THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, KAROKORA, MULENGA, KANYEIHAMBA AND

MUKASA - KIKONYOGO J.J.S.C)

CIVIL APPEAL NO.11 OF 1999

BETWEEN

MULUTA JOSEPH ::APPELLANT AND

KATAMA SYLVANO::RESPONDENT

(Appeal from the judgment and orders of the Court of Appeal (G.M. Okello, S.G. Engwau, and A. Twinomujuni, JJA) in Civil Appeal No.12 of 1998 dated 27th November,1998, and arising from the judgment and decree of the High Court of Uganda (I. Mukanza, J in Civil Suit No.445 of 1995 dated 3rd October 1997)

JUDGMENT OF KANYEIBAMBA J.S.C.

The appellant who was the plaintiff in the High Court in Civil Suit No.455 of 1995, claimed that by an agreement dated 10/10/1969, he bought from one Baturumayo Balatulwango a customary Kibanja situated on the mailo land owned by one Kisosonkole in accordance with the law applicable at the time namely, Busulwa and Envujjo law. The appellant claimed that, between 1969 and 1971, he held and developed the Kibanja, which were about two and half acres in size. Amongst the developments he effected on it were three buildings, which he rented out to tenants. He further claimed that in 1992, he was approached by the respondent, Sylvano Katama, who introduced himself as the new Landlord and who had bought from Kisosonkole the land on which the appellant's kibanja was situated.

The respondent gave the appellant an option to purchase the mailo interest in the kibanja. It was agreed between the parties that the appellant would pay Shs.3.5 Million/= per acre and in actual fact he paid and the respondent received the sum of Ug. Shs. One million, by way of a down payment or deposit, for which appellant got a receipt dated 29th May 1992 from the respondent.

The appellant claimed that he made a number of attempts to pay the balance to the respondent but failed because the latter's whereabouts could not be discovered. However, in

May 1995, all his buildings on the Kibanja were demolished by court bailiffs on the instructions of the respondent. Appellant filed a suit in the High Court claiming general damages for trespass and breach of contract and asked for an order of specific performance of the contract, special damages, interest and costs of the suit.

In his defence, the respondent stated that in 1970 he bought fifteen acres of mailo land from Kisosonkole, which was registered as Block 212, Plot No.82, Bukoto, Kampala, Kyaddondo. He paid the purchase price and was subsequently registered as the owner. He had bought the land without encumbrances of any sort. Shortly after being registered as owner, respondent went into political exile and stayed outside the country. He returned in 1986. In March 1987, he engaged a firm of surveyors, Katuramu and Company, Surveyors, to survey and value his registered land. The firm's report indicated that whereas there were some seasonal crops growing on it, there were no buildings. However, during the same year the respondent noticed that some people were beginning to construct buildings on his land without his permission or the City Council's planning permission. He then served the people concerned notices to quit his land. In 1992, he agreed to sell the mailo interest in the 2 1/2 acres occupied by the appellant to him at Ug. Shs.3.5 million per acre. The appellant who now became a prospective buyer was one of the squatters served with notice to quit. The appellant failed to pay the balance of the agreed price within the period stipulated in the sale agreement. The respondent took the matter to court and obtained a warrant for the demolition of all illegal structures on his land. The warrant was executed by Court bailiffs in accordance with the court's orders. The respondent therefore asked the High Court to dismiss the suit with costs.

The learned trial judge held that the appellant was a customary tenant on the land and therefore the respondent committed trespass when he caused the appellant's buildings to be demolished illegally. He awarded the appellant the sum of Ug. Shs.10,000,000/= in general damages and ordered the respondent to refund the Ug. Shs. 1,000,000/= which he had received from the appellant by way of deposit and awarded costs in the suit to the appellant. The respondent appealed to the Court of Appeal, which allowed the appeal. The Court of Appeal held that the learned trial judge had not properly evaluated the evidence before him and had not given reasons why he placed so much reliance on the evidence of the appellant and disbelieved that of the respondent. The Court of Appeal set aside the judgment and orders of the High Court and awarded costs in both the Court of Appeal and the High Court to the respondent. Hence, this appeal.

The Memorandum of Appeal contains seven grounds framed as follows:

1. The learned Justices of the Court of Appeal erred in law and fact when they failed in their bounden duty as the first appellate court to properly or at all, evaluate and weigh evidence on record, particularly in support of the appellant's case, thereby coming to a wrong decision that the appellant was not a customary tenant.

2. The learned Justices of the Court of Appeal erred in law and fact when they relied on provisions of the Busuulu and Envujjo law of 1928, which were neither in issue at the trial in the High Court nor agreed or relied upon in the appeal.

3. The learned Justices of the Court of Appeal erred in law and misdirected themselves on the application of rule 29(1) of the Rules of that Court and on the cases of *Trevor Prince & Another v. Raymond* Kelsall *(1957)* E.A *752* and of *Watt v. Thomas* (1947) A.C. 484.

4. The learned Justices of the Court of Appeal erred and misdirected themselves on the burden of proof in civil cases.

5. The learned Justices of the Court of Appeal, having found that there was a contract of sale between the parties, erred in law and in fact when they failed to take into account the appellant's equitable interest thereof that enhanced his status on the land.

