THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
MISC.APPLICATION.NO.100 OF 2021
(ARSING OUT OF CIVIL APPEAL NO.24 OF 2018)
(CIVIL SUIT NO. 004 OF 2016)

KABAGAMBE GEORGE & 5 ORS :::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

FRANCIS KAAHWA ::: RESPONDENT

RULING

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This is an application by Notice of Motion under **0.43 rr.1, 2, 22(1) (b)** and **O.52 rr.1, 2, & 3 CPR, Section 33 of the Judicature Act** and **Section 98 CPA** for leave to be granted to the Applicant to amend the memorandum of appeal to include the ground of objection to the pecuniary jurisdiction of the trial court in trying and hearing of **Civil Suit No.004 of 2016**. That costs of this application be in the cause.

[2] The application is supported by the affidavit of **Kabagambe George,** the 1st Applicant wherein there are grounds of this application which briefly are;

1. That the Respondent filed **C.S No.004 of 2016** against the Applicants for trespass and recovery of land.
2. That the value of the subject matter was not indicated in the plaint.
3. That the judgment was entered against the Applicants in **Civil Suit No.004 of 2016** without any inquiry or reference to the pecuniary jurisdiction of the disputed land.
4. That the Appellants filed an appeal against the said judgment and during the pendency of the appeal, they discovered that the trial court had tried a matter whose pecuniary jurisdiction

it did not have and hence the trial offended substantive law on jurisdiction, an illegality and was a nullity.

5. That a valuation exercise of the suit land was conducted and a valuation report extracted putting the value of the suit land to be worth **shs. 17,500,000,000/-.**
6. That the Appellants filed **Civil Revision No.12 of 2020** arising out of the instant appeal before this honourable court seeking a revision of the trial court judgment based on the ground of want of jurisdiction but that this court advised that it would not be prudent to have an appeal and a revision over the same subject matter and the revision was withdrawn in favour of pursuing the appeal.
7. That the Respondent extracted the order out of **Civil Revision No.12 of 2020** and filed a bill of costs where instruction fees to oppose Civil Revision were based on the value of the subject matter as **shs.17,500,000,000/-** and shs.355,220,000/- were claimed before a taxing master.
8. That it is within the discretion of the honourable court to grant leave to amend the memorandum of appeal.
9. That this application has been made without delay and it is in the interest of justice and fairness that leave be granted to the applicants to amend the memorandum of appeal so that the appeal is determined with the ground of jurisdiction included in the memorandum of appeal.

[3] In opposition to the application, the Respondent filed an affidavit in reply deponing as follows;

1. That the applicants cannot amend the memorandum of Appeal to introduce a ground challenging jurisdiction as the same was not raised in the trial court.

2. That the Applicants were ably represented by counsel during the hearing of **C.S No. 006 of 2016** and they did not object to the jurisdiction of the court and that in any event, the Chief Magistrates court was clothed with jurisdiction to try the suit whose cause of action was trespass to land.

3. That the Applicant on their own volition withdrew **Civil Revision No.12 of 2020** with costs to the Respondent and the instant application has been filed **1,214 days** (more than 3 years) from the date of filing the memorandum of appeal, an inordinate and un explainable delay.

4. That this Application is an abuse of court process and brought malafide.

Counsel Legal representation

[4] The Applicants were represented by **Counsel Selwambala Julius Ceaser** of **Ms Kasumba, Kugonza & Co Advocates, Kampala** while the Respondent was represented by **Counsel Lou Javis** of **Ms Kabayiza Kavuma. Mugerwa & Ali Advocates, Kampala**. Counsel for the Applicants filed written submissions which he served upon counsel for the Respondent on the very morning for hearing the application but was nevertheless ready to respond orally and he did so raising the following objection:

1. Failure to securely seal annextures.

That the application is supported by an affidavit with annextures that were never commissioned and therefore unsealed yet it is trite that the evidence ought to be taken to a commissioner who administers the oath and then proceed to mark the exhibits thereon.

2. Undated affidavit;

That the supporting affidavit is not dated and therefore, this combined with the fact that the annextures are un commissioned, it is doubtable whether the deponent appeared before the commissioner for oaths.

3. Failure by counsel for the Applicant to attach his current practicing certificate;

That counsel for the Applicant attached a copy of his 2020 practicing certificate and if it is found that indeed, he does not have a practising certificate, then his submissions cannot be had on record.

