IN THE REPUBLIC OF UGANDA.

THE SUPREME COURT OF UGANDA AT KOLOLO

CIVIL APPEAL NO.11 OF 2017

(Arising from CACA No.0090 of 2009 and HCCS No.002 of 2008)

[Coram: Arach-Amoko, Opio-Aweri, Mwondha, Tibatemwa-Ekirikubinza, Nshimye, JJSC.]

BETWEEN

BUSONYA JAMADA
WANENYA SHAMIM :: **APPELLANTS**
MAGOOLA AFUSA

AND

DAUDI GIRULI :: **RESPONDENT**

Representation

At the hearing of the appeal, the appellants who were absent in Court were represented by Mr. Dagira of M/S Dagira & Co. Advocates. The respondents were represented by Mr. Henry Ddungu of M/S Sekaana & Co. Advocates.

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA, JSC.

Background.

This is a second appeal arising from the judgment and orders of the Court of Appeal ordering a retrial of the case in the High Court.

The background to this appeal is that the respondent was sued by the appellants as administrators of the estate of the late Taibu Magoola in the High Court for a total sum of Ushs. 87,480,000/=. The sum arose out of a loan that had been advanced to the respondent by the late Taibu Magoola. As a form of security, the respondent had provided his land title to the deceased and executed a mortgage transfer agreement in case of default on the payment of the loan sum.

It was alleged that at the time the deceased died, the respondent had not paid back the loan sum of 27,000,000/=. However, the respondent claimed that the deceased had during his life time received part payment from him. The appellants objected to the respondent's allegation stating that there was no document showing acknowledgment of receipt of any amount of money from the respondent. Consequently, the appellants by way of originating summons sought for orders to foreclose the respondent's property.

During the High Court hearing, the trial Judge found that the annexures (documents that the respondent sought to rely on to show that he had made part payments to Taibu Magoola) attached to the respondent's affidavit had not been sealed by the Commissioner of Oaths as required by Rules 8 and 9 of the Commissioner for Oaths Rules. Basing on this, the trial Judge struck out both the affidavit and the annexures of the respondent.

The High Court Judge held in favour of the appellants and ordered that the appellants were entitled to payment of Ushs. 87,480,000/= on or before six months from the date of the judgment.

The respondent appealed against the decision. The Court of Appeal held that Rules 8 and 9 of the Commissioner for Oaths Rules did not make the respondent's affidavit fatally defective. That the omission to have the annexures sealed was a procedural irregularity curable by Article 126 (2) (e) of the Constitution. The Court of

Appeal found in favour of the respondent and sent the file back to the High Court for a retrial.

Dissatisfied with the Court of Appeal decision, the appellants have now appealed to this Court on the following grounds:

Grounds.

1. **The learned Justices of appeal erred in law when they held that the learned trial Judge erred in law to strike out annexures to the respondents' affidavit that had not been sealed by the commissioner for oaths who commissioned the said affidavit.**

2. **The learned Justices of appeal erred in law when they held that non-compliance with the provisions of rules 8 and 9 of the commissioner for oaths regulations was a technically curable under the provisions of Article 126 (2) (e) of the Constitution.**

3. **The learned Justices of appeal erred in law when they failed to evaluate the evidence on record properly as a first appellate court and therefore reached a wrong decision.**

4. **The learned Justices of appeal erred in law when they set aside the judgment and orders of the trial Judge after finding and holding that the appellants' case was properly brought before that court.**

5. **The learned Justices of appeal erred in law when they ordered a retrial in the circumstances of the appeal before them.**

6. **That the decision complained against has occasioned a substantial miscarriage of justice.**

Appellants' prayers

The appellants prayed that this Court finds in their favour, the judgment and orders of the Court of Appeal be set aside and that the costs of this appeal as well as those in the Court of Appeal be provided for.

The appellants argued grounds 1 and 2 together as well as grounds 4, 5 and 6. Ground 3 was argued separately.

