

(Arising from Civil Suit No. 138 of 2013)

VERSUS

2. MIKKA GEORGE RESPONDENTS

JUDGMENT

The Appellant brought this appeal against the decision of Her Worship Bareebe Rosemary Ngabirano, Chief Magistrate Mpigi that was undated in which the trial Court decided in favor of the first Respondent.

1. The learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.

2. The learned trial Chief Magistrate erred in law and fact when she gave judgment in favor of the 1st Respondent based on unpleaded facts.

3. The learned trial Chief Magistrate erred in law and fact when she awarded remedies to the first Respondent when the 1st Respondent had not raised a counterclaim.

4. The learned trial Chief Magistrate erred in law and fact when she held that the Appellant is not a bonafide purchaser of the suit land.

The Appellant filed a suit in the Chief Magistrates court against the Respondents seeking for a declaration that the 1st Respondent is a trespasser on land known as **Busiro Block 359-363 Plots 2130 and 2132 land at Nakatema** of which he is a registered proprietor, an eviction order,


permanent injunction, an order of specific performance against the 2nd Respondent general damages and costs of the suit.

The Appellant claims to have purchased the said suit land from the 2nd Respondent who was at the time the registered proprietor and at the time he purchased the same land it was vacant and no encumbrance was found when a search was made in the land registry, hence the subsequent transfer into his name. That in May 2013 the 1st Respondent without consent of the plaintiff entered onto the above suit land and erected illegal structures thereon. That by the time the plaintiff purchased the above land the 1st Respondent had already sold it to the 2nd respondent.

10 The 1st Respondent on the other hand stated that she bought two pieces of land on various occasions in 2007 from Irene Nakabiito who was by then the registered proprietor. That she first paid for an equitable interest as she didn't have enough money for the legal interest but she agreed with the vendor to pay for the legal interest which she started to pay for but the vendor died before completion of the purchase price for the legal interest. That shortly after the death of the vendor Irene Nakabiito, the 2nd Respondent demanded for the balance which the 1st respondent paid diligently. That later the 1st Respondent was approached by the relatives of the late Irene Nakabiito who informed her that the 2nd Respondent had fraudulently acquired the title to the land and upon that she demanded for a refund of her money she had paid from the 2nd Respondent.

0 The matter was heard before the Chief Magistrates Court by Her Worship Bareebe Rosemary Ngabirano and both parties adduced evidence to support their case. Judgement was given in favour of the 1st Respondent hence this appeal to the High Court.

REPRESENTATION;

During the hearing, the Appellant was represented by **M/S S.K Kiiza & Co. Advocates** and the Respondent was represented by **M/S Kibirango & Partners Advocates.** 

SUBMISSIONS;

Both parties filed written submissions.

Appellant 's submissions.

Counsel for the Appellant raised four grounds of appeal and argued grounds 1 & 4 jointly as well as grounds 2 & 3. Counsel for the Appellant led evidence to show that the Appellant is the registered proprietor of the suit land which certificate of title wasn't contested by the 1st Respondent. Counsel for the Appellant further stated that the 1st Respondent was granted remedies yet she didn't raise a counterclaim in her written statement of defence and that judgment was entered in her favor based on unpleaded issue which is an error of law.

1st Respondent's submissions.

10 Counsel for the 1st Respondent raised two preliminary objections and submitted that firstly this appeal was filed out of time and without leave to do so. That Judgment was delivered on the 1st day of September 2016, the Memorandum of Appeal was filed on the 30th October 2018 after a period of 2 years and 53 days after judgment was passed.

That counsel for the Appellant explained the delay in filing the appeal which was not supported by any law as he claimed that the 1st Respondent's lawyers declined to receive the appeal and that their chambers are usually closed.

Secondly, counsel for the 1st Respondent submitted that the appeal was not served on the 1st Respondent which is contrary to Order 49 Rule 2 of the CPR as Order 43 of the CPR is silent on service of appeals. That the appeal was never served on the 1st Respondent until 2nd November 2021 when the 1st respondent's counsel was served with the record of appeal from which he got an opportunity to see a copy of the Memorandum of Appeal.

20 The law is very clear on proof of service and there is no affidavit of service as required by Order 5 rule 16 on record to show that the 1st Respondent was served with the notice and memorandum of appeal. Counsel submitted that the memorandum of appeal was endorsed on 19th January 2019 and it would have been served on the 1st respondent on 9th February 2019 which is in line with the 21 days provided for in Order 5 rule 2 of the CPR.