4. Introduction of a new ground of appeal;

That in this application, counsel for the Applicant is seeking to introduce a new ground of appeal which was never raised in the lower court. That the ground of jurisdiction and illegality raised by the opposite counsel is one of mixed law and fact and as such the Respondent as well would have enlisted evidence if it were raised in the lower court. That at this stage of appeal, that is not possible and hence this court would not be able to weigh the contradicting arguments. He relied on the authorities of **MUSISI GABRIEL & ANOR VS EDCO LTD H.C.M.A NO.386/2013, CHRISTINE BITARABEHO VS EDWARD KAKONGE S.C.C.A NO. 04/2000** and **WILLIAM TWAKIRANE VS VIOLA BAMUSEDDE 18 C.CIVIL APPEAL NO.46/2007,** that as a result, the issue of jurisdiction and illegality which were never argued in the lower court, cannot be raised at this stage.

5. Inordinate delay;

That their application has been brought after grave and in ordinate delay. That the appeal was filed in 2018 and the application to amend

the memorandum of appeal has been brought close to 4 years later. That such delay cannot be explained because the conduct of the appellant and the record indicate that the Appellant since 2018 has never made any attempt to fix the appeal. Lastly, that this conduct abuses the process of court because in any event, the rule under which this application has been brought does not necessarily require that the memorandum be amended.

6. Unlimited jurisdiction of Chief Magistrate in cases of trespass: That under **Section 207 MCA,** the Chief Magistrate has unlimited jurisdiction to try cases of trespass. That paragraph 6 of the Respondent's affidavit shows that he filed a suit for trespass to land and further consequential orders that flow therefrom. That it is therefore well within jurisdiction of the Chief Magistrate to order vacant possession and any other consequential orders that follow.
Counsel for the Respondent concluded therefore that the application lacks merit and it is brought in bad faith.

[5] In rejoinder, counsel for the Applicant submitted reiterating his earlier grounds;

1. That as regards the un commissioned annextures, in **KIKONGO NOELINA VS E.C & ANOR, H.C ELECTION APPEAL NO.75/2011,** court held that a defect in the jurat or any irregularity in the affidavit cannot be allowed to vitiate an affidavit in view of **Article 126(2) (e) of the Constitution**.

2. On the issue of the practicing certificate, counsel undertook to provide the right copy.

3. That this application is based on a matter of law only and not on a matter of law and facts as the case in the authority of **MUSIS GABRIEL (supra)** relied on by counsel for the respondent.

4. As regards the inordinate delay, there was **Civil Revision No.12/2020** and **M.A No.84/2018** which had to be disposed of first before the appeal.

5. Lastly, on the issue of the Chief Magistrate's jurisdiction in trespass under **Section 207 MCA,** counsel submitted that as per annexture "A" to the application, i.e a copy of the plaint, the 1st prayer was for ownership of land and not trespass. That when ownership is in issue, jurisdiction is in issue.

Determination

[6] **Effect of failure to securely seal annextures under the seal of a commissioner for oaths**;

Admittedly, the annextures to the affidavit in support of the application deponed by the Applicant; **Annexture "A" – "G" were** not securely sealed under the seal of the commissioner for oaths.

Under **Rule 8** in the 1st schedule to the **Commissioner for Oaths (Advocates) Act Cap 5**, all exhibits should be securely sealed to the affidavits under the seal of the commissioner and should be marked with serial letters of identification.

[7] In **NAMBOOWA RASHIDA VS BAVEKUNO MAFUMU & ANOR EPA NO. 69 OF 2016** citing the case of **UGANDA CORPORATION CREAMERIES LTD & ANOR VS REAMATON LTD C.A.C.A NO. 44 OF 1998** in which some of the annextures had not been duly sealed by the commissioner for oaths, counsel for the Respondent raised a preliminary objection that the original and supplementary affidavits supporting the Notice of Motion were incurably defective because all exhibits to these affidavits ought to have been sealed by the commissioner and marked with serial letters of identification but that was not done. Court noted the distinction between **"exhibits"**

and **"annextures"** and agreed that whether or not annextures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend **Rule 8** because they were not **exhibits** produced and exhibited to a court during a trial or hearing in proof of facts. That **Rule 8,** though mandatory, is procedural and does not go to the root as to the competence of affidavits. In the premises, substantive justice should be administered without undue regard to technicalities.