6. . The learned Justices of the Court of Appeal erred in law and acted contrary to public policy and occasioned a miscarriage of justice when they failed to order the refund of the initial deposit of one million shillings.

7. The learned Justices of the Court of Appeal erred in law and fact when they found that the appellant was not entitled to damages.

Mr. Babigumira, counsel for the appellant, combined grounds 1, 2, 3 and 4 and argued them together first and then argued grounds *5, 6, and 7* together. On the first batch of grounds, he submitted that it had been the appellant's case in the High Court that he was a customary tenant in the land claimed by the respondent. The appellant had produced a written agreement between himself and one Baturumayo Balatulwango in support of his kibanja title and appellant's evidence had not been contradicted by the pleadings or submissions of the

respondent. In consequence, the Court of Appeal erred in ignoring the appellant's evidence, which had not been denied or contradicted by the respondent.

Counsel contended that the amended plaint dated 24th of July *1995,* had clearly stated:
"4. At all material time, the plaintiff was the owner of a customary holding with developments thereon situated on land comprised in Bloc 212 plot No.82 situated at Kasolo Zone, Kyebando, being a leasehold on mailo land owned by the defendant, the plaintiff having acquired the said customary holding by way of sale on 10th October, 1969, copy for the sale agreement and its translation are attached hereto and marked Annexation 'A'."

Mr. Babigumira contended that this agreement and the appellant's evidence on the customary lease were not contradicted either by the respondent's statement of defence or the submissions of his counsel in the High Court. The trial judge was therefore correct in finding for the appellant. Counsel contended that it is now settled law that where a party fails to challenge evidence that evidence, is accepted as true. He cited the leading judgment of learned Justice Karokora, J.S.C, in *Habre International Co.Ltd.v. Ebrahim Alarakhia Kassam & Others,* Civil Appeal No.4 of 1999 (S.C), (unreported), at pp. 108-9. Counsel submitted that in ignoring the unchallenged evidence of the appellant and the finding of the trial judge in the high Court, the Court of Appeal erred in both law and fact.

Counsel further submitted that the Court of Appeal took it upon itself to receive new facts and evidence, which had not been raised in the High Court. These related to the issue of whether or not the appellant had obtained consent of the landlord, which was necessary in order to comply with the law governing the grant of customary leases. This was not raised in the trial court. On the evidence before him the learned trial judge had found that the appellant was a customary tenant. On appeal, no ground relating to lack of consent was advanced or argued by the respondent, and yet the trial judge was criticised by the learned Justices of appeal for failing to asses properly evidence relating to consent. Neither in their pleadings nor submissions did either party make reference to the law before the Land Reform Decree of 1975, which influenced the Court of Appeal in its judgment. Counsel cited a number of authorities to show that courts refrain from taking or are reluctant to take new facts and evidence not presented in the trial courts. The cases cited include *Alwi Abdul Rehman Saggaf v. Abed A. Algeredi* (1961) E.A.767, *Warehousing and Forwarding Co. of East Africa, Ltd. v. Jeffereli and Sons Ltd.* (1963) E.A, 385, and *Katelemwa Traders Ltd. v. The Attorney General* Civil Appeal No.2 of 1987, (S.C), (unreported). Counsel contended that the learned Justices

of appeal were in error when they took into account new facts not raise in evidence and allowed themselves to be influenced by the same in their judgment without giving the appellant an opportunity to be heard on the same. Mr. Babigumira, citing *Antonio Kiwedemu and Paulo Mukasa* V. *Wolfred Kabagu Mugwanya*, Civil Appeal No.41 of 1974, 1976 HCB, contended that there was no need for there to be an agreement in writing before the relationship of landlord and tenant can be created under the Busuulu and Envujjo law. Counsel therefore prayed that ground 1,2,3 and 4 of the appeal should be allowed.

Mr. Nkurunziza learned counsel for the respondent opposed the appeal. In his submissions, he too combined grounds 1,2,3 and 4 of appeal. He contended that it was wrong on the part of the appellant's counsel to argue that since in the High Court, respondent had not specifically denied that the appellant was a customary tenant or that there had been no consent for the tenancy as required by law when he introduced those two matters in the Court of Appeal, they were new facts. Mr. Nkurunziza submitted that the statement of defence filed in the High Court on behalf of the respondent shows quite clearly that the respondent put the appellant to strict proof of the claims that he was a customary tenant and that he had obtained the necessary consent from the mailo landowner. Counsel contended that the requirements for strict proof was tantamount to a complete denial that the appellant was either a Kibanja holder or had obtained consent for it. He submitted that it was not disputed that the respondent acquired the mailo interest in the land from one Kisosonkole in 1970 and up till then Kisosonkole had been the registered owner of the mailo land in question. The appellant alleged that he acquired the customary lease in 1969 pursuant to a transaction between the appellant and one Baturumayo Balatulwango. The onus was therefore on the appellant to prove these facts and not upon the respondent to disapprove them.

