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THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

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**CIVIL APPEAL NO. 0053 Of 2019
(ARISING FROM NABWERU CIVIL SUIT NO. 56 OF 2013)**

1) MIGADDE RICHARD LUBINGA

2) NAKATO WALUGEMBE

15 **3) CHARLES WALUGEMBE ESTATES LTD ::::::::::::::::::::**
APPELLANTS

VERSUS

1) NAKIBUULE SANDRA

20 **2) BUSULWA ALAN**

3) NAKAMATE FIONA ::::::::::::::::::::
RESPONDENTS

**(BEFORE: LADY JUSTICE IMMACULATE BUSINGYE
25 BYARUHANGA)**

JUDGMENT

This Appeal arises out of a judgment of the Chief Magistrate at Nabweru delivered by Her Worship Nasambu Esther Rebecca in Nabweru Civil Suit No. 56 of 2013. The background to this Appeal is
30 as follows: -

The Respondents that is Nakibuule Sandra, Busulwa Allan and Nakamate Fiona as Plaintiffs instituted a Civil Suit at Nabweru Chief Magistrates Court against Migadde Richard Lubinga, Nakato Walugembe and Chares Walugembe Estate Ltd (Appellants) on 25th
35 June 2013 seeking the following: -

- a) A declaration that the Plaintiffs enjoy a right of way and/or easement through land claimed, owned and/or occupied by the Defendants.
- 40 b) A declaration that the third Defendant's title ought to be cancelled in as far as it touches on the pre-existing easement.

c) An order directing the Defendants and anybody acting under their authority to immediately clear the access road.

d) A permanent injunction restraining the Defendants, their siblings, children, servants, relatives, agents, servicemen, directors, licensees or any other person working under the authority and direction of the Defendants from further infringing on the Plaintiffs right of way/access/easement.

e) General damages.

f) Interest on (e) at 24% per annum from the date of filing the suit until full payment.

g) Costs of the suit.

h) Any other relief that the court deems fit.

The Plaintiffs claimed that they enjoyed a right of way and/or easement through land claimed, owned and/or occupied by the Defendants since the Plaintiffs were registered proprietors of land and developments constituting a family home adjacent to land claimed and/or occupied by the Defendants. The Plaintiffs stated that the said land was bought by their father (Nsereko Henry in 1971) from the 1st Defendant (1st Appellant's) grandmother who previously owned land occupied by the Appellants and the Respondents and there was an access road which was running through the suit land until 2011 when the Defendants tampered with the access road. That the 3rd Defendant intended to construct a wall fence right through the access road.

On 25th July 2013, the Defendants filed a written statement of Defence and a counterclaim indicating that the plaintiffs claim was unjustified and unlawful as their land is on the main Gayaza Road and the Plaintiffs had refused to use the main road. In the counterclaim, the Defendants raised the issue of trespass by the Plaintiffs indicating that the plaintiffs were advised to ask for an access road from UNRA but they refused and had continued to

trespass on the Defendant's property despite the numerous warnings from the Defendants.

A Joint Scheduling Memorandum was filed on 7th March 2014 and the following issues were agreed upon for trial.

- 5 1) Whether the Plaintiffs/Defendants have/enjoy a legal right of way through the suit land?
- 2) Whether that right of way has been violated by the Defendants/Plaintiffs action?
- 10 3) Whether the Plaintiffs/Defendants are entitled to the remedies sought?

The Learned Chief Magistrate delivered judgment in favour of the Plaintiffs (Respondents) on 2nd April 2019 by making the following
15 orders: -

- 1) For the psychological torture mental anguish, suffering, inconvenience and hardship resulting from the blocking of the road general damages of **Ug. Shs. 15,000,000/= (Fifteen million shillings only)**.
- 20 2) Costs hereby declares that there exists an easement on the land of the Defendants where the Plaintiffs passed hence the same should be left vacant with no infringements.
- 25 3) Court also issues a permanent injunction against the Defendants, their siblings, children, grandchildren, servants, agents, directors, servicemen, licensees or any other people working under them or under their authority from further infringing on the Plaintiffs rights of way, access or easement.
- 30 4) The first Defendant Richard Migadde Lubanga is hereby ordered to fill the deep pit next to the Plaintiffs' land and gate.
- 5) The Plaintiffs are awarded interest on general damages at a rate
35 of 25% per annum from the date of filing (26th June 2013) till payment in full.
- 6) The Plaintiffs are also awarded taxed costs of the suit.

