of the affidavit in support of the application, which affidavit was sworn at Jinja on 3rd November 2015. The reasons for giving wrong information arose from the fact, that the applicant suffered from an illness described as Zicozephrenic disease, which disease makes her on and off to forget matters and events easily and frequently; this information is found in the 1st ground of the application and in paragraphs 2 & 3 of the affidavit in support of the application.

That as soon as this application was placed on the court record, the trial Magistrate had a duty to fix it for hearing as a matter of urgency, she ought

to have tracked it, before further hearing of the main suit. They further noted that counsel for the Defendants had closed the defence case on 21st January 2016, after **DW5** testifying.

Further, that on 10th March 2016 in the presence of all parties and their Counsel, the suit was fixed for *locus in quo* for 17th March 2016; by the time the court visited the locus in quo, the application for leave to amend the defence, was already before the trial Magistrate and pending disposal; she ought to have disposed the application, grant it or reject it; and it is after that process that she could proceed to visit the *locus in quo*.

They therefore submitted that there would have been no harm, if the 1st defendant had amended her written statement of defence at that late stage, as long as, it was before submissions and before judgment; He relied on the case of **General Manager EAR & H.A vs Therstein [1968] EA 354 at pages 358-359**, leave to amend the defendants Written Statement of Defence was granted by court as late as after the defendant had closed his case; and in the case of **Cheleta Coffee Plantations Ltd vs Mehlsen [1966] EA 203 (CAK)**, leave to amend the plaintiff was granted as late as on appeal, by the Court of Appeal for East Africa, such leave to amend having been refused by the trial court.

That unfortunately, the trial Magistrate failed to act at the right time, till when she delivered the judgment; However, when it came for delivery of Judgment, the 1st Defendant lost her case on the ground that, per the said judgment:

“That the Defendant - Ruth Kakaire states that the plaintiff’s father gave her the land and it is from her share that she gave permission for a piece of land to be given to the plaintiffs.

That however exhibit PE, which is the written statement of Defence, reveals that the Defendants, through their evidence departed from their pleadings. The Defendant Ruth Kakaire’s evidence is to that effect that by the time the plaintiff shed them, the land was in ownership of Rachael Alitusubira and yet the pleadings state otherwise.

Her written statement of Defence states that D2 is a porter whereas the evidence at the trial states otherwise that Rachael Alitusubira sold the land to D2- Waiswa God as stated by DW2,4 and DW5 Rachael Alitusabira; these

are major contradictions and inconsistencies in the Defendants' evidence which this honourable court cannot safely rely on; (see the decision of the court on the 1st issue) and on that analysis, court found that the plaintiff had proved his case on a balance of probabilities".

Learned Counsel for the Appellants submitted that with due respect to the Trial Magistrate, the departure from pleadings which made her enter Judgment for the plaintiff, is the departure the intended **Miscellaneous Application No. 9 of 2016** intended to cure, by stating in the amended written statement of Defence, that the 2nd Defendant was not a porter of the 1st Defendant, but the purchaser of the suit land, from one Alitusabira a copy of the draft amended Written Statement of Defence was annexed to the Application in those terms. That had the trial Magistrate fixed the application for hearing, it would have been most likely granted and the departure would have been cured and the amended statement of Defence would have tallied with the Defendants' evidence on record.

Furthermore, that indeed evidence on record, reveals that the second Defendant purchased the portion he possessed from Alitusubira Rachael; and that in failing to fix for the application for disposal before disposing of the suit clouded the intended Amended Written Statement of Defence off the record to the prejudice of both Defendants.

That it is obvious, it was the Defendants' case and the Defendant's counsel ought to have applied to court for Misc. Application to be heard first, before further hearing of the Defence case or before the Defendants closing their case, however, this did not take away the duty from the trial Magistrate as the umpire of the proceedings, to see that the Application is heard and disposed of. They referred to **M. Ssekema** per his book **Criminal Procedure and Practice in Uganda at page 65**, where the learned author states as under:-

"The conduct of a fair trial is in the hands of the trial court and the portion of fairness in this context is one which transcends the Rules embodied in protection accorded under the constitution".

If the judge is the guardian of fair proceedings it follows that the officer must control his or her behavior so as to ensure fairness".