Mr. Nkurunziza further submitted that in examination in chief, the appellant had stated that he bought the Kibanja from Baturumayo Balatulwango and had given the customary Kanzu of Ug. Shs.30/= to the landlord, Kisosonkole, and yet in cross-examination, the appellant claimed that he bought from Baturumayo Balatulwango and paid him a kanzu. The Busuulu and Envujjo law prohibits such a transaction without the consent of the landlord.

Counsel for the respondent contended further that one of the reasons why the respondent challenged the appellant not to be a customary tenant is that he actually occupied the alleged kibanja after 1975 when the Busuulu and Envujjo law had been abolished by the Land Reform Decree of that year. The appellant started developing the land after 1987 as

confirmed by the report of Katuramu & Company, Chartered Surveyors of 19th March, 1987, which shows that before that date there were no structures on the land but only seasonal crops could be found on it.

It was counsel's contention that the Justices of the Court of Appeal rightly criticised the findings of the trial judge. The judge had accepted the evidence of the appellant, which was not supported by any other, and yet the learned trial judge ignored a lot of evidence, which indicated that the appellant had actually entered the land not in 1969 but in 1987. The learned trial judge also ignored the evidence of the surveyors who reported that there were no structural buildings on the land by March, 1987. He also ignored the evidence of the area's defence security secretary of the RC, which corroborated the evidence of the surveyors.

Counsel contended that the Court of Appeal should not be criticised for reevaluating the evidence because this is what is expected of them, under the Rules of the Court of Appeal. In counsel's view, the learned Justices of Appeal had properly directed themselves on the law applicable. Mr. Nkurunziza prayed that grounds 1,2, 3,and 4 of the appeal should be dismissed.

Before I consider Counsels' submissions in this appeal I wish to make three observations. Firstly, it is my opinion that the grounds as set out in the Memorandum of Appeal do offend against rule 81(1) of the Rules of this Court in that they are narrative and argumentative.

Secondly, in my view, the seven enumerated grounds raise only two issues to be resolved in this judgment. These are whether the learned Justices of Appeal erred in law and fact in reevaluating the evidence and departing from the findings of the learned trial judge and secondly, whether the learned Justices of Appeal erred in law and fact when they failed to order the refund of the deposit of Ug. Shs. One million. The rest of the grounds are either amplification of the two matters I have mentioned or are consequential on their determination. There might as well have been only two grounds of appeal framed for determination by this court.

Thirdly, I am constrained to observe that a number of salient features on this appeal were either submerged in the pleadings and submissions of counsel or ignored, which, if they had

been brought out more clearly, could have made the understanding of some of the issued raised simpler. There is the fact that the appellant was one of dozens of squatters in the area who were the concern and subject of judicial and administrative decisions raised not only by the respondent but by the local authorities which had jurisdiction over the area. This is a matter that figured prominently in the summary of evidence by the learned trial judge but which did not apparently influence his judgment. There was also the fact that the appellant had been expected to benefit from general amnesty and the compensation offered to the squatters, but he declined to be so considered in the belief that he was already catered for in a separate arrangement with the respondent. I will refer to these matters later in this judgment.

I will now consider the issue raised on grounds 1-4 of the appeal, as argued by both counsel in this court. In the leading judgment of Twinomujuni, J.A, the Court of Appeal does, in my opinion, correctly state its jurisdiction in reevaluating evidence in an appeal brought before that court. The learned Justice of Appeal observed:

"Before I embark on the evaluation of evidence in this case let me re-state the jurisdiction of this court as I understand it. Rule 29 of the Court of Appeal Rules Directions, 1996 states: 29(1) on any appeal from a decision of a high Court acting in exercise of its original jurisdiction the court may (b) re-appraise the evidence and draw inference of fact. It has been held by our superior Courts time and again that this appellate jurisdiction must be exercised with caution."

Thereafter the learned Justice of Appeal proceeds to cite and comment on a number of authorities for the amplifications of rule 29(1) including *Peter v. Sunday Post Limited*, (1958) E.A, 429, and *Watt v. Thomas (1947)*, A.C 484.
The grounds of appeal which were argued before the Court of Appeal were framed as follows:

1. The learned trial judge erred in law when he failed to properly evaluate and weigh the plaintiff's evidence against the defendant's evidence thereby wrongly concluding or finding that the respondent entered the suit land in 1969.

2. The learned trial judge erred in both law and fact when he held that the respondent was a customary tenant on the suit land whereas there was not sufficient evidence on record to prove, on a balance of probabilities, that he was a customary tenant.