The Appellants being dissatisfied with the judgement of Her Worship Nasambu Esther Rebecca, Chief Magistrate filed this Appeal.

At the hearing of the Appeal, the Appellants were represented by Kigozi Nasser while the Respondents were represented by Kirunda
5 Henry of Sekabanja & Co. Advocates.

On 6th May 2019, Counsel for the Appellants filed a Memorandum of Appeal with the following grounds: _

- 10 **1) The Learned Trial Magistrate erred in law in holding that the Defendants enjoy a right of way through the Appellants property yet the Respondents land touches the main Gayaza road and instead decided to use the said access for commercial purposes to the detriment of the Appellants.**
- 15 **2) The Trial Magistrate erred in law and fact when she completely ignored the Defendants evidence on court record and solely relied on the Plaintiffs evidence thereby reaching a wrong decision.**
- 20 **3) The Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and she arrived at an erroneous decision thereby occasioning a miscarriage of justice.**

On 1st September 2020, the Appellants filed an amended
25 Memorandum of Appeal whereby two more grounds were added after ground two as follows:-

- 30 **4) The Learned Trial Magistrate erred in law and fact when she entered judgment and made orders against all Appellants inclusive of the second Appellant yet she does not own any interest on the suit land in her personal and individual capacity.**
- 35 **5) The Learned Trial Magistrate erred in law and fact when she ignored the fact that the second Appellant had been sued in a wrong capacity and as such a wrong party to the suit.**

Before addressing the grounds of Appeal, I have to address my mind to the role of the first Appellate Court. The role of the first Appellate Court has to be addressed since this is a first Appeal from the decision of the Chief Magistrate to the High Court. This role was properly articulated in the case of **Selle and Another vs Associated Motor - Boat Ltd and Others (1968) E.A 123 at Page 126** where Justice Clement De Lestang stated the role of the first Appellate court as follows: _

“An Appeal.....is by way of retrial.....the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in this respect.”

The same principle role was referred to in the case of **Fredrick J.K. Zaabwe vs Orient Bank Ltd & 05 Others, SCCA No. 4 of 2006** by the Supreme Court of Uganda.

In re-evaluating the evidence and subjecting it to a fresh scrutiny, I will keep in mind the issues raised at trial and the evidence adduced by both parties in order to resolve the grounds presented in the Memorandum of Appeal.

Ground One

In respect of ground one, Counsel for the Appellants submitted that the Respondents and their witnesses gave consistent testimony as to the fact that their land touches Gayaza Main Road and reference was made to the evidence of PW1 and PW2. Counsel further submitted the alleged cliff which was stopping the Respondents from having direct access to Gayaza Road could easily be filled instead of passing across the Appellants' land in search of an easement. Counsel argued that according to the evidence on record, the Respondents instead of accessing their land from the main road opted to put containers on their boundary touching the Main Gayaza Road and rented out the same for commercial houses. Reference was made to the case of **Barclays Bank vs Patel (1970) EA 88** where it was held that right of way arises as a result of necessity and cannot be defeated unreasonably. Article 43 of Uganda's Constitution was quoted whereby in the enjoyment of the rights and freedoms

described in the constitution no person is allowed to prejudice the fundamental or other rights and freedoms of others or public interest while enjoying their rights. It was Counsel's argument that the creation of an access road through another person's land is normally permitted where there is no other way which the Applicant can access the public highway which the Trial Magistrate failed to consider. Reference was made to the case of **Fowler & Anor vs Busingye MA No. 111 of 2013** where Justice Joseph Murangira stated that where the Plaintiff already has an access road, there is no legal ground to warrant him force his way through the Applicant's land as it is selfish, unjust and unfair to inconvenience others and even go to the extent of grabbing part of their property to maximize profit on one's land.