They submitted that the trial Magistrate failed to fix the Misc. Application for disposal, before completing the hearing of the suit and in the process, she failed to conduct the proceedings in such a way, that they can be described as having been a fair trial; she therefore occasioned a miscarriage of justice to the prejudice of both defendants; and they submit that this ground of appeal be allowed.

In reply, it was submitted by learned Counsel for the Respondent that the 1st Appellant alleges that she filed **Miscellaneous Application No.09 of 2016** in the lower court, seeking orders of court that leave be granted to her and enable her to amend her written statement of defence claiming that;

- a) She gave wrong information to her counsel concerning the measurements of the piece of land the subject matter of the suit and about the 2nd Appellant,
- b) The 2nd Appellant was not her porter, but rather the purchaser of the piece of land in issue, from a one Alitusabira, who allegedly acquired the piece of land from her aunt (1st Appellant),
- c) The reasons for giving wrong information arose from the fact, that the 1st appellant suffered from an illness described as Zicozephrenic disease, which disease makes her on and off to forget matters and events easily and frequently,

That the 1st Appellant further claims that as soon as her application was placed on the court record, the trial magistrate had a duty to'

- i. fix the said application for hearing as a matter of Urgency,
- ii. Ought to have tracked it, before further hearing of the main suit which duties she failed to execute as an umpire of proceedings.

They strongly objected to the said submissions and stated that the above appellants' arguments and or allegations as per the fact of "*filing of the said Miscellaneous Application No.09 of 2016 which is purportedly said to have been filed by the 1st Appellant on court record and my concerns as per the copy of the said application attached to the Appellants*" submission as a basis of seeking for a retrial in this Honourable Court are as follows:-

1. The said copy of the application bars no "court received stamp" as a matter of proof as to when it was filed, received and registered in the lower court,
2. The said copy of the application also bears no "Signature of the then trial magistrate" to ascertain or prove as to whether it was indeed filed and brought to the attention of the trial magistrate to act thereon.

3. The said copy of the application further bears no "Seal of court and a court's stamp of certification of a true copy of documents filed on court record" to certify whether the said application was indeed filed and a true copy on the court record.
4. The said copy of the application and affidavit in support also does not "bare the stamp and address of the commissioner of oaths" to prove that the 1st Appellant was in her normal state of her mind at the time of signing or swearing the said affidavit in support of the said application.
5. And lastly but not least, the 1st Appellant has not in addition attached any copy of the letter whether written by her personally nor the then counsel, addressing the trial magistrate or any authority requesting that the said application be fixed and heard as a matter of urgency" to prove to this Honourable Court, that she did not negligently contribute to failure of the said justice if so existed.

They argued that in absence of proof of all the above mentioned facts, it will be fatal to the Respondent if this Honourable Court base on such a fraudulent document or allegations made by the Appellants with intentions to deny the innocent respondent of his right to the proceeds of the lower Court Judgment.

That the said application vide **M/A No. 09/2016** was never filed and or brought to the attention of the then trial magistrate as alleged by the appellants and for that matter therefore, there was nothing to grant or reject.

That more emphasis still on the above, the Appellants claim have filed the said application on court record on a day not disclosed and their failure to address court over the said application so existed at any stage of the court proceedings is indeed an implication or proof that the said application was never filed and brought to the attention of the then trial magistrates moreover, the appellants appeared in person several times on record but never disclosed such a fact if the application did exist.

That it was indeed the Appellants duty to instruct their Counsel to file and or apply to court for their said Misc. Application "if so existed" to be fixed and or heard as a matter of urgency before Judgment, however much the magistrate had the duty to exercise as an umpire of the proceedings, she could not act on an application not filed and or brought to her attention.

They finally submitted that the trial Magistrate's conduct revealed on the whole record of proceedings indeed exhibited a high degree of fairness whereby the case proceeded interparty that circumstantially led to "a fair trial" and there was nothing in the proceedings or on record that could have occasioned any kind of miscarriage of justice as alleged by the Appellants;

and therefore prayed that this Honourable Court fails this appellants' 1 ground of appeal.