3. The learned trial judge erred in law and fact when he awarded and assessed the respondent excessive and arbitrary general damages in trespass assessed only on the evidence of destruction of illegal structures on the suit properly by the appellant

Mr. Peter Nkurunziza and Mr. James Nangwala represented the respondent and the appellant respectively in the Court of Appeal, and fully argued the merits of the grounds of the appeal before the learned Justices of Appeal. After Counsels' submissions, the Court of Appeal re-evaluated the evidence in accordance with rule 29(1) of its rules. Justice Twinomujuni who wrote the leading judgment of the Court first dealt with the merits of grounds 1 & 2 of the appeal and later disposed of them and he then dealt with ground 3. The learned Justice of Appeal observed that the trial judge had found that the appellant was a customary tenant and therefore the respondent as landlord had trespassed on his tenant's land. However, in the opinion of the learned Justice, there was insufficient evidence for the findings of the trial judge yet the evidence, which showed the contrary, was ignored by the same trial judge. Justice Twinomujuni stated in his judgment that;

> *"As far as the credibility of the respondent was concerned, it is only him who testified that he took possession of the suit Kibanja in 1969 and by 1971 he had completed construction of the buildings he claimed were demolished in 1995. He did not call any other witness to support the claim. He did not call any of the eight persons who appear on exhibit I as witnesses to the 1969 agreement. He did not call any authority from the disputed area to support the claim, yet the learned trial judge found his evidence totally credible. There was however, quite a lot of evidence which indicated that the respondent entered the land in 1987 and not in 1969. The trial judge never at any stage tested the respondent's evidence against the evidence of several witnesses of the appellant. The appellant himself had said that when he bought the land from Kisosonkole in 1971, there were no tenants. The trial judge did not say whether he believed him or not. DW2, Francis Kasozi Lubega, a surveyor, testified that he, at the request of the appellant, visited the disputed property. He did not find any people on the land and there were no buildings. The trial judge did not comment on this*

evidence. DW4, Ambrose Obonyo who was an enforcement officer with KCC around 1992 stated that a lot of people in Kyebando area, including the respondent, were reported to be putting up Illegal structures. He visited the area, which included the suit property. Many of such structures were subsequently demolished. The trial judge did not at all say whether he believed this evidence or not"

The learned Justice of Appeal next scrutinised the evidence of one Francis Nyondo Kiiza, DW5, who had resided in Kyebando since 1968 and who testified that there were no buildings on the disputed land before 1987. There was the evidence of DW6 and exhibit D2 which was a report of the surveyor of Katuramu and Company Chartered Surveyors, dated 1 9th March 1987 which showed that there were not houses on the disputed land. Surprisingly, the trial judge failed to comment on or ignored all this evidence.

The other Justice of Appeal concurred with their brother Justice Twinomujuni, J.A, and in my opinion, they were right to do so. The manner in which the learned Justice analysed the evidence relating to this issue and the way he disposed of it are correct.
The next issue to be considered and disposed of by the learned Justices of Appeal was whether or not the appellant was a legitimate kibanja holder. The court first stated the law, which was applicable at the time the appellant allegedly acquired the kibanja by purchase and with the consent of the landlord. The law was the Busuulu and Envujjo Law of 1928, which remained in force until *1975*, when the Land Reform Decree abolished it. Section 8(1) of that law provided,

"8(1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except a wife or a child of the holder of a kibanja, or a person who succeeds to a Kibanja in accordance with native custom upon the death of the holder thereof'

It is to be observed that the appellant did not claim to be nor was he any of the persons prescribed in section 8(1). Section 8(2) provided:
"Nothing in this law shall give to the holder of a kibanja the right to transfer or sublet his kibanja to any other person"

The Court of Appeal very carefully considered the evidence which was given before the learned trial judge regarding the sale of the alleged kibanja by one Baturumayo Balatulwango

to the appellant and the contradictions in the evidence regarding the kanzu. In his testimony, the appellant claimed that he gave the kanzu to Baturumayo Balatulwango and in cross-examination, he said that he had given the kanzu to the mailo owner and landlord, Kisosonkole. The amounts paid to represent the kanzu differed from one statement to another made by the appellant during his evidence, and they ranged from Ug. Shs.70/-, 40/- to 30/- and, at times it was difficult to determine from his evidence whether the Ug.Shs.70 was the price for the kibanja or the kanzu. The learned trial judge appears to have overlooked all these contradictions. His complete belief that the appellant's evidence was credible and he ought to succeed appears to be inexplicable. In my opinion, the Court of Appeal was right to re-assess the evidence relating to the claim that the appellant had a kibanja in the mailo. In my opinion, the learned Justices of Appeal properly, re-evaluated the evidence and rightly came to the decision that even if the appellant had attempted to acquire the kibanja in 1969 as he claims, the acquisition would not have complied with the then existing law. On this very point, Justice Twinomujuni, J.A. concluded.

"In my judgment, the learned trial judge never evaluated the evidence before him at all. His belief in the truthfulness of the evidence of the respondent when he refrained from testing that evidence against all other evidence on record goes beyond my understanding. The learned trial judge should have assigned reasons for his total reliance on the credibility of the respondent. No wonder this led him to an erroneous holding that the respondent became a customary tenant on mailo land which was a legal impossibility in 1969"

The other members of the Court agreed and so do I. I also agree that the case of *Trevor Price and Another v. Raymond Kesall* (1957) E.A 752, in which it was held that:
"Where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial court before expressing a view, derived from demeanor, or reliability of a witness, it is open to the appellate court to find that the view of the trial judge regarding the witness is ill founded and, where wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself"

Is an authority in support of the evaluation done by the learned Justices of Appeal in this case.

