

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 130 OF 2009**  
(ARISING FROM IGANGA CIVIL SUIT NO. 08 OF 2009)

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1. **SIRAJI BAGEYA**
  2. **KUWAYA NASSA**
  3. **NGOBI K:..... APPELLANTS**

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**VERSUS**

**OCHIENG DAVID :..... RESPONDENT**

15 **BEFORE: THE HON. MR. JUSTICE GODFREY NAMUNDI**

**JUDGMENT**

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This is an Appeal from the decision of the Chief Magistrate Iganga dated 18/9/2009 in which the said magistrate entered Judgment for the Plaintiff/Respondent, having struck out the Defendants/Appellants written statement of defence.

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The background to this matter is that the Plaintiff/Respondent Ochieng David sued the Defendants/Appellants seeking Judgment based on trespass and false claims by the Defendants/Respondents and specifically seeking for orders that:

- (a) The suit land belongs to the Plaintiff.
- (b) A permanent Injunction to issue restraining the Defendants from trespassing on  
30 the suit land or laying false claims over it.
- (c) General damages.
- (d) Costs of the suit.

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The Defendants/Appellants had filed a written statement of defence among others:

- Denying having ever stayed or used the suit land (Defendant No. 4).

- That the Lease in favour of the Plaintiff over the suit land was obtained fraudulently.
  - That the suit land is gazette as a Forest Reserve under the National Forestry Authority.
- 5 - That the Defendants' claim to the land is based on a corroborative forest management that was granted to them by the National Forest Authority.

At the hearing of the suit, a preliminary point of law was raised by counsel for the Plaintiff.

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It was based on grounds that under Order 6 r.3 CPR the Defendants' written statement of defence did not disclose the particulars of fraud alleged to have been committed by the Plaintiff in acquiring a Lease for the suit land. (Paragraph 5 and 7 of written statement of defence).

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The trial magistrate upheld the preliminary objection, holding that the failure to disclose the particulars of fraud in the written statement of defence was not a mere procedural technicality but a substantive matter that could not be remedied under Order 6 rule 19 of the CPR. That this was a substantive illegality that once brought to the attention of Court overrides all questions of pleadings. He accordingly struck off the written statement of defence and went ahead to enter Judgment for the Plaintiff.

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I have had to reproduce these details in order to appreciate the basis of this Appeal in its proper context.

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The Appellants raised three ground of Appeal that the trial magistrate erred in law and fact:

- (1) When he ruled that failure to plead particulars of fraud amounted to an illegality.

(2) When he failed to give due regard to other defences in the written statement of defence.

(3) When he solely based his decision on unpleaded particulars of fraud.

5 Two preliminary points of law were raised. One by the Appellants and the other by the Respondent which I will deal with first.

For the Appellants it has been submitted that in the trial Court, the Respondent (Plaintiff) instituted a suit in his personal names and yet he is a holder of a Power of Attorney. That  
10 the Plaintiff did not accordingly disclose a cause of action since it was instituted by a person who had no locus in the suit property. That the Respondent enjoyed no right in the suit and could not sustain an action. Ref: **Auto Garage Vrs. Motokov (1971) EA 314** was relied upon. It was argued that on the strength of **Ms. Ayighungu & Co. Advocates Vrs. Muteteri Munyankindi (1988-1990) HCB 161**, a person holding a Power of Attorney  
15 ought to take proceedings in the name of the owner of the property, the donor of an Attorney has no right of action.

Finally that this is an illegality brought to the attention of Court within the meaning of the holding in **Makula International Ltd. Vrs. Cardinal Nsubuga (1982) HCB 11**. It is  
20 prayed that the Plaintiff in the original suit should be struck out.

Replying to this point of law, Counsel for the Respondent has submitted that this point of law was not alluded to or addressed either in the Appellants' pleadings and or submissions in the lower Court. That this was not even raised as a ground of Appeal. This should  
25 have been done under the provisions of **Order 6 rule 6 CPR** and the Appellants are accordingly prevented from departing from their pleadings under **Order 6 rule 7 CPR**. Reference was made to the case of **Opiko Opoka Vrs. Munno Newspaper & 2 Others HCCS 992/89** and **Gipjani Properties Ltd. Vrs. Dar-es-Salam City Council (1966) EA**. In both cases, an attempt to raise points of law not pleaded in the pleadings was  
30 disallowed.

Without going into the merits of the point of law itself, the settled law and practice is that a party is bound by his/her pleadings. **Order 6 rules 6 and 7 CPR** are clear on this.

- 5 What is before the appellate Court is premised on different grounds/pleadings. The point of law should have been raised and determined in the lower Court.

I am alive to the mandate of an appellate Court to review the record of the lower Court and come up with its own findings.

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However the provisions on pleadings are very clear and the Appellants cannot be seen to smuggle into these proceedings matters that have not been pleaded either in the lower Court or on appeal. This point of law is disallowed.