Grounds 1 and 2

Appellants' submissions

The appellants submitted that the Court of Appeal Justices were right in faulting the trial Judge for striking out the respondent's supplementary affidavit but not the annexures that were not sealed and identified as required by Rules 8 and 9 of the Commissioner for Oaths Rules. Furthermore, that the omission of having the annexures sealed was not a curable irregularity under Article 126 (2) (e) which stipulates that substantive justice shall be administered without undue regard to technicalities. In support of this argument, the appellants relied on the authority of **Egypt Air Corporation vs. Suffish International Food Processors Ltd & anor**[1], where the Court *inter alia* held as follows:

> **We would like to point out that sealing and marking of annexures to affidavits is a legal requirement which, inter alia, facilitates the easy identification of annexures and in our view the procedure must be adhered to.**

The appellants therefore submitted that the trial Judge was right in striking out the offending annexures and that the Justices of Appeal erred in holding that this was a mere technicality curable by Article 126 (2) (e) of the Constitution.

[1] Supreme Court Civil Appeal No.14 of 2002.

Respondent's submission

The respondent supported the finding of the learned Justices of Appeal. The finding was that the failure to securely seal the annexure or exhibits did not invalidate the affidavit. The failure to seal the annexures to the supplementary affidavit was a procedural irregularity curable under Article 126 (2) (e) of the Constitution.

The respondent argued that not sealing the annexures should not have led the trial Judge to strike out the whole affidavit but only the annexures which offended Rules 8 and 9.

The respondent also submitted that it is the duty of the Commissioner of oaths to ensure that the annexures to the affidavit are properly sealed. That this being so, the mistake and negligence of the commissioner for oaths should not be visited on the litigant. Counsel therefore prayed that this Court be pleased to find that grounds 1 and 2 of the appeal lack merit.

Consideration of Court

The central issue to be resolved in the grounds is:

Do the defective annexures attached to the affidavit constitute a procedural irregularity curable by **Article 126 (2) (e)** of the **Constitution**?

Article 126 (2) (e) of the Constitution provides as follows:

> **In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles—**
>
> **(e) Substantive justice shall be administered without undue regard to technicalities.**

The above provision has been considered in a number of cases. In **Utex Industries Ltd. vs. Attorney General**[2], this Court emphasized that Article 126 (2) (c) was not intended to wipe out the rules of procedure. Furthermore, that the Article reflects the saying that rules of procedure are handmaids to justice and should be applied with due regard to the circumstances of each case.

In **AG vs. Major General David Tinyefuza**[3], several objections were raised in respect to the defective affidavits sworn in support of the petition. The Constitutional Court overruled the preliminary objections. Manyindo DCJ held that:

"The case before us relates to the fundamental rights and freedoms of the individual like the petitioner which are enshrined in and protected by the Constitution. In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on merit unless it does not disclose a cause of action. This Court should readily apply the provisions of Article 126(2) (e) of the Constitution in a case like this one and administer justice without undue regard to technicalities. It is for the above reason that I cannot uphold Mr. Kabatsi's objections."

In **Col. Dr. Besigye Kiiza vs. Museveni Yoweri Kaguta and Electoral Commission**[4], Odoki C.J in dealing with the objections raised against the affidavits supporting the petition stated that:

"... There is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the

---

[2] Supreme Court Civil Application No.52 of 1995.
[3] Constitutional Petition No.1 of 1996.
[4] Election Petition No.1 of 2001.

constitutional directive enacted in Article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it."

The question I must now answer is: In the circumstances of the present case, would strict adherence to Rules 8 and 9 of the Commissioner of Oaths Rules serve the ends of justice?

The appellants argue that the annexures offended Rules 8 and 9 which are couched in mandatory language. Therefore, the failure to comply with the said Rules made the defective annexures incurable by Article 126 (2) (e).

The respondent on the other hand argues that the non-sealing of the annexures as required by Rules 8 and 9 (supra) was a procedural irregularity curable by Article 126 (2) (e).