In order to resolve this ground, I have carefully examined the record of the lower court as availed to me, there is a file affixed containing an Application by Notice of Motion accompanied by an Affidavit sworn by the 1st Appellant. It is clear that the Application was never received in court as it bears no stamp of receipt of documents in the Kaliro Chief Magistrates Court; and to me, this is the likely reason as to why the Application was never considered by the Learned Trial Magistrate because it was non-existent in the Court Registry at the time. I'm therefore, perplexed as to how learned counsel for the Appellants is coming up with the date alleging when this Application was filed.

Upon further perusal of the court record, it reveals that the said Miscellaneous Application was also never mentioned by learned counsel for the Defendants /Appellants that there was a pending Application.

In view of the above findings, I agree with the submissions of learned counsel for the Respondent and I cannot fault the Learned Trial Magistrate for having not ruled on an inexistent Application.

This ground of Appeal FAILS.

Learned Counsel for the Appellants submitted on the 2nd & 3rd ground of Appeal concurrently.

Ground 2: That the Learned Trial Magistrate erred in law and fact to dispose of the suit without the 2nd Defendant testifying in his defence thus being denied a right to a fair trial.

Ground 3: That the procedure adopted by the trial Magistrate, though the Defendants' counsel, was also much to blame, was so irregular that it amounted to a mistrial.

It was submitted by learned counsel for the Appellants that **Order 18 of the Civil Procedure Rules** provides for the procedure for hearing of suits and examination of witnesses. **Order 18 Rule 1 of the Civil Procedure Rules**, provides that the plaintiff shall have a right to begin.

Further, that under **Order 18 Rule 2**, it is provided that on the day fixed for hearing of the suit, or any other day to which the hearing has been

adjourned, the party having a right to begin (plaintiff), shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove.

Also under **Order 18 rule 2(2)**, it is provided as under:-

“That then the other party (Defendant) shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case”.

They argued that in this particular case, the Defendants were two i.e. Ruth Kakaire and Waiswa Godfrey, whereas the Plaintiff presented his case and produced his evidence, and whereas the 1st defendant presented her case and produced her evidence, it never came to be, for the 2nd Defendant to state his case and produce his evidence.

That as can be seen from the record, the evidence of the 2nd Defendant is missing, since there were two Defendants, the 1st Defendant was supposed to give her evidence, produce her witnesses, close her side of the case and thereafter the 2nd Defendant would open his case and produce his witnesses; this never happened- in non-compliance with **Order 18 rule 2(2) of the Civil Procedure Rules** and in the process, judgment was pronounced without the evidence of the 2nd Defendant; meaning that judgment was delivered without hearing the side of the 2nd Defendants case. They cited the **Constitution of the Republic of Uganda of 1995** - under **Article 28(1)** provides as under:

- (1) ***“That 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; in this particular case, the 2nd Defendant was denied the right to be heard, a question arises; if heard did he have a Defence? The answer is in the affirmative; his defence was that he purchased the suit land from one Alitusabira Racheal.”***

They submitted that indeed, Alitusabira Racheal appeared and attended court as witness and testified that she indeed sold the very plot (Suit land) to Waiswa God, she testified as **DW5**, she even stated that an agreement of sale was made and the 2nd Defendant constructed a house thereon; much as the application was made by Counsel for the Defendants to produce the Agreement of purchase and leave was granted, surprisingly,

the agreement was never produced in court till when the defendants closed their case and court has never seen this agreement.

In addition, the 2nd Defendant having not testified, it is difficult to discern with precision, whether **DW5** was a witness of the 1st Defendant or of 2nd Defendant, however had the 2nd Defendant testified, his evidence would most probably have tallied with the evidence of **DW5**, who sold to him the suit land, and as purchaser and a bigger stakeholder, he would have produced the Agreement of purchase of the suit land, between Alitusabira Rachael and himself; however this was never to be; of course it was the duty of the Defendants' counsel to make sure that the 2nd Defendant testifies; but where he failed like in this case, it was equally the duty of the trial Magistrate as the umpire of the proceedings, to make sure that the 2nd Defendant testifies, herein the trial Magistrate failed and in the result, the 2nd Defendant's fundamental right to a fair hearing was infringed. They relied on the author, M. Ssekana in his book **Criminal Procedure & Practice in Uganda at page 65**, he opines as under:-

“Any infringement of a fundamental right is regarded as fatal irregularity, vitiating the proceedings as a whole”.