[8] In the instant case, the annextures to the affidavit of the applicant are not exhibits as they had not been formerly tendered in court during trial or hearing to prove a fact but mere annextures to the affidavit in support and therefore do not affect the potency of the affidavit. In any case, even if these annextures were detached, the affidavit thereof would still be competent to support the Notice of Motion as evidence.

[9] Besides, in **KAKOOZA JOHN BAPTIST VS E.C & ANOR S.C EPA NO. 11 OF 2011 [2008] HCB 40**, it was held that affidavit evidence does not necessarily apply to the annexture thereof. This is because the affidavit contains the facts which the deponent swears to be true because he has personal knowledge of them but this is not always true of annextures to affidavits.

[10] For the above reasons, the Respondent's objection regarding the effect of the failure by the applicant to have the annextures securely sealed under the seal of a Commissioner for oaths is overruled.

Undated affidavit;

[11] Upon perusal of the Applicant's affidavit in support of the applicant, it is found to had been dated 21st of October 2021. This objection is therefore, also accordingly overruled.

Counsel for the Applicant's practicing certificate;

[12] This was corrected by court. Court assumed that counsel for the Applicant inadvertently attached a wrong copy of 2020 instead of a copy of 2021, and was asked to present his current practicing certificate which he did and it is on record.

Introduction of a new ground of appeal;

[13] Counsel for the Applicant submitted that under **O.43 r.22 (1) (a) (b) CPR,**

> ***"22. Production of additional evidence in High Court***
>
> *(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court; but if-*
>
> *(a) the court from where the appeal is preferred has refused to admit evidence which ought to have been admitted; or*
>
> *(b) the High court requires any document to be produced of any witness to be examined to enable it to pronounce judgment, or if any other substantial cause, the High court may allow the evidence or document to be produced, or witnesses to be examined."*

That in the instant case, the proposed ground of appeal as per the defendants amended memorandum of appeal is as follows;

"The learned trial magistrate erred in law and in fact in entertaining a case the value of whose subject matter exceeded the trial court's pecuniary jurisdiction."

That **Section 207 (1) (a) MCA** as amended, provides;

> *"A Chief magistrate shall have jurisdiction where the value of the subject matter in dispute does not exceed fifty million and shall have unlimited jurisdiction in disputes relating*

to conversion, damage to property or trespass."

That in paragraph 2 of the affidavit in support of this application, the Applicant attached **annexture "A"** which is a plaint in **Civil Suit No.004 of 2016** where in the 1st prayer in the plaint is that the plaintiff be declared the lawful owner of the suit land.

[14] Counsel argued that in the instant case, during the pendency of the appeal, the Appellants discovered that the trial court heard and tried the matter without pecuniary jurisdiction. That a valuation exercise of the suit land was conducted and a valuation report extracted put the value of the suit land to be worth **Ugx.17,500,000,000/-,** the basis that the Respondent used as the value of the subject matter to claim **shs.355,220,000/-** as instruction fees in the bill of costs of **Civil Revision No.12 of 2020**.

[15] Counsel for the Respondent on the other hand submitted that this application is seeking to introduce a new ground of appeal which was never raised in the lower court thus at this stage, this court would not be able to weigh the contradicting arguments of the parties.

[16] It is trite law that a matter of law can be brought up at any time and where a question of illegality is brought to the attention of court, it overrides all other considerations and court cannot close its eyes but it is **duty bound to investigate such claims of illegalities; MUSIS GABRIEL VS EDCO LTD & ANOR HCMA NO.386 OF 2013.**

[17] Guiding principles in court allowing new issues on appeal are:

a) Court has discretion to allow a new point to be taken on appeal as long as it is satisfied that *"full justice can be done to the parties";* **TANGANYIKA FARMERS ASSOCIATION LTD VS**

UNYAMWEZI DEVELOPMENT CORPORATION LTD [1960] E.A 620.