Despite the apparently mandatory provisions of Rules 8 and 9 (supra), it is my opinion that the failure of the Commissioner of Oaths to seal and identify the annexures does not ipso facto make the affidavit itself fatally defective and inadmissible. It is a fact on record that the affidavit on its own complied with the Rules. I agree with counsel that the affidavit should not have been struck out together with the defective annexures.

Arising from the above, I hold that a defective annexure cannot lead to striking out a duly filed affidavit. Consequently, I uphold the decision of the Court of Appeal that failure to seal the annexures to the appellant's supplementary affidavit was an irregularity curable under Article 126 (2) (e) of the Constitution.

Therefore, grounds 1 and 2 fail.

Ground 3

Appellants' submissions

The issue under this ground is whether the learned Justices of Appeal erred in law when they failed to evaluate the evidence on record properly as a first appellate court and therefore reached a wrong decision.

The appellants argue that although the learned Justices of Appeal were alive to the duty of a first appellate court, they did not carry out that duty when they did not evaluate the affidavit evidence of both parties. The appellants specifically contend that the evidence which was not evaluated is in respect to the non-repayment of the loan sum by the respondent contained in the affidavit in reply.

Respondent's submission

On the other hand, the respondent argues that the Court of Appeal correctly carried out their duty and found that the allegations in the appellants' affidavit disclosed fraud which had to be proved by oral testimony in an ordinary suit. As such, the Court of Appeal could not evaluate the evidence.

Court's Consideration

The paramount duty of the 1st appellate court is to re-evaluate the evidence adduced by the parties at the trial court. This duty is well stated in **Kifamunte Henry vs. Uganda**[5] as follows:

> **The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate court must then make up its own mind not disregarding the judgment**

[5] Supreme Court Criminal Appeal No.7 of 2004.

appealed from but carefully weighing and considering it.

In carrying out the above duty, the 1st appellate court need not reach a similar decision as the trial court. The best way this Court can ascertain whether or not the Court of Appeal as a 1st appellate court carried out its duty is by looking at the Record of Appeal.

I have carefully studied the judgment and findings of the Court of Appeal. The court in re-evaluating the evidence stated as follows:

"We accept counsel for the respondent's submission that ground 2 of the appellant's Memorandum of Appeal offends Rule 66 (2) of the Rules of this Court because it does not specify what evidence the trial Judge rejected and what wrong conclusion he arrived at. However, we shall consider it in the interest of justice because it is clear from the Record of Appeal that evidence was led by way of affidavit.

Counsel for the respondents [now appellants] *conceded, rightly in our view, that the appellant had two affidavits on Court record (affidavit in reply and a supplementary affidavit) but the trial Judge considered only the latter. We are of the considered view that the trial Judge erred in law by not taking into consideration the appellant's affidavit in reply which was on Court record especially because evidence in the lower court was by way of affidavit evidence.*

... We note that in paragraph 6 of the affidavit in rejoinder, the respondents raised the issue of fraud on the appellant's part by alleging that he had applied for a Special Certificate of title for the suit property on the representation that the Duplicate was lost. They attached documents in proof thereof. However, the issue was not handled by the trial Judge ... It is our view that

fraud cannot be glossed over and once a party to a suit raises it, the court should address it. As already indicated above, the trial Judge did not address the allegation of fraud at all in the judgment yet it was brought to his attention. He should have done so. Fraud is to be specifically pleaded and proved ... Affidavit evidence is not sufficient." (My emphasis)

From the above, I find that the Court of Appeal re-evaluated the evidence on record. The court actually pointed out the affidavit evidence that was erroneously omitted for consideration by the trial Court. The Court of Appeal did not make conclusive findings on whether or not the said evidence proved the non-payment of the loan sum because it amounted to allegations of fraud which could only be proved in an ordinary suit and not by way of affidavit evidence as required in an Originating Summons suit.

I therefore hold that the Court of Appeal carried out their duty of re-evaluating the evidence.

As a result, ground 3 too fails.

Grounds 4, 5 and 6

Appellants' submissions

The issue in these grounds is whether the Court of Appeal erred in setting aside the judgment and orders of the trial Judge and ordering a retrial of the matter.