- 15 The second point of law was raised by the Respondent who submit that the appeal is incompetent since it was filed out of time. The decision being appealed against was delivered on 18/9/2009. The Memorandum of Appeal was filed in the High Court on 18/12/2009 over 2 months after the event. That this contravenes **Section 79 (1) (a) CPA** which provides that an appeal must be filed within 30 days of the date of the Decree or  
20 Order of Court. It is further submitted that the Appellants cannot seek cover under **Section 79 (3) CPA** which takes into account the time the Court takes in making a copy of the Decree or Order and the making of the proceedings. For the Appellant to rely on the above provisions, he should prove that he applied for a copy of the Decree or date of receipt of the said Decree.

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In the absence of having obtained the leave of this Court to extend the time, the appeal would be out of time.

- In reply, the Appellants rely on **Section 79 (1) CPA** which allows the appellate Court to  
30 admit an appeal for good cause even though the limitation period has elapsed.

They also rely on **Section 79 (2) CPA** which excludes the time taken to either make the Decree or record in the computation of the time for filing the Appeal. That in any case under **Order 21 rule 7 (2), CPR**, it is upon the successful party in the suit to prepare and  
5 serve the Decree on the opposite party. My attention has been drawn to 2 copies of Decrees signed by the same magistrate; one in December 2009 and one in April, 2010.

In the meantime, the Appellants filed a Memorandum of Appeal on 18/12/2009 in response to the first Decree signed by the magistrate.

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I have looked at the provisions cited by both parties clearly, within the provisions cited, the Appellants could only file the appeal on receiving the Decree which they promptly did on 18/12/2009.

15 The rules task the successful party to ensure the extraction of the Decree, signing thereof by the Court and service on the opposite party.

I am sure this was meant to ensure that the unsuccessful party is neither taken by surprise nor taken advantage of. The very fact that 2 Decrees are signed by the same magistrate on  
20 different dates raises questions which should in my view not be visited on the Appellants.

It is my finding that the appeal is competently before Court, sufficient cause having been demonstrated for the filing of the appeal 70 days after the decision.

25 The preliminary point of law is accordingly disallowed.

**Merits of the Appeal:**

The grounds of Appeal have already been laid out. They all revolve on the trial magistrate's striking out the written statement of defence for failure to disclose particulars  
30 of fraud.

The decision of the trial magistrate apart from striking out the written statement of defence went further to enter Judgment in favour of the Plaintiff.

- 5 It is submitted that by striking out the entire defence, other defences raised in the written statement of defence e.g. paragraphs 4, 6, 8, 9, 10 and 11 were not addressed.

In the Supreme Court case of **Israel Kabwa Vrs. Martin BanobaMusiga – SCCA 52/95 (1996)11 KAL**; it was held that the trial Judge could frame fraud as an issue and decide  
10 the same even when the pleadings gave no particulars thereof.

It is also submitted that the trial magistrate should have proceeded to hear the case *ex parte* to enable the Plaintiff prove his claim.

- 15 For the Respondent, it is submitted that the Appellants failed to comply with the provisions of Order 6 rule 3 CPR which makes it mandatory for the litigant to specify particulars of **misrepresentation**, Fraud, **Breach of trust, etc.** and all other particulars which may be necessary.

- 20 It is argued that there were no particulars of the fraud alluded to in the written statement of defence.

It is argued that the suit in the lower Court was based on trespass. That under the Registration of Titles Act (Section 176) a Certificate of Title can only be impeached on  
25 the grounds of fraud. That all other defences alleged by the Appellants are outside the ambit of Section 176 RTA.

It is also submitted that the magistrate was satisfied that the defence provided no answers to the Plaintiff and hence went ahead to enter Judgment.

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In rejoinder, the case of **Okello Vrs. UNEB (1986-1989)1 EA 436** was cited. There in it was held that failure to give dates of particulars of fraud is not a fatal defect.

5 It is further reiterated that the trial magistrate erred in entering Judgment without evidence.

I have looked at both the Plaintiff and the written statement of defence. The Plaintiff raises several prayers including one for General damages, and a permanent injunction.

10 The written statement of defence on the other hand raised other defences other than fraud for example that the Appellants claimed no ownership of the suit land, and only had a sharing arrangement with the controlling authority.

15 On the strength of the authorities cited above i.e. **Okello Vrs. UNEB (supra)** and **Kabwa Vrs. Martin Banoba (supra)**, it was incumbent upon the magistrate to address all issues raised in both the Plaintiff and the written statement of defence. If any, he should have framed fraud as an issue and proceeded to hear the case, and give a Judgment dealing with all aspects of the case. In the Plaintiff for example, General damages had to be proved. This was not done. Did he award any and if so on what basis?

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In the written statement of defence, where is the evidence against other defences and where is the Defendants' evidence in support thereof?

25 I am inclined to believe that the trial magistrate misapplied the law of pleadings and proceeded to dispose of the suit in a perfunctory manner without due regard to the pleadings and evidence.

30 This appeal is allowed on all grounds. The file is to be remitted to the lower Court for retrial with particular emphasis on the prayers in the Plaintiff and other defences raised in the written statement of defence.

Fraud should be framed as one of the issues to be addressed and dealt with. Costs to Appellants.

5 **Godfrey Namundi**  
**Judge**  
**25/06/2014**

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25/6/2014:

Ssekaana for Appellants

Mangeni on brief for Respondent

Parties present

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Court: Judgment read.

20 **Godfrey Namundi**  
**Judge**  
**25/06/2014**