They also cited the case of ***Grimshaw vs Dunbar [1953] 1 QB 408; [1953]1 ALLER 350-357*** that in that case, on 5th June 1952, a landlord, commenced an action for possession against the tenant of a dwelling house, within the Rent Restriction Act, on the ground of non-payment of Rent. On 30th June 1952, the tenant paid the arrears of Rent into court with costs and was then told by a court official, of the county court, that it was unnecessary for him to attend the hearing of the action.

On 3rd July 1952, the action was heard and in the absence of the tenant, an order for possession, on 3rd November 1953, was made in favour of the Landlord. On 23rd September 1952, the tenant served a notice of his application to have the order set aside, under this County court Rules of 1936 – order 37 Rule 2.

After an adjournment, the Application was heard on 28th October 1952, when the proceedings lasted only a few minutes and the County Court Judge dismissed the application but extended the time for giving possession to 1st January 1953.

The tenant appealed to the court of Appeal; and on appeal, justice Jenkins held thus:

“Be that as it may, a party to an action, is prima facie entitled to have it heard in his presence. He is entitled to dispute his opponent’s case and cross examine his opponents’ witnesses and give his own evidence, before the court.

If by mischance or accident a party is shut out from that right and an order is made in his absence, then common justice demands so far as it can be given effect to, without injustice, to the other parties, that that litigant who is accidentally absent, should be allowed to come to the court and present his case, no doubt on suitable terms as to costs, as was recognized in Dick Vs Miller [1943]1 ALLER 627”.

The Judge/Court allowed the appeal.

They therefore argued that the case before the Honourable court is almost on all fours with the case he has referred to above; and submitted that this is a case fit for ordering a retrial so that all parties are heard and the suit is disposed off on merit.

They also referred Court to yet another case on the subject of a right to be heard; and this is the case of **Musa Misango vs Eria Mushe** plaintiff claimed to be the Chairman, Director and the largest single shareholder of a Limited Liability Company, and that he had been deprived of his offices by special Resolutions, passed as a result of changes in the Articles of Association of the company, which changes were themselves made at meetings convened by members and non-members who had insufficient shares to requisition the meetings or to alter the articles.

He also alleged that false returns had been submitted and filed with the Registrar of companies. The company was neither co- plaintiff nor co-defendant. The Defendants consisted of another director and five non-members. Notwithstanding the points of law disclosed in the plaint (including fraud). The defendants adopted a strategy of disposing of the suit by technicalities; they applied to have the suit summary dismissed, on the grounds that:-

(1) The plaintiff disclosed no cause of action.

- (2) **That the plaint was vague and omitted material facts.**
- (3) **That the court lacked jurisdiction in proceeding on behalf of the company when brought by a member alone,** they sought that claim ought to be dismissed under order 9 Rule 29 of the Civil Procedure Rules.

The matter came before Sir Udo Udoma Chief justice of Uganda as he then was.

The matter he had to determine was the preliminary part of law as to whether the suit should be dismissed at that stage or whether it should be disposed of, on merit, and he had this to say at page 395;

“In Dyson Vs Attorney General [1911] IKB 410, it was held by the court of Appeal that Order 25 Rule 4, which enables the court or the judge to strike out any pleading on the ground that it discloses no reasonable cause of action, was never intended to apply to any pleading, which raises a question of general importance or serious question of law.

In his speech in that case, Fletcher Moulton LJ said [1911] IKB at PP 418-419”.

“Now it is unquestionable that both under inherent power of the court and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages upto trial would be to allow the Defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless.

But from this, to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region and courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever excepting in cases where the action is an abuse of legal procedure.

They have laid down again and again that this process is not intended to take the place of the old demurer by which the Defendant challenged the validity of the plaintiff’s claim as a matter of law.

To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”.

They submitted that the case before court, the suit proceeded on merit, however, when it came to the 2nd Defendant, to present his case, there was a flaw; he never testified and there is nothing to show that he presented his witnesses, **he was obviously driven out of the judgment seat without being heard.**

Further that having addressed court on the right to be heard and since he was seeking for an order of a retrial, he addressed Court, as to under what circumstances, will a court order a retrial and cited the case of ***Fatehali Manji vs The Republic [1966] EA 343-345*** where the court of Appeal for East Africa held thus:-

“In general, retrial will be ordered only when the original trial was illegal or defective; it will not be ordered, where the conviction is set aside because of insufficiency of evidence, or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow, that a retrial should be ordered, each case must depend on its particular facts and circumstances”.