The record of proceedings show quite clearly that the trial judge simply believed the testimony of the appellant and exhibits P1 and P2 in appellant's favour without any serious

scrutiny. On the other hand, the learned trial judge failed to give any reasons for rejecting the evidence of the respondent. The respondent's evidence was supported by that of six other witnesses. The trial judge made no comment on this evidence. He did not say whether he believed or disbelieved the respondent's witnesses. He did not comment on their demeanor or credibility of their evidence. In a number of cases, including *Coghlance v. Cumbeland*, (1898) CH 704, Trevor Price And Anor V. Raymond Kelsall *(1957)* E.A. *752,* and *Habre International Co. Ltd., v. Ebrahim Alayakhia Kassam And Others*, (supra), appellate courts have firmly held that where it is apparent that the evidence or the record of proceedings has not been subjected to adequate scrutiny by the trial court or first appellate court, as the case may be, the appellate court has an obligation to do so. In my view therefore grounds 1, 2,3 and 4 of this appeal must fail.

I will now consider grounds *5,6,* and 7 of the appeal. These grounds relate to the decision of the Court of Appeal that the deposit money of Ug. Shs l, 000,000/= which was paid following the agreement to purchase the mailo interest in the disputed kibanja was non-refundable and whether the appellant was entitled to damages.

On grounds *5,6* and 7, counsel for the appellant submitted that the Court of Appeal erred in finding that the demolition of the appellant's buildings was lawful. Such a finding is not borne out by the evidence. Counsel contended that the appellant's name was not included amongst the squatters whose names were in the court warrant that authorised demolition. In any event, the appellant had already concluded an agreement with the respondent for the purchase of the mailo interest in the lease he owned and had already paid a deposit for it and therefore his buildings on the same lease could not be held to be there illegally, as far as the landlord was concerned. Counsel further contended that the Justice of Appeal were in error in holding that the Ug. Shs. 1,000,000/- paid by the appellant to the respondent was not refundable.

The learned Justices of Appeal based their finding on a letter written by Mulira & Co. Advocates, who were acting on behalf of the respondent without any evidence from the appellant or some other independent witness that what that firm of advocates claimed to be the terms of the sale agreement were correct. The letter in question stated one of the terms of the sale agreement to be that deposit of Shs. One million was not refundable. The appellant refuted the correctness of the contents of that letter and therefore the learned Justices of Appeal erred in accepting the version of the terms of the agreement from only one party to

the agreement. Counsel further contended that had the agreement been executed by both parties, the appellant would have acquired the land and the question of refund would not have arisen. However, now that the respondent had opted out of the agreement and demolished the appellant's buildings, it would be contrary to public policy for the respondent to take back his land and keep the appellant's money as well. Lastly, counsel for the appellant submitted that the learned Justices of Appeal denied the appellant of his general damages of Ug. Shs.1, 000,000 in the belief that he was a trespasser, but as shown by the evidence, he was not a trespasser but a legitimate customary tenant and a genuine party to the sale agreement of the mailo interest from the respondent. Counsel contended that on the grounds he had raised and the submissions he had made, the appeal ought to be allowed and the judgment of the Court of Appeal set aside and the judgment of the learned trial judge upheld with costs.

On grounds 5,6, and 7 Mr. Nkurunziza, counsel for the respondent, confined his submissions to three matters, which he believed counsel for the appellant had highlighted and argued. These were whether the Court warrant for the demolition of the buildings had also been addressed to the appellant, whether the demolition of the appellant's buildings was unlawful and whether the deposit of Ug. Shs. 1,000,000/- was non-refundable.

Counsel contended that the court warrant for the demolition of the buildings did include those of the appellant as well. The Court of Appeal having held that there was no customary tenure relationship between the appellant and the respondent, by this finding alone, any structures put up by the appellant would be illegal and their demolition would be justified. Therefore the appellant was subject to the demolition warrant. On the second matter of whether demolition attracted compensation, counsel submitted that it did not and contended that once a landlord has a right to demolish illegal structures on his land he is entitled to do so without any liability to compensate those affected. Mr. Nkurunziza further contended that the fact that the appellant produced an agreement between himself and the respondent to buy the mailo reversionary interest could not, per Se, affect the landlord's right to demolish illegal structures without compensation.

On whether or not the deposit of Ug. Shs. 1,000,000/= was non-refundable, counsel for the respondent submitted that the respondent himself had not made this claim in the High Court and the Court of Appeal. The matter was raised and considered by the Justices of Appeal on

their own volition. Mr. Nkurunziza nevertheless contended that the Court of Appeal was correct to find that the terms and conditions of the oral sale agreement between the parties had been reduced into writing and as the version of the agreement in writing states that the deposit money, was non-refundable, the learned Justices of Appeal were correct to confirm this condition of the agreement. Counsel submitted that the appellant had failed to give any sound reasons for this court to overrule the decision of the learned Justices of Appeal that the money is non-refundable. Counsel therefore contended that ground 5,6 and 7 of the appeal should be dismissed and in the result, the entire appeal should be dismissed with costs.

