

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO.01 OF 2017

Coram: Arach-Amoko; Mwangusya; Opio-Aweri; Mwendha; Buteera;
JJ.S.C

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| 1. BETUCO (U) LIMITED | } | |
| 2. J & M AIRPORT ROAD HOTEL, | } | }::APPELLANTS |
| APARTMENT & LEISURE CENTER LIMITED} | | |

VERSUS

- | | | |
|--|---|-----------------------|
| 1. BARCLAYS BANK OF UGANDA LIMITED} | } | |
| 2. VICTOR MATHIAS SSEKATAWA | } | |
| (Joint Receiver and Manager) | } | |
| 3. KERETO MARIM | } | }::RESPONDENTS |
| (Joint Receiver and Manager) | } | |
| 4. K.K. SECURITY (U) LIMITED | } | |

(Appeal from the Judgment of the Court of Appeal of Uganda at Kampala before Honourable Justices; Solomy Balungi Bossa; JA, Kenneth Kakuru JA, and Elizabeth Musoke; JA, dated on the 7th day of November 2016 in Civil Appeal No. 93 of 2009)

JUDGMENT OF JUSTICE BUTEERA

Background

The 1st and 2nd appellants were customers of the 1st respondent. In 2005, the 1st appellant borrowed from the 1st respondent a sum of 3.2 billion UGX. On 23rd June 2006, the 2nd appellant borrowed from the 1st respondent the sum of 13.5million US\$.

Both the 1st and 2nd appellants defaulted on their respective loan repayments resulting in the 1st respondent commencing foreclosure proceedings in relation to the mortgage and debenture facilities held by it through appointing the 2nd and 3rd respondents as joint receivers and managers. The 4th respondent had been deployed at the 1st appellant's business centre to secure the premises.

On the 18th of February 2008, the appellants filed H.C.C.S No. 40 of 2008 seeking to restrain the 1st respondent from realising the mortgage securities. On 27th February 2008, the respondents filed a written statement of defence laying out a basis for the recourse to the securities held and counterclaiming for the sum of 4.6 billion UGX then owed by the 1st appellant and 14.4 million US\$ then owed by the 2nd appellant.

Before the formal hearing in Court, the Registrar at the High Court (Commercial Division) conducted mediation but no agreement was reached between the parties and the matter was referred back to the trial Judge. When the matter came up for a scheduling conference, counsel for both parties requested that the matter be referred back to mediation before a Judge of the Commercial Court. The matter was accordingly referred to Hon. Justice Geoffrey Kiryabwire, J, (as he then was) for mediation.

On the 25th of March 2009, the mediation was conducted and concluded on the same day. The parties and their advocates then signed a Consent Judgment before the Hon. Justice Geoffrey Kiryabwire, who also signed it.

In the Consent Judgment, the 1st appellant agreed to pay the 1st respondent the outstanding loan sum of 4,500,000,000/= UGX in monthly instalments of 80,000,000/= UGX beginning 31st May 2009. The 2nd appellant agreed to pay the 1st respondent bank 15,600,000 US\$ in monthly instalments of 75,000 US\$ beginning 31st March 2009.

On 11th May 2009, the appellants filed Miscellaneous Application No.243 of 2009, seeking for an order to set aside the Consent Judgment on the following grounds:-

- 1) The appellants Directors had signed the Consent Judgment under a mistake/misrepresentation as to the true content of the judgment.**
- 2) In signing the Consent Judgment, the parties were not of the same mind / were not in agreement.**
- 3) The mediation proceedings were so fundamentally defective that they did not bind the applicants.**
- 4) That it was just and equitable that the application was allowed.**

At the hearing of the Application to set aside the Consent Judgment, the trial Judge made a finding that all the parties were bound by the Consent Judgment and dismissed the Application.

Dissatisfied with the trial Judge's finding, the appellants appealed to the Court of Appeal on 4th December 2009 against the dismissal of their Application to set aside the Consent Judgment.

Before the matter came up for hearing in the Court of Appeal, the appellant paid to the 1st respondent the sum of 4,500,000,000/= UGX in settlement of its obligations under the Consent Judgment in late 2013 and the securities held in respect thereof were released to the 1st appellant.

The 15,600,000 US\$ owed by the 2nd appellant to the 1st respondent remained unpaid to date.

On the 9th of May 2016, the appeal was heard by the Court of Appeal Justices who issued their judgment dismissing the appeal on 7th November 2016.