They added that although the case cited is a criminal case, it ought to have the same force like a Civil Suit except that in a criminal case, the right to order a retrial will be jealously guarded bearing in mind the liberty of the individual which would be at stake, however, the principle remains, that a retrial will be ordered only if the original trial was illegal or defective.

That in this particular case, the trial in the case before court, was not illegal, however, they submitted that under the circumstances of the case cited, while arguing the first ground and what they have raised while arguing the 2nd & 3rd grounds of appeal, with due respect to the trial Magistrate, the trial was defective. They defined the word defective according to **Black’s Law Dictionary** Defective is defined as under:-

“Lacking in some particular which is essential to the completeness, legal sufficiency or security of the object spoken of, as defective service of process or return of service.”

In the first ground of appeal, they submitted that the 1st Appellant's Application to amend her defence was ignored to the prejudice of her case; in the second ground of appeal, the 2nd Defendant's/2nd Appellant's right to a fair hearing was infringed; in the result.

They concluded that the trial was a mistrial and was defective and that the second and third grounds of appeal be allowed and the following orders be made.

In reply, it was submitted for the Respondent that as already stated in the Appellants' written submission that, **Order 18 of the Civil Procedure Rules (CPR)** provides for the procedure for hearing of suits and examination of witnesses, **Order 18 Rule 1 of the CPR**, provide that "*the plaintiff shall have a right to begin*"; **Order 18 Rule 2 of the CPR**, it is provided that "*on the day fixed for hearing of the suit, or any other day to which the hearing has been adjourned, the party having a right to begin (Plaintiff), shall state his or her case and produce his or her evidence in support of the issues which he or she is bound to prove, then under Order 18 Rule 2(2) the other party (Defendant) shall then state his or her case and produce his or her evidence, if any, and may then address the court generally on the whole case*".

Further, that it should be noted from the proceedings of the lower court that the defendants were two (2) thus Ruth Kakaire (1st Appellant) and Waiswa Godfrey (2nd Appellant) who were duly and throughout the whole trial jointly represented by a "*one or single*" Counsel (M/S. Liiga & Co Advocates) through whom they jointly filed written statement of defence.

That as much as the Respondent/Plaintiff presented his case and produced his witnesses and evidence in support of his case, the appellants/ defendants were also given the same platform wherein were at liberty to present their defence case and produce their witnesses and or evidence the way they wished sufficient to support their defence case.

While at the course of the hearing on the 10th day of October 2013, page 18 of the court proceedings, the then Appellants' counsel is quoted to have stated that "*I have 5 witnesses to call and sought audience*". That it should also be noted that, the 2nd Appellant who claims not to have been given an opportunity to testify also attended court that day and even most of the other court sittings thereafter, however, he did not at any stage quoted to have shown his interest to testify.

That the said 2nd Appellant is also seen to have been given an opportunity during the locus proceedings where, he indeed testified but failed to produce the said alleged sale agreement between him and a one **Alitusabira Racheal (DW5)** as a matter of proving his interests as he alleged. It should also be noted that, the Appellants were jointly represented and or defended the matter as per their written statement of defence on record and therefore, produced witnesses or evidence jointly and severally since they did not at any stage of the trial disclose as to who of the Appellants owns a particular witness.

In addition, that under the said rule of procedure cited by the Appellant's counsel "**Order 18 Rule 2(2) of the CPR**, *"the other party Defendant) shall then state his or her case and then address the court generally on the whole case."* That it is not "mandatory" that a party to the suit "must" testify or be compelled to testify in favour of his or her matter, for that matter therefore, the magistrate as an umpire of court proceedings as stated by Appellants', could not force the 2nd Appellant to testify for his case as the rule cited is very clear; however, the then trial Magistrate as an umpire is seen to have extended her duty towards the 2nd Appellant when she visited the *locus in quo* where she indeed gave the 2nd Appellant an opportunity to say something before Judgment delivered.