In **NORTH STAFFORDSHIRE RAILWAY CO. VS EDGE [1920] AC 254**, Lord Buckmaster at p.270 stated thus, on the issue of whether or not to allow a new point at the appellate stage: *"whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed."*

b) The rule is that the court must be satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts if fully investigated would have supported the new plea; **CONNECTICUT FIRE INSURANCE CO VS KAVENAGH [1892] A.C 473 at p.480.**

In TASMANIA [1890] 15 A.C 223 at p.225, where a point is raised for the first time at the court of appeal, Lord Hersdell stated:

> *"court of appeal ought only to decide in favour of an appellant on a ground they put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box."*

See also **CHRISTINE BITARABEHO VS EDWARD KAKONGE (Supra)**

c) It is only a pure question of law that could be raised on appeal even when it was never raised in the court below but a question

of both mixed law and fact where evidence would be needed, the appellate court would be justified in refusing to entertain it at that point; **CHRISTINE BITARABEHO (ibid).**

[18] In the instant case, counsel for the Applicants relied on both a certain valuation report of the suit property that is not dated but purported to be as of 9th September, 2020 **(Annexture "D")** and a **Bill of costs** in **Civil Revision No.12/2020** related to this case filed on 3rd May, 2021**(Annexture "F")** to support his application for leave to amend the memorandum of appeal. He also sought for the aid of **O.43 r. 22(1) CPR** which provides for production of additional evidence on appeal to justify his reliance on both the **valuation report** (Annexture "D") and the **Bill of costs** (Annexture "F").

[19] It is my view that **O.43 r. 22(1) CPR** is applicable to applications for leave to adduce additional evidence, both oral and documentary at the hearing of an appeal and not in applications for amendment of a memorandum of appeal, the instant one. Secondly, none of the documents i.e the **valuation report** and the **Bill of costs** annexed to the application were in existence during the trial yet this application intends to make them form part and parcel of the memorandum of appeal. As counsel for the Respondent rightly submitted, the application is seeking to introduce a new ground and evidence which were never before the lower court.

[20] It is trite that the Appellate courts will not admit additional evidence which introduces a matter that is new altogether which was never raised or does not emerge at all from the evidence on record; See **ALUMA & 2 ORS VS OKUTI H.C.M.NO. 12 /2016 [2017] UGHCLD 28** and **R VS YAKOBO BUSIGO (1945) 12 EACA 60.** The only exceptions are as follows;

First, if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **Secondly,** the evidence must be such that if given, it would probably have an important influence on the result of the case, though it need not be decisive; **thirdly**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible; **ALUMA & ORS (ibid).**

[21] None of the above I have found apply to the instant application. The **valuation report** (Anexture "D") was in the first instance not properly admitted through its author. It is therefore a mere annexture and not an exhibit. The Respondent was never involved in the valuation of the land alleged as the suit land and there is no evidence that it relates to the suit land. The fact that the Report was used as the basis for the bill of costs appear to had been prompted by the Applicant's display of the same and the Respondent picked it as a spear against the applicants in the taxation of **Civil Revision No.12 of 2020** but not that it is a valid piece of evidence upon which this court can rely on and admit for purposes of determination of either this application or the appeal itself. With reasonable diligence, the report could have been obtained for use at the trial.

[22] The **bill of costs** has in the 1st instance to be subjected to a Taxing officer for determination of whether the claims are genuine. This **bill of costs** which has not passed the taxing officer's test and is based on a **valuation report** that was formulated after the trial over the suit land is of no evidential value and worthless at that for purposes of this application. It is not credible at all.

[23] In conclusion, I find that the memorandum of appeal cannot be amended on a new piece of evidence that never formed part and

parcel of the trial court record. Secondly, the Applicant's reliance on the valuation report as the basis for the point of jurisdiction raised by the Applicant is proof that it is a question of both mixed law and fact as evidence was needed to be adduced to establish the pecuniary jurisdiction; **CHRISTINE BITARABEHO (Supra).** The pleadings themselves show that the determination of jurisdiction would require adducing evidence in view of the fact the plaintiff's claim against the defendant **is trespass upon land measuring approximately 5000 ha** and it is further pleaded in **para 4 (c)** of the plaint that the defendants proceeded to partition the land, erect semi-permanent houses and cattle kraals thereon implying that out of the **5000 ha,** the portion trespassed upon has to be determined through evidence. Under **Section 207 MCA,** the Chief magistrate is vested with unlimited jurisdiction.