In my opinion, there is one aspect of this appeal, which came out more clearly than any other through the evidence and on which there is no dispute. This is the sale agreement of the mailo reversionary interest between the parties. It is also agreed between the parties that the agreed price for the land which was *2.5* acres was to be Ug.Shs.3.5 million per acre of which the appellant actually paid the sum of Ug. Shs.1, 000,000/= by way of deposit. In his evidence, the respondent stated:

"Yes, this is the receipt on which 1 million shillings was paid. There is nothing to show that the amount was not refundable. Ex Dl is a copy of the letter from Mulira & Co. Advocates, which was given to me. It is not on the headed paper of Mulira & Co. Advocates. The letter I had earlier on written to Muluta is a photocopy. In fact I served this letter to his son in the shop. Yes, the terms were not reduced in writing because I relied on Muluta I did not pay compensation to Muluta before I asked him to quit"

The appellant also gave evidence on this same matter and stated that he had paid the one million shillings and that before he could complete payments, the respondent demolished the buildings on the land and evicted him without compensation.

There is evidence that before High Court suit No.445 of 1995 was instituted, officials of the Kampala City Council, Local Resistance Councils and a magistrate had made attempts to resolve the dispute between the respondent and the appellant who was one of many other squatters in similar situation. The reasons for these attempts were varied. The local authorities were interested in ensuring that the area should be developed in accordance with the City and Local Authorities' residential and zoning plans. The respondent wished to have his land cleared of unauthorised encumbrances

while the magistrate was concerned with law and order and wanted to resolve the disputes and ensure that persons affected were compensated in accordance with the law.

Thus, Hamund Mutanda Ssenyonga, DW6, testified,
The case came to our RC3 Court. It came from RC2 Court. I know the decision of the RC2. It said that Katama had to compensate the squatters on his land. We summoned all the complainants Katama inclusive. They came and gave a list of all squatters on the land.... I know one Muluta. He is the brown man in court. Muluta was one of the parties but he merely sent his representative"

Bosco Ambrose Obonyo, DW4, a senior city law officer in the legal department of the Kampala City Council also testified. His evidence was that the structures in the disputed land had been constructed without permission and they were therefore illegal structures which the City Council had power to demolish without having to compensate the squatters.

In the Magistrates' Court the magistrate ordered that the list of squatters in the disputed land be compiled and their holdings verified for purposes of compensation. The verification committee of the RCs did its work and also discovered that the appellant did not wish to be included amongst those who were seeking compensation because he had already made private arrangements with the respondent.

It is important therefore that the facts and circumstances surrounding the claim for the refund of the one million shillings be set out and appreciated. In the High Court, counsel for the appellant submitted that the money was refundable since the subject matter for which the parties had negotiated about, namely the appellant's structures, had been destroyed by the respondent.

Eva Luswata, DW3, testified that the she wrote the letter from Mulira and Co. Advocates concerning the land in dispute. This is the letter, which claimed that it was a term of the sale agreement that the one million shillings was non-refundable. However, in her testimony she said.
"At one time in 1992 Mr. Katama instructed me that there was Mr. Muluta on his land. That Mr. Katama had offered him to buy land in Bukoto. He then showed me a letter with certain conditions for sate. It was Mr. Katama who wrote that letter. It was addressed to Muluta. He told me that that particular letter would require some legal backing to be followed up by

another letter. So what I did was to write a letter to Muluta in which I was saying what Katama had told me and in which I told Muluta his obligations. I was not present when Katama and Muluta negotiate for the sale of the land. I did not know the agreement concerning the sale. I did not rely on any conditions other than the conditions shown to me"

The letter written by DW3 on behalf of Mulira & Co. Advocates, and addressed to the appellant was emphatic on the matter of refund. It said that the money was non-refundable. The learned trial judge found that the terms of the sale agreement were uncertain and as such there could not be a breach of the contract by either party, but he was of the view that the money was refundable.

In consequence, the issue of whether or not the one million shillings paid in pursuit of the sale agreement was refundable required Justice, Twinomujuni, J.A. stated;
"There is no ground of appeal concerning that issue, but since it is the duty of this court to evaluate the evidence on record itself it is incumbent upon me to make a finding whether indeed such a contract was entered into and what its terms were There is evidence that in 1992 the appellant agreed to sell to the respondent two and a half acres of land on Block 212, Plot 82 where he had already constructed illegal structures There is evidence that the respondent made an initial deposit of one million shillings. The agreement was oral It is however clear to me that the respondent was not being truthful in this matter and I accept that the terms which were reduced in writing in a letter dated 17th August from Mulira and Co. Advocates, to the respondent contained the terms agreed upon by the parties.

By 1995 when the structures on the land were demolished, the respondent had breached the said agreement and failed to pay as agreed. In my judgment, he is not entitled to refund of the money he paid"

The other learned Justices of the Court agreed with the findings of the learned Justice on this matter of refund. In light of the background 1 have given on the matter and, with greatest respect, it is my opinion that the learned Justices of Appeal did not properly or fully reevaluate the evidence, as they ought to have done under rule 29(1) of the rules of the Court of Appeal. Where the Court of Appeal has failed to re-evaluate the evidence or not done so adequately, this court will do so to ensure that justice is done.