That the 2nd Appellant failed to prove the source of his alleged interests in the said piece of land when he failed to produce the said sale agreement between him and a one **Alitusabira Racheal (DW5)**.

They therefore for the reasons afore mentioned herein above, submitted that whatever procedure applied during the trial, was done in line with the law and rules of procedures provided under **Order 18 rule 2(2) of the CPR** and the said Judgment was pronounced the brought evidence joint after Appellants/ defendants a proper indication that judgment was delivered after hearing the case "interparty".

That the said 2nd Appellant's purported part of evidence that *"the 2nd Appellant purchased the suit of land from a one Alitusabira Racheal"* was brought on record pending production of the said sale agreement to be admitted of which the Appellants jointly failed produce/tender either a photocopy or an original. See as high lightened in the Appellant's submission herein attached for easy of reference And Indeed, Alitusabira Racheal appeared and attended court as witness and testified that she indeed sold the very plot (Suit Land) to Waiswa God, she testified as **DW5**, she even stated that an agreement of sale was made and the 2nd Defendant constructed a house thereon; much as the Application was made by counsel for the defendants to produce the Agreement of purchase and leave granted.

Surprisingly, that the agreement produced in court till when the defendants closed their case and court has never seen this Agreement. That it is to that extent that court could not consider or rely on the 2nd Appellant's mere allegations to beat the Respondent's interests in the suit land.

That the failure for the 2nd Appellant to have the Agreement produced in court, clearly exhibited that the intentionally and trying to were just appellants fraudulently meander from their facts provided in their joint written statement of defence as a way of sealing the Respondent's proved interests in the said piece of land. It is also clearly exhibited during the whole trial, that the Appellants were not in possession of the said agreement which circumstantially led to failure to have the same produced during the trial in the lower court and since then they have been trying to fraudulently make the said false agreement to use the same as a basis of seeking a retrial.

The Respondents further contended that the proper grounds for ordering a retrial is upon proof as to whether there or during the preceding in the lower court existed an illegality, fatal irregularity and or an infringement on any of the fundamental rights which can vitiate the proceedings as a whole.

They contended that as already discussed herein above, it is massively obvious that there was/is nothing whether an illegality or an infringement on any fundamental right and or a fetal irregularity apparently exhibited on the face of the record of the lower court proceedings that this Honourable Court may base on to vitiate /nullify the whole record of proceedings of the lower court.

That the 2nd Appellants' allegations that he was denied his right to be heard is not found as the chance was at his detriment and no rule of procedure could make the Magistrate force/ compel him to testify for his case.

Secondly, that the 2nd Appellant while at locus is seen to have been given an opportunity to say something pertaining the matter wherein he personally failed to produce his said agreement as evidence to prove his alleged interests whereby the lower court could not base itself on just an allegation to beat the respondent's proved case.

That the defence counsel is seen representing both Appellants an implication that the case proceeded interparty as exhibited by the Appellants' Joint Written Statement of Defence filed on court record revealing that whatever evidence or witness produced, was in favour of both Appellants.

That the said evidence or agreement was indeed during the proceedings but the Appellants personally failed to produce the physical copy thereby failing court to prove their allegations.

Basing on the above grounds they submitted that there is no kind of infringement on any of the Appellants' fundamental right especially the right to be heard as per the appellants' allegation, The 1st Appellant's allegations that she filed an application for leave to amend her Written Statement of Defence is also unfound as there is no proof given as to whether the said document/Application was filed or existed in the lower Court for that matter therefore, this Honourable Court cannot base itself on such a document which does not bare the requirements of a dully filed court document.

That it is always the duty of a party to the civil suit to prove his or her case on the balance of probabilities; and in this case, it was indeed the duty of the 2nd Appellant and his counsel to make sure that the 2nd Appellant testify in open Court if he wished to do so. The Respondents contended that had the trial magistrate forced the 2nd Appellant to testify, she would have exhibited high degree of unfairness on both appellants and the respondent's part.

They argued that, the right to be heard in civil proceedings is optional and or not forced therefore, the opportunity for the 2nd Appellant to testify was open when the defence counsel opened the defence case until they mutually closed; and that it is not proved that during the preceding in court existed an illegality, fatal irregularity and infringement on the 2nd Appellant's fundament rights as the magistrate was seen exercising high degree of impartiality throughout the trial, so such a 2nd Appellant's error can't be attributed to the innocent trial magistrate and the Respondent.