Appellants Submissions in Rejoinder;

Counsel for the appellant in rejoinder stated that when the appeal first came for hearing, the appeal was adjourned to enable them to sort out the dates which were not clear as to the date of filing the memorandum. That when the appeal came up for hearing on 30th November 2021, the

1st Respondent's Counsel abandoned his earlier preliminary objection regarding filing the appeal out of time and attempted to claim that he hadn't been served with the memorandum of appeal within the time stipulated by law.

That the 1st respondent's counsel acknowledges to have received all the other correspondences but denies the service of the memorandum of appeal which he knows is a crucial document and non- service of the same would render the appeal incompetent. That counsel for the 1st respondent also acknowledged that at times their chambers are closed and documents are passed under his office door and that raising this preliminary objection on non- service of the memorandum of appeal is a clear manifestation of bad faith intended to frustrate the appellant.

10 **DUTY OF THE FIRST APPELLATE COURT;**

It is the duty of first Appellate Court to appreciate the evidence adduced in the trial Court, subject it to an exhaustive scrutiny and to make its independent finding of fact, giving allowance to the fact that it had no opportunity to see and observe the demeanor of witnesses in which case the Appellate Court will rely on the notes made by the lower court as per the case of **Attorney General v George Owor Constitutional Appeal No. 0001/2011**.

RESOLUTION BY COURT;

Having carefully looked at the submissions of both counsel, I will first determine the preliminary points of law raised by Counsel for the 1st Respondent before determining the merits of this appeal.

- 20 With regard to the first preliminary objection that the appeal was filed out of time and without leave to do so, Section 79 of the Civil Procedure Act is very clear on limitation of appeals and provides that every appeal shall be entered: (a) within thirty days of the date of the decree or order of court, (b) In computing the period of limitation prescribed by the section, the time taken by the court or the registrar in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded. These time limits are designed to dictate a time schedule within which certain steps ought to be taken to avoid endless litigation.

From the evidence on court record what counsel for the appellant stated in their memorandum of appeal isn't correct as he states that the record of proceedings was gotten on the 11th of October

2018 and the memorandum of appeal was filed on 30th October 2019. Even if what is stated in the by counsel for the appellant were correct, the memorandum of appeal would have been filed on the 11th of November 2018 which is exactly 30 days as stipulated by the law.

The evidence of court record shows that the record of proceedings was certified on 7th December 2018 and there is no way the memorandum of appeal was filed before the record was certified.

10 Basing on this counsel for the Appellant would have filed the memorandum of appeal on 7th January 2019 which falls in the ambit of the 30 days that are mandatory. Even if the judgment was undated as counsel for the Appellant stated, there is no way a record of proceedings can be certified before judgment is given.

Therefore, counsel for the Appellant would have filed an application for extension of time to file this appeal which wasn't done in this case. Accordingly, it is my findings that the appeal was filed out of time.

20 With regard to the second preliminary objection raised by counsel for the 1st Respondent that they were not served with the memorandum of appeal till 2nd November 2021 which is contrary to Order 49 rule 2, having carefully looked at the submissions of both counsel, it is not in dispute that the request for the record of proceedings and memorandum of appeal was never served on the 1st Respondent and counsel for the appellant blames it on the fact that the 1st Respondents Counsel's Chambers to be closed which isn't sufficient reason for non-service of the same.

Be it as it may, Counsel for the Appellant did not adduce evidence in Court to show that the 1st Respondent was served nor was there proof that the Respondents Counsel's chambers were closed. Court cannot act on mere speculations.


Section 101,102 and 103 of the Evidence Act is to the effect that whoever asserts a fact must prove it. It is clearly stipulated that whoever wants Court to believe in the existence of a given set of facts must have the burden to prove their existence.

I agree with the ruling of the Justices of Court of Appeal in **National Housing and Construction Co. Limited V Salome TB Kyomukama Civil Application No. 133 of 2009** where they struck out the appeal on grounds that the record of proceedings was never served on the respondent which in turn made the notice of appeal null and void.

I also agree with Counsel for the 1st Respondent that failure to follow the proper procedure laid down on filing an appeal within time and service on the Respondent being mandatory and that failure to do so makes such appeal incompetent. The fact that the 1st Respondent was later served with the record on the 2nd November 2021 doesn't cure the above defect.

- 10 Therefore, this preliminary objection is sustained as it effectively disposes off the appeal and I will not delve further into the merits of the appeal.

In the circumstances, this appeal is dismissed with costs to the 1st Respondent both in this Court and in the lower Court.


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Oyuko Anthony Ojok
Judge.

Dated this 17th day of January, 2022.