In reply, Counsel for the Respondents first submitted on grounds of the law before addressing the grounds of Appeal.

The first issue of law raised by Counsel for the Respondents is that the Appeal was filed out of time. Counsel submitted that under **Section 79 (1) (a) of the Civil Procedure Act**, every Appeal from the Magistrates courts to the High Court is supposed to be entered within thirty days from the date of the decree or order of the court. Counsel for the Respondents argued that the Trial Magistrate passed judgment on 2nd April 2019 and the Appellants should have appealed by 2nd May 2019 but instead chose to file a Memorandum of Appeal on 6th May 2019 after thirty-six days from the date of judgment. Counsel made reference to the case of **Luzinda George vs Edward Waswwa HCCA No. 39 of 2009** where it was held:

"Appeal from the Magistrate Grade One and Chief Magistrate shall be lodged in the High Court within 30 days from the date of the decree or order.....This Appeal thus has no merit. It is accordingly missed."

Counsel prayed that the Appellants Appeal should be dismissed on that ground.

On this preliminary objection Counsel for the Appellant submitted that the Trial Magistrate delivered judgment on 2nd April 2019, in the absence of the Appellants and Counsel and that on 18th April 2019, the Appellants applied to the trial court for certified copies of

judgment and record of proceedings and the same were not availed by the trial court. Counsel made reference to **Section 79 (2)** of the **Civil Procedure Act** that where good cause is shown, court can admit an Appeal even after the lapse of the prescribed time.

5 Reference was made to **Section 79 (3)** of the **Civil Procedure Act** to the effect that the time taken to prepare a certified copy of the record of Appeal is not reckonable in computation of the thirty days within which an Appeal should be filed.

10 Counsel for the Appellants indicated that on 18th April 2019, they applied to the trial court for certified copies of the judgment and record of proceedings. He indicated in his submissions that the letter to the trial court and the Notice of Appeal were attached to the submissions.

15 I have perused the record and I have found no letter dated 18th April 2019. If I had found a letter on record, it would have amounted to good cause under **Section 79 (2)** of the **Civil Procedure Act**. Instead, I am only seeing a letter dated 5th August 2019, from MED KAGGWA & CO. ADVOCATES addressed to the Registrar of Land Division indicating that the judgment and court proceedings of the
20 lower court were availed to their clients asking the Registrar to call for the lower court file to be transferred to the High Court. Indeed, on the same date (5th August 2019), the Assistant Registrar of the Land Division wrote to the Chief Magistrate of Nabweru under Ref LDCA No. 53/2019 asking for the lower court record to be forwarded to the
25 High Court.

I have not seen any other communication in respect of the record of proceedings and judgment of the lower court. Since the judgment of the lower court was delivered on 2nd April 2019, the Appellants ought to have filed a Memorandum of Appeal within 30 days from 2nd April
30 2019. There is no good reason which has been advanced by the Appellants which falls within the ambit of **Section 79 (2)** of the **Civil Procedure Act**. Therefore, the Appellants Appeal was filed out of time under **Section 79 (1) (a)** of the **Civil Procedure Act** and is, therefore, incompetent, hence dismissed for being filed out of time.

35 Counsel for the Respondents raised another preliminary objection in respect of failure to extract a decree by the Appellants before

lodging the Memorandum of Appeal. Counsel for the Respondents submitted that under **Section 220 (1) (a) of the MCA**, Appeals from Magistrates Grade One and Chief Magistrates, we from decrees and orders to the High Court and failure to extract a formal decree before filing an Appeal is a defect which goes to the root of the jurisdiction of court. The decree appealed against must be filed with the Memorandum of Appeal because that is what is being appealed against. In the absence of a decree, there is no basis of the Appeal. Counsel for the Respondents made reference to the case of **Mbambu Stella vs Monday Nicholas HCCS No. 10 of 2016** where court stated that:

"It is a requirement of the law that the documents namely (decree or order and memorandum of appeal) must be filed together when the Appeal is lodged. A decree or order from which an Appeal is lodged must be extracted and filed together with the memorandum of appeal. Failure to do so renders the appeal incompetent."