Finally, that basing on all my arguments contained herein above, the Appellants' prayers and grounds of appeal should be failed and the appeal be dismissed with costs to the respondent. They further prayed that may this Honourable Court be pleased and revise or award the respondent with general damages to a tune of UGX 10.000,000/= (Ten million Uganda shillings only) as the Appellants have since constructed a commercial house on the suit land with monthly property rent/earnings of approximately UGX 200,000/= (two hundred thousand Uganda shilling only) per month.

For that matter they prayed that the said award of One million at the lower court be revised and the Respondent be awarded as prayed herein above.

In rejoinder, learned counsel for the Appellants argued in specific reply to counsel for the Respondent's argument **that at no stage did the second Defendant show interest to testify**. That at no stage, did the 2nd Defendant show interest that he wanted to testify. That Counsel for the Appellants submitted that like the 1st Defendant, the second Defendant was represented by Counsel-Mr. Aloysious Liiga (RIP); himself being a layman, he had to be led into a witness box; his counsel failed in that duty; this

however does not mean, that the trial magistrate had to just look on, unless satisfied that his evidence was not necessary or that his defence had been fully covered by the 1st Defendant's testimony, which was not the case, she (trial Magistrate) ought to have directed or reminded counsel, that the 2nd Defendant should testify, in the process, by mischance, or accident, he failed to testify.

That this Honourable Court be pleased to revise the award of general damages from 1,000,000/= to shs.10, 000, 000/=.

On the above connotation, learned counsel for the Appellants submitted that the learned Counsel for the Respondent has submitted that the Appellants have since constructed a commercial house in the suit land, from which they earn shs.200,000= per month; as such, that this court be pleased to revise the award of general damages from shs.1,000,000/= to shs.10,000,000/=

That Counsel for the Appellants argued to this submission, that the second defendant has constructed a house on the suit land is not new; **DW5** testified to that effect; even the Trial Magistrate saw the house on the suit land, when she visited the locus in quo. That in her Judgment at pages 4 & 5, the Trial Magistrate observed as under:-

"That later the 2nd Defendant brought bricks on the suit land and even built a house, whilst this suit had already been instituted.

At a visit of court on locus, this structure was clearly viewed".

That it therefore follows, that by the time the Trial Magistrate awarded general damages in the sum of shs. 1,000,000= she was alive to the fact that the second defendant had constructed a house in the suit land.

Further, that if the Respondent wanted an enhancement of the award, he ought to have cross appealed; having not done that, he cannot ask for enhancement in defending the judgment in his submissions in reply.

In resolution of Grounds 2 and 3 of the Appeal I have critically analyzed the certified record as availed to me, the judgement and submissions of both sides. **Section 70 Civil Procedure Act** which provides that;-

"No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not

*affecting the merits of the case or the jurisdiction of the court”.***[Emphasis Mine]**

I have also relied on the case of **Onek & Anor vs Omona (Civil Appeal No. 0032 of 2016) [2018]**, by my brother Hon. Justice Stephen Mubiru wherein he stated that;-

“...before this court can set aside the judgment on that account, it must therefore be demonstrated that the irregularity occasioned a miscarriage of justice. A court will set aside a judgment, or order a new trial, on the ground of a misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favorable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial”.

Relating the above to the instant case, the record reveals that the Defendants were present in in court on 19/2/2012 and also on 21/8/2012, 13/11/2012; 12/12/2012; 13/3 /2013; 5/3/2014; 9/4/2014. It is also noted that all these dates reflect the hearing of the Plaintiff’s evidence.

Thereafter, the opening of the evidence of the Defendants was first heard on the 9/4/2014 and on that date, both Defendants were in court and counsel for the Defendants started with the 1st Appellant / 1st Defendant.

On the 25/9/2014 on **page 26 of the record of proceedings line 18**, the second Defendant/2nd Appellant was in court but the matter was adjourned as counsel for the parties were absent. On the 15/01/2015 as per page **28 of the record of proceedings**, all parties were in court and started with **DW2 Kakaire** testifying; however on the following hearing dates of the Defence evidence on 12/03/2015, the second Defendant was absent.