It is clear the issue of refund of the Ug. Shs. 1,000,000/= was not made a ground of appeal by the respondent in the Court of Appeal. In my view, counsel for the appellant was correct when he submitted that, in dealing with this matter in their judgment, the learned Justices of appeal introduced a new fact upon which the appellant should have been allowed to the heard but was not. Mr. Babigumira, learned Counsel for the appellant, relied on *Warehousing and Forwarding Go. of East Africa Ltd v. Jafferali and Sons Ltd.* (1963) E.A. *385* and *Katalemwa Traders Ltd. v. The Attorney General* Civil Appeal No.2 of 1987 (S.C), (unreported), to support the view that courts are reluctant an often decline to take on new issues which were not argued in the trial court.

In my opinion, counsel for the appellant was correct to question the decision of the learned Justices of Appeal for taking on board a matter that had not even been raised by the respondent. In a number of cases, including *Banco Arabe Espanol v. Bank of Uganda* Civil Appeal No.8 of 1998 (S.C), (unreported), this Court reiterated our view that, as a second appellate court, except in the clearest of cases, we are not required to re-evaluate the evidence like a first appellate Court. However, where the Court of Appeal has failed to do so or has applied a wrong principle as in this case, we must correct any errors committed as was held *in D.R. Pandya v. R.* (1957) E.A *366* and *Bogere Charles v. Uganda.* Criminal Appeal No.10/98 (S.C), (unreported).

In my opinion, time was not of the essence in the sale agreement of the mailo interest. Parties were often detracted to attend to other matters such as discussions in the RCs' meetings on the threatened demolitions of illegal structures and magistrate's court proceedings. The respondent did not specifically plead for the retention of the deposit money as conceded by his own counsel in this court. The one million shillings was part of the consideration of the sale of the mailo interest in the dispute land.
It is the respondent who decided that he was no longer interested in selling to the appellant as evidenced by the demolition on his orders of the appellant's structures on the land. In consequence, it is my view that the Ug. Shs. 1,000,000/= Shillings paid to the respondent is refundable. It should also be refunded on the ground of unjust enrichment. Therefore ground 5 and 6 of the appeal should succeed. In light of my judgment in relation to grounds 1,2,3 and 4, ground 7 must fail. I would accordingly vary the judgment and orders of the Court of

Appeal only with regard to the sum of Shs. One million paid by the appellant to the respondent, and order that the latter should refund that sum of money to the former.

As this appeal has substantially failed, I would award one half (1/2) of the costs in this Court and in the Courts below to the respondent.

Dated at Mengo this 14th day of June 2000.

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS A
TRUE COPY OF THE ORIGINAL
W. MASALU MUSENE
REGISTRAR THE SUPREME COURT.

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JUDGMENT OF ODER J.S.C.

I have had the benefit of reading in draft the judgment of Kanyeihamba, JSC, with which I agree. The appeal should partially succeed. As Karokora, Mulenga, and Mukasa Kikonyogo, JJ.S.C, also agree, the Court's orders shall be as proposed by Kanyeihamba, J.S.C.

Dated at Mengo this 14th day of June 2000

A.H.O.ODER

JUSTICE OF THE SUPREME COURT

JUDGMENT OF KAROKORA. J.S.C.

I have had the benefit of reading in draft the judgment prepared by my learned brother, Kanyeihamba, JSC and I agree with his reasoning and conclusion that the appeal should substantially fail. As the facts are set out in his judgment I only wish to add some remarks on one or two aspects of the appeal.

From the evidence on record, there is no doubt that the manner in which the appellant allegedly acquired the land in question did not conform with Section 8 of the Busuulu and Envujjo law of 1928 which provided as follows:

8 *(1) Nothing in this law shall give any person the right to reside upon the land of a mailo owner without first obtaining the consent of the mailo owner except:*
(*a) wife or child of the holder of a Kibanja or,*
b) a person who succeeds to a Kibanja In accordance with native custom upon the death of the holder thereof

(2) Nothing in this law shall give the holder of the Kibanja the right to transfer of the Kibanja the right to transfer or sublet this Kibanja to any other person"

In view of the above law which was in existence in 1969 when the appellant claimed to have acquired the Kibanja from Batulumayo, I think Batulumayo, who was not the mailo owner, had no powers to transfer the kibanja through sale or otherwise without the consent of the mailo owner. The claim by the appellant that he gave a kanzu to Kisosonkole (which would be a sign of his consent) is not borne out by the Sale Agreement, which is alleged to have been made when he bought the kibanja from Batulumayo in 1969.