Counsel for the Respondents submitted that in this Appeal, the Appellants failed to extract the decree and this was failure to comply with a mandatory legal requirement which rendered the Appeal fatally defective and on this basis alone the Appeal should be struck out with costs.

In reply and rejoinder, Counsel for the Appellants submitted that it is longer a legal requirement and position that failure to extract a decree or order renders an Appeal defective where the judgment or ruling forms part of the record since an Appeal by its very nature is against the judgment on a reasoned order. Counsel for the Appellants made reference to the case of **Mbukara Mumbere vs Maimuna Mbabazi HCT-01-CV-CA-0003-2003** where Lameck N. Mukasa stated that it is clear from the above provisions that extraction of a formal decree embodying the decision complained about is no longer a legal requirement in the institution of an Appeal.

Section 220 (1) of the Magistrates Courts Act provides as follows: -

"Subject to any written law and except as provided in this Section an Appeal shall lie from the decrees or any part of the

decrees and from the orders of Magistrates' court presided over by a Chief Magistrate or Magistrate Grade 1 in the exercise of its original civil jurisdiction to the High Court."

According to the decision in **Mbambu Stella vs. Minday Nicholas, Fortportal High Court Civil Appeal No. 001 of 2016**, the memorandum of appeal must be filed with a decree. In this case there was no decree extracted and there is no decree appealed from. This renders the appeal incompetent.

The third preliminary point of law issued by Counsel for the Respondents is that the Appeal is based on a fatally defective Amended Memorandum of Appeal. Counsel for the Respondents submitted that the memorandum of appeal was illegally amended without obtaining the necessary leave from court. It was counsel's submission that **Order 43 Rule 2(1)** of the **Civil Procedure Rules** provides that the Appellant shall not except by leave of court of argue, or be heard in support of any ground of objection not set forth in the memorandum of appeal. Counsel submitted that on 1st September 2020 the Appellants filed an amended Memorandum of Appeal without obtaining leave of court and according to the case of **Mbambu stella vs Monday Nicholas(supra)** where Appellant decided to raise new grounds of appeal and departed from the initial grounds raised in the Memorandum of Appeal, without seeking leave of court, the appeal was dismissed since the Appellant had departed from pleadings.

In reply, Counsel for the Appellants submitted that under **Order 6 Rule 19** of the **Civil Procedure Rules**, the court may at any state allow amendment of pleadings in such a manner and in such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Counsel cited the case **Mulowoza & Brothers vs N.shah & Co. Advocates Civil Appeal No. 26 of 2010** (UGSC) and **Kiiza vs Attorney General (1986) HCB 71**, where it was held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side.

In the instant appeal, the first Memorandum of Appeal was filed on 6th May 2019 with three grounds of appeal. On 1st September 2020, an amended Memorandum of Appeal was filed without leave of court. Much as **Order 6 Rule 19** of the **Civil Procedure Rules** allows amendments to pleadings at any stage of the proceedings the rule shows that it is court to allow the amendments. Where pleadings have been closed, parties have to seek permission from court to amend the pleadings.

In this case where an amended Memorandum of Appeal was filed without leave of court renders the amended Memorandum of Appeal ‘incompetent.’ In this Appeal, the amended Memorandum of Appeal filed on 1st September 2020 is incompetent.

The third preliminary point of objection had a second limb in respect of the way the grounds of appeal were formed.