[24] In the premises, at this stage, this court cannot therefore determine the point of pecuniary jurisdiction. It ought to have been raised at the trial since it is not purely a question of law which could be raised on appeal. This court does not therefore in the circumstances of this case, have any material facts bearing the new contention of jurisdiction to rely on while entertaining this application or the pending appeal. There is no valid and credible evidence as I have already observed to provide redress for the applicants' claims. As was held in **KARMALI TARMOHAMED & ANOR VS T.H. LAKHANI & CO. LTD [1958] E.A 567** and **NAMISANGO VS GALIWANGO & ANOR [1986] HCB 37** that **except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available. It is an invariable rule in all the courts that if**

evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained is either not produced, or has not been procured and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.

[25] In the instant application, the affidavit evidence in support together with the evidence already on record fell short of satisfying the above requirements yet the Applicant on trial was ably represented by counsel! It is presumed that counsel must have been alive and aware that court did have the jurisdiction to entertain the suit at trial and that's why he chose not to raise the objection.

[26] It cannot be said that there was a mistake of counsel and indeed, the applicants have not shown so for one to hold that this was mistake of counsel which should not be visited on the litigant. As was observed by Justice Mubiru in **ALUMA & 2 ORS (Supra**), in the nature of things a wrong decision made by an advocate acting honestly and carefully, will not be categorized as a mistake but rather as an error of judgment. Such an error cannot be described as mistake simply because they led to an unsuccessful result. It is therefore in the interests of the proper administration of justice that parties should know that they have a duty to adduce any material evidence that they have in their possession or that can be procured before the trial court and if they fail to do so, they cannot require a second hearing to put the matter right, only because they have become wiser with the benefit of hind sight.

[27] Lastly, this application for leave to amend the memorandum of appeal in the instant case was filed on the **25th of June 2018**. On

23/8/18, the Applicants filed **H.C.M.A No.84 of 2018** for leave to adduce additional evidence in **Civil Appeal No.24 of 2018** pending before this court. The application was dismissed by Hon. Justice Wilson Musene with costs on **4/8/2020.** On **24/9/20,** the Applicants filed **H.C. Civil Revision No.12/2020** for Revision of the decision/judgment and decree entered by the Chief magistrate in **Civil Suit No.04/2016** during the pendency of the Appeal, **No.24/2018.** Before it could be disposed of, the same, counsel for the Applicants on 27/5/2021 filed yet another application vide **H.C. Civil Revision No.6/2021** for Revision of the decision by the Chief magistrate in the same wording as in **H.C. Civil Revision No.12 of 2020**. **H.C. Civil Revision No.12 of 2020** was nevertheless disposed of by way of withdrawal for it could not be filed while at the same time, there is a pending appeal, **H.C.C.A No. 24/2018** both arising from **C.S No.04/2016.** However, **H.C Civil Revision No.6/2021** remained pending to date.

[28] It is my view that the filing of the present application, which as I have found seeks to introduce a new ground of appeal and new evidence, was intended to circumvent **H.C.M.A No. 84 of 2018** that had been dismissed with costs. I find this to be a clear case of abuse of court process which has the potential of leading to a multiplicity of matters in court, hence the present case backlogs that have clogged our system. The Applicants ought to have pursued their appeal instead of clogging this court with one application after the other. It is not clear whether the Applicants have even met by way of payment of costs for the 2 applications so far disposed of with costs. **H.C. Civil Revision No.6/2021** was uncalled for in view of the presence on record of **H.C. Civil Revision No.12/2020** while both are in similar terms.

[29] In view of the above, I am ready to find that besides the multiple applications by the Applicants which have now become an abuse of court process, the applicants are guilty of inordinate delay in filing this application for amendment of the memorandum of appeal in view of the fact that the appeal was filed on **25/6/2018.** All in all, I would find this application lacking merit and it is accordingly disallowed.

[30] As regards costs, counsel for the Applicants implored this court that if it is inclined to disallow this application, costs should be in the cause for purposes of ensuring access to justice. It is however an established principle in law that costs of any action, cause or matter shall follow the event unless court for good cause orders otherwise; **Section 27 (2) CPA.** In the instant case, no good cause has been shown by the applicants to warrant this court to order otherwise.
No efforts for example, have been made by the applicants to compromise this application well knowing that it has an element of an abuse of court process. The application is therefore in the circumstances dismissed with costs to the Respondent.

Dated at Masindi this 13th day of December, 2021

Byaruhanga Jesse Rugyema

JUDGE