The Sale Agreement of kibanja provide as follows:-

"I, *Batulumayo Balatulawango C/O Mulago Hospital has sold to Mr. Joseph Tibasiima Muluta of Mulago Kamwokya my Kibanja, measuring over 2 acres. I bought this kibanja from Jafari Bukono and he has been the caretaker of this land. Southwards the boundary is the river Nsooba. Still southwards, it is boarded by Jafari Bukono and the boundary is at the Kalitunsi near his coffee plants. Considerations S/is. 170/- being Kanzu and he is the one who has paid commission to Jafari and Kasozi which is S/is. 40/- . He also takes all the plantation therein to wit Cassava, potatoes, maize, etc"*

Clearly, from the above Sale Agreement as noted, the mailo owner, Kisosonkole, does not appear anywhere in the agreement as having directly or by conduct, consented to the appellant to reside on his or her mailo land. So what Batulumayo did to transfer his kibanja to the appellant contravened subsection 2 of Section 8 of the Busuulu and Envujjo Law of 1928,

because a customary tenant had no powers to transfer his Kibanja except in circumstances as provided in subsection 1(a) and (b) of Section 8 of the Busulu and Envujjo Law (supra).

Therefore the appellant's occupation of the mailo land in question was null and void ab initio when he purchased kibanja from Batulumayo without the consent of the mailo owner. In my view, I think that he lost his last opportunity of acquiring some legal interest in that land when he failed to honour the agreement he had concluded with the respondent whereby he was supposed to pay Shs. 3,500,000/- per acre to the respondent.

In the circumstances, the appellant having failed to validate his illegal occupation of the mailo land after the respondent had permitted him to pay for the land he had illegally occupied, the respondent rightly, in my view, caused demolition of the illegal structures, which the appellant had constructed without respondent's consent.

Lastly, on the issue of refund of Shs. 1,000,000/- which the appellant had paid to respondent pursuant to the agreement whereby the respondent had permitted the appellant to buy the land on which he (appellant) had illegally occupied, if the respondent terminated that agreement and demolished appellant's buildings after the appellant had failed to fulfill that agreement of sale, I think that it would be inequitable to allow the respondent to retain the money which the appellant had deposited as part payment for the land in question. In my view, if the appellant failed to pay the purchase price as a result of which the respondent demolished the appellant's structures on the land in question, it is fair and equitable that the respondent refunds the amount of Shs. 1,000,000/= which the appellant had deposited.

In the result, this appeal should substantially fail and I would award costs as proposed by Kanyeihamba, JSC.

Dated at Mengo this 14th day of June 2000.

A.N.KAROKORA

JUSTICE OF THE SUPREME COURT.

JUDGMENT OF MULENGA JSC.

I had advantage of reading in draft the judgment prepared by my learned brother Kanyeihamba J.S.C. I agree with his conclusions and the orders he proposes. I do not intend to add much to what he has said except a brief remark on the burden of proof.

The Evidence Act provides in ss. 100, 101, and 102:

"100. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist…

101. The burden of proof in a suit or proceeding lies on that person who would fail f no

evidence at all were given on either side.
102. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"

The appellant's suit was founded on his claim that he was lawful owner of a customary kibanja holding on the respondent's mailo land, having acquired it in 1969, from one Batulumayo Balatulwango.

Since the appellant desired to obtain judgment upholding his legal right as a kibanja holder the burden was on him to prove the claim. The system of kibanja holding was at the material time governed by the Busuulu and Envujjo law under which no person could acquire a lawful kibanja holding over mailo land without the consent of the mailo owner. It followed therefore that in order to discharge the burden of proof the appellant had to prove as a fact that the mailo owner's consent to his acquisition of the kibanja had been given.

It was common ground that in 1969 the owner of that mailo land was one Kisosonkole. In his defence, the respondent, who is successor in title to Kisosonkole, denied the claim that the appellant was lawful owner of a kibanja holding, and he put the appellant to the strict proof thereof. When the Court of Appeal re-evaluated the evidence adduced in the instant case, as it was under duty to do as a first appellate court, it found that the appellant had failed to prove that Kisosonkole had given consent.

The appellant produced in evidence, an agreement between himself and Batulumayo Balatulwango by which the latter purported to sell and transfer a kibanja holding to the appellant without evidence that Kisosonkole had consented to the sale and a transfer. Even if the agreement is taken at its face value, it is not sufficient proof of acquisition of a lawful kibanja holding in absence of proof of the essential fact that would have constituted creation of the kibanja holding, namely consent of the mailo land owner.

In the circumstances, the submission for the appellant that the Court of Appeal erred in considering the Busuulu and Envujjo law, which had not been raised or argued in the trial court, was misconceived. The substantial issue is that the appellant failed to discharge the burden of proof to establish his claim. In *Antonio Kiweddemu v. Wilfred Kabusu Mugwanya*

(1976) HCB 127 cited by Counsel for the appellant, the Court did not decide that it was not necessary to prove the mailo owner's consent. It only held that such consent need not be in writing.

DATED at Mengo…. 14th… day of …June... 2000

J.N. MULENGA

JUSTICE OF THE SUPREME COURT.

JUDGMENT OF MUKASA KOKONYOGO, J.S.C.

I have had the benefit of reading in draft the judgment prepared by Hon. Justice G. Kanyeihamba, and I concur with it. I have nothing useful to add.

Delivered at Mengo this 14th day June 2000.

L.E.M. MUKASA KIKONYOGO

JUSTICE OF THE SUPREME COURT