Counsel for the Respondents submitted that the grounds in the amended Memorandum of Appeal were offensive and should be struck out because they were not in tandem with the provisions of **Order 43 Rule 2** of the **Civil Procedure Rules** to the effect that a Memorandum of Appeal must set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument. Counsel submitted that the Appellants’ grounds of appeal had not complied with **Order 43 r (2)** of the **Civil Procedure Rules**. Counsel made reference to the case of **National Insurance Corporation vs. Pelican Air services, Civil Appeal No. 15 of 2003** where the Court of Appeal held that a ground which offended the rules of court in as far as how grounds of appeal shall be framed should be struck off. Reference was equally made to the case of **Kizito Mpumpi vs Seruga Frank Civil Appeal No. 68 of 2010** where Justice Tuhaise held that, the words “***Yet there was unanimous agreement by the said vendor’s family who all endorsed and witnessed the transaction***” are clearly argumentative offending the above cited rule. For that reason alone, I would struck off this ground of appeal as incompetent. Counsel for the Respondents submitted that grounds 1, 3, 4 and 5 of the Amended Memorandum of Appeal were offensive since there were not only narrative but argumentative and lacked provision. Counsel submitted that grounds 1, 3, 4 and 5 should be struck off for non-

compliance with the requirements of **Order 43 Rules 2** of the **Civil Procedure Rules**.

In reply and rejoinder, Counsel for the Appellants submitted that the decisions cited by Counsel for the Respondents were cited out of context. Counsel submitted that the grounds of appeal were precise and concise as required by the law and were in compliance with the requirements of the rules.

It should be noted that **Order 43** of the **Civil Procedure Rules** which governs Appeals to the High Court provides in **Rule 1 sub rule 2** as follows;

"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively"

In this Appeal, grounds 1, 3, 4 and 5 which are the subject of this issue were framed as follows: -

1. The Learned Trial Magistrate erred in law and fact in holding that the respondents enjoy a right of way through the Appellant's property yet the Respondents' land touches the main Gayaza road instead decided to use the said access for commercial purposes to the detriment of the Appellants.

3. The Learned Trial Magistrate erred in law and fact when she entered judgment and made orders against all the appellants inclusive of the second appellant yet she does not own any interest on the suit land in her personal capacity.

4. The Learned Trial Magistrate erred in law and fact when she ignored the fact that the second Appellant had been sued in a wrong capacity and as such a wrong party to the suit.

5. The Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and she arrived at an erroneous decision thereby occasioning a miscarriage of justice.

In respect of ground one the words *“yet the Respondents’ land touches the main Gayaza road and instead decided to use the said access for commercial purposes to the detriment of the Appellants”* are argumentative and provide a narration which are prohibited by
5 **Order 43 rule 1 (2)** of the **Civil Procedure Rules** and this ground is struck off the record for offending the Civil Procedure Rules.

The third ground of appeal the words *“inclusive of the second Appellant yet she does not own any interest on the suit land in her personal and individual capacity”* offend the rules. These words form
10 an argument and are narrative in nature. These are words which should have been used in the submissions and not the grounds of appeal. Ground three is equally struck out.

Ground four the word *“and as such a wrong party to the suit”* are argumentative and narrative. Ground four of the Memorandum of
15 Appeal is also struck off.

In respect of Ground five the words *“and she arrived at an erroneous decision thereby occasioning a miscarriage of justice”* do not make the ground concise. These are arguments which should be embedded in the submissions and they offend **Order 42 Rule 1 (2)**
20 of the **Civil Procedure Rules** and the ground is struck out accordingly.

Given the above background and reasons, I will not proceed to determine the merits of the Appeal due to the following reasons: -

a) The Appeal was filed out of time and no reasonable excuse was
25 presented to court.

b) The Appellants filed an amended Memorandum of Appeal without leave of court.

30 c) Grounds 1, 3, 4 and 5 of the amended Memorandum of Appeal offend the provisions of **Order 43 Rule 1 (2)** of the **Civil Procedure Rules**.

Therefore, Civil Appeal No. 53 of 2019 is **dismissed** with costs to the Respondents.

Dated at Kampala this 22nd day of January 2021

IMMACULATE BUSINGYE BYARUHANGA
JUDGE

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