On page 32 of the record of proceedings, it is reflected that the matter came again for hearing on 23/4/2015, and the 2nd Defendant was he was present in court. He was again absent on the 18/6/2015 for hearing of the evidence of **DW4 Kagoya Joyce Baraza**; and he was also present on 11/11/2015 and on 21/01/2016 when the defence evidence closed.

The matter was then adjourned to 10/3/2016 and on 17/3/2016 *locus in quo* was visited. The 2nd Defendant/ 2nd Appellant was recorded as present.

Learned counsel for the Appellants has focused his arguments on the validity and fairness of a trial conducted in that manner; and I'm alive to the right to a fair trial as guaranteed by **Article 28 (1) of The Constitution of the Republic of Uganda, 1995** which provides that:-

"In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court established by law".

The certified record in this case does not give any indication as to why the 2nd Defendant who was in and out of court on the dates mentioned above never testified.

Since no reasons were recorded as to why that omission happened, I therefore agree with counsel for the Appellants/Defendants that the irregularity of failure to hear the evidence of the 2nd Defendant resulted into a miscarriage of justice and denied the 2nd Defendant his right to a fair trial.

The failure to hear the 2nd Defendant or record reasons as to why his evidence was not received in court goes to the root of the whole dispute; and I agree with learned counsel for the Appellants that this. I therefore also agree that the procedure adopted by the trial Magistrate, though the Defendants' counsel, was also much to blame, was so irregular that it amounted to a mistrial.

My findings are that had the trial Magistrate had properly heard all the evidence in this case and followed properly described procedures, then justice would not only be done, but seen to be done. This would have conclusively resolved all the issues in the case.

For those reasons, both grounds of Appeal SUCCEED.

Following upon that, I have invoked the provisions of **Section 80 of the Civil Procedure Act (as amended)** which expounds on the powers of the appellate Court and reads as follows:-

"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

a) to determine the case finally;

- b) to remand a case;
 - c) to frame issues and refer them for trial;
 - d) to take additional evidence or to require such evidence to be taken;
 - e) to order a new trial.
- (2) subject to subsection (1), the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted in it.”

This means that the irregularities in the above two grounds can be cured by applying ordering a full retrial whereby the file is referred to the current Magistrate Grade 1 Kaliro for re trial *denovo* in order for justice to be done and not only done, but seen to be done.

It is therefore fair and just that the Judgment of the lower court is quashed and be set aside. The whole record shall be transmitted back to the current Magistrate Grade 1 Kaliro for hearing *denovo*.

Finally, it is now well established law that costs generally follow the event. See **Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC)** and **Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35**. Indeed, in the case of **Sutherland vs. Canada (Attorney General) 2008 BCCA 27**, it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a ‘reasonable expectation’ of obtaining an order for costs.

In the instant appeals, much as I have found valid reasons to allow the appeal based on the reasons I have stated hereinabove, I have also found that none of the parties are to be blamed for this unfortunate occurrence, default in procedure and the resultant Judgment and Decree.

I therefore find that there are justifiable reasons NOT to condemn any side in costs. Instead, each party shall bear their own costs in this appeal and the costs in in the lower court shall abide in the outcome of the retrial.

Accordingly, it is hereby ordered as follows;_

1. On the whole, the first ground of Appeal FAILS.
2. The second and third ground of Appeal have been found to be valid and they all SUCCEED.
3. The Judgement and Orders of the learned Trial Magistrate Grade 1 Kaliro is hereby quashed and set aside in their entirety.

4. The Chief Magistrate Iganga is directed to re allocate the case and have it heard *denovo*.
5. Each party shall bear its own costs in this appeal and the costs in the lower court shall abide in the outcome of the fresh Judgment.

I SO ORDER

JUSTICE DR. WINIFRED N NABISINDE
JUDGE

05/04/2023

This Judgment shall be delivered by the Honorable Magistrate Grade 1 attached to the Chambers of the Senior Resident Judge of the High Court Jinja who shall also explain the right of appeal against this Judgment to the Court of Appeal of Uganda.

JUSTICE DR. WINIFRED N NABISINDE
JUDGE

05/04/2023