The appellants argue that the order for retrial of the matter is a violation of the doctrine that justice delayed is justice denied. The appellants' argument is premised on the fact that it took seven (7) years for the Court of Appeal to have the judgment delivered in the matter. And that since this was a commercial dispute, it was not fair because the interest on the

loan amount will have accumulated to the detriment of the respondent.

Counsel also relied on the persuasive Indian authority of **Ajay Kumar Ghoshal etc vs. State of Bihar & Ano**[6] wherein the Supreme Court of India held that, an order for retrial may be passed only in exceptional cases, where the appellate court is satisfied that an omission or irregularity has occasioned a failure of Justice. Furthermore, counsel also relied on the case of **Nuru Kaaya vs. Crescent Transport Ltd**[7] where this Court held that retrial can be ordered on injudicious exercise of discretion.

Respondent's Submissions

The respondent's counsel submit that the order for retrial is guaranteed under the law in **Rule 32** of the **Court of Appeal Rules**. The Rule provides as follows:

> **On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.** (My emphasis)

Basing on the above provision, the respondents argue that the Court of Appeal had power to order a retrial and that if the case was not heard on its merits through a retrial, there would be a miscarriage of justice.

The respondent prayed that this ground fails and the appeal be dismissed with costs.

---

[6] Criminal Appeal NOs. 119-122 of 2017.

[7] Supreme Court Civil Appeal No.6 of 2002.

Court's consideration

It is not in dispute that the Court of Appeal has power to order a retrial. [See: **Section 80 (1) (e)** of the **Civil Procedure Act** and **Rule 32 (supra)**].

What is in contention however is whether in the circumstances of the present case, the order for a retrial was appropriate.

A retrial is ordered in the interest of justice. In the present matter, allegations of fraud by the appellants were raised. The appellants averred in their affidavits that because the respondent had failed to pay the loan sum, he convinced the office of lands to issue him with a special certificate of title and yet he had given the original certificate of title to the appellants as a mortgage for the loan.

In such circumstances, the Court could not simply gloss over the allegation of fraud without hearing a defence from the other party. This would lead to a miscarriage of justice. Therefore, in the interest of justice the Court of Appeal ordered for a retrial. Thus, I cannot fault the Court of Appeal for making such an order.

I therefore hold that grounds 4, 5 and 6 also fail.

Conclusion and Orders

Having held that all the grounds of the appeal fail as they lack merit, I would dismiss the appeal and grant costs of this appeal to the respondent.

Consequently, I would uphold the judgment of the Court of Appeal.

Dated at Kampala this 28th day of SEPTEMBER 2018.

Tibatemwa

PROF. JUSTICE LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Arach-Amoko; Opio-Aweri; Mwondha; Tibatemwa-Ekirikubinza; JSC, Nshimye, Ag. J.S.C.

CIVIL APPEAL NO. 11 OF 2017

BETWEEN

BUSONYA JAMADA
WANENYA SHAMIM::APPELLANTS
MAGOOLA AFUSA

AND

DAUDI GIRULI:::RESPONDENT

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft, the judgment of my Learned sister Hon. Justice Prof. Tibatemwa-Ekirikubinza, JSC. I agree with her that all grounds of the appeal lack merit and should be dismissed with costs.

Dated at Kampala this 28th day of SEPTEMBER 2018.

OPIO-AWERI

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: *ARACH-AMOKO, OPIO AWERI, MWONDHA, TIBATEMWA, JJSC NSHIMYE AG.JSC,)*

CIVIL APPEAL NO.11 OF 2017

BETWEEN

1. BUSONYA JAMADA
2. WANYENYA SHAMIM } ::**APPELLANTS**
3. MAGOOLA AFUSA

AND

DAUDI GIRULI::**RESPONDENT**

[Appeal from the judgment and orders of Kasule, Buteera, Barishaki, JJA of Court of Appeal at Kampala Civil Appeal No. 90 of 2009 dated 24th October, 2016]

JUDGMENT OF A.S. NSHIMYE, A.G JSC.

I have had the benefit of reading in draft the judgment of my learned sister Prof Lilian Tibatemwa Ekirikubinza, JSC.

I agree with her consideration of the general grounds of appeal, analysis of the issues, reasoning and conclusion that the appeal should fail.

I also agree with the orders she has proposed.

Dated at Kampala, this 28th day of September 2018.

A.S. NSHIMYE

A.G. JUSTICE OF SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: Arach-Amoko, Opio-Awerl, Mwondha, Tibatemwa-Ekirikubinza, Nshimye; JJSC)

CIVIL APPEAL NO. 11 OF 2017

BETWEEN

1. BUSONYA JAMAADA
2. WANYENYA SHAMIM ::::::::::::::::::::::::::::::::::::**APPELLANTS**
3. MAGOOLA AFUSA

AND

DAVID GIRULI ::**RESPONDENT**

(Appeal from the decision of the Court of Appeal at Kampala (Kasule, Buteera, Barishaki; JJA). Dated 24th October, 2016 in Civil Appeal No. 90 of 2009)

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft, the Judgment of my learned sister Hon. Justice. Prof. Tibatemwa-Ekirikubinza, JSC, and I agree with her decision that this appeal should be dismissed with costs to the respondent for the reasons she has given in her Judgment.

As the majority of the members on the Coram agree, this appeal is dismissed with costs. We uphold the Judgment and orders of the Court of Appeal.

Dated at Kampala this 28th day of SEPTEMBER 2018

.....

M.S. ARACH-AMOKO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Arach Amoko, Opio Aweri, Mwondha, Ekirikubinza, Nshimye JJSC

Civil Appeal No. 11 of 2017

Between

1. Busonya Jamaada
2. Wanyenya Shamim.
3. Magoola Afusa

.....Appellants

And

David Giruli.....Respondent

(Appeal from the Judgment and orders of Kasule, Buteera, Barishaki JJA of Court of Appeal at Kampala Civil Appeal No. 90 of 2009 dated 24th October 2016)

JUDGMENT OF MWONDHA JSC

I have had the opportunity of reading in draft the judgment of my learned sister Tibatemwa Ekirikubinza JSC. I agree with the analysis, reasons and the orders proposed. By way of emphasis, I wish to add that issues of fraud if pleaded must be carefully considered. The principle laid **in Farm International Ltd Farah Vs Mohammed Hamid Ferih Civil Appeal No. 16 of 1993 (SC)** has to be born in mind. It states:

No court will allow a person to keep an advantage which he has obtained by fraud, Fraud unveils everything, the court is careful not to find fraud unless it is distinctly pleaded and proved. But once proved, it vitiates contracts, judgments and all transactions whatsoever.

It was submitted by counsel for the respondent at the Court of Appeal that;

The appellant had tried to fraudulently apply for a grant of a special certificate of Title to the suit property when he knew that the original was with the 2nd respondent. This was a brazen attempt by the appellant to defeat the late Taibu Magoola's interest in the suit property after he had been challenged by the respondents (now

appellants) to prove repayment of the loan to the deceased. This conduct of the appellant does not render him a credible witness on the issue of repayment and/ or excuse of the interest.

The learned Justices of the Court of Appeal came to the right decision when they decided;

We are of the considered view that though the suit was properly instituted by way of originating summons under Order 37, R 4 of the Civil Procedure Rules once allegations of fraud were introduced in the affidavit in rejoinder, an ordinary suit should have been ordered by the trial Judge.

I am of the view that the introduction of fraud in rejoinder affidavit vitiated the nature of course of action and hence the need to strictly plead the same so that the opposite party file a proper statement of defence in the interest of Justice. I agree this appeal should fail.

The orders of the Court of Appeal are upheld that the file be sent back to High Court for retrial. Each party to bear its own costs.

Dated at Kampala this 28th day of SEPTEMBER 2018

Mwondha
Justice of the Supreme Court