Being aggrieved by the Judgment of the Court of Appeal, the appellants appealed to this Court against the whole decision of the Justices of Appeal on the following grounds: -

- 1. The learned Justices of Appeal erred in law and fact when they denied the appellants their Constitutional right of legal representation in Civil Appeal No. 93 of 2009 and erroneously came to a wrong conclusion in the matter.**
- 2. The learned Justices of Appeal erred in law and fact when they dismissed grounds 1, 2 and 4 of appeal in Civil Appeal No.93 of 2009 and erroneously came to wrong decisions in their judgment.**
- 3. The learned Justices of Appeal erred in law and fact when they failed to re-evaluate the entire evidence of the parties in the record of appeal in Civil Appeal No.93 of 2009 and erroneously came to the wrong decision in their decision.**
- 4. The learned Justices of Appeal erred in law and fact when they failed to set aside a consent judgment which was a nullity by law.**

5. **The learned Justices of Appeal erred in law and fact when they awarded costs against the appellants.**

The Appellants prayed to Court that:-

- a) **The appeal be allowed.**
- b) **The judgment of the Justices of Appeal and its orders be set aside.**
- c) **The impugned Consent Judgment be declared null and void.**
- d) **The Court orders vide Civil Suit No. 40 of 2008 be set down for hearing interparties in the Commercial Court before another Judge.**
- e) **The appellants be awarded costs here and in the Courts below.**

Representation

At the hearing of this appeal, learned counsel, Ms. Kasande Venny Murangira appeared for the appellants.

Mr. Masembe Kanyerezi and Mr. Timothy Lugayizi appeared for the respondents.

Counsel for both parties filled written submissions. They orally highlighted their written submissions at the hearing of the appeal. We shall consider both the written submissions and the highlights in resolution of the appeal.

Preliminary Objection

Before we consider the grounds of appeal, we have to first consider the preliminary objection raised by Counsel for the appellants in her submissions. He submitted that the respondent's supplementary record of appeal should be expunged from the Supreme Court record.

The Supplementary record contains hearing notices and letters written to the Registrar of the Court of Appeal from the appellant.

The appellants contend that the said documents were not part of the record of the Court of Appeal as per **Rules 86 (4), (5) and 83 (1), (2), (3) and (7) of the Judicature (Supreme Court Rules) Directions, S.I. No.13-11.**

Rule 86 provides:-

“86. Preparation and service of supplementary record.

- (1) If a respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the registry a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal.**
- (2) The respondent shall, as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant and on every other respondent who has complied with the requirements of rule 76 of these Rules.**
- (3) The appellant may, at any time, lodge in the registry a supplementary record of appeal, and shall as soon as practicable after that serve copies of it on every respondent who has complied with the requirements of rule 76 of these Rules.**
- (4) A supplementary record may be lodged to cure defects in the original record of appeal due to want of compliance with rule 83 of these Rules.**
- (5) A supplementary record of appeal shall be prepared as nearly as may be in the same manner as a record of appeal.”(Underlining is for emphasis)**

Rule 83 provides:-

“83. Contents of record of appeal.

- (1) The record of appeal shall contain the records of appeal in the Court of Appeal, the High Court, and in the case of a third appeal the record of appeal from the trial magistrate’s court in addition to the foregoing records.**

- (2) The record of appeal from the Court of Appeal shall contain—**
 - (a) an index of all the documents in the record, including the records of the courts below, with the number of the pages at which they appear;**
 - (b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any respondent who has not furnished an address for service, then as required by rule 76 of these Rules, his or her last known address and proof of service on him or her of the notice of appeal;**
 - (c) the order, if any, giving leave to appeal; (d) the memorandum of appeal;**
 - (e) the record of proceedings;**
 - (f) the order or judgment;**
 - (g) the notice of appeal; and**
 - (h) in case of a third appeal the certificate of the Court of Appeal that a point or points of law of great public or general importance arise.**

- (2) A judge or a registrar of the Court of Appeal may, on the application of any party, or of his or her own motion, direct which documents or parts of documents should be included or excluded from the record; and an application for the direction may be made informally.**

....

(6) Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 23 of these Rules to appear on his or her behalf.

The respondent filed a supplementary record of appeal including hearing notices relating to earlier fixtures of the appeal and letters written to and copied to the Registrar of the Court of Appeal in which the appellants persistently sought to adjourn the appeal on the basis that the parties were in their advanced stages of negotiations to settle the money owed as per the Consent Judgment.

The several adjournments sought by the appellants were part of the Court record as they were continuously referred to by both counsel and Court at the hearing of the appeal at the Court of Appeal. The supplementary record is part of the record of the Court of Appeal bringing out the facts on the various adjournments. The appellants do not deny that fact.

I have perused the supplementary record of appeal filed by the respondents and do not see how it goes against **Rules 86 (4), (5) and 83 (1), (2), (3) and (7) of the Judicature (Supreme Court Rules) Directions, S.I. No.13-11**, in view of the fact that it simply puts on record what actually transpired in the Court of Appeal.

The contents of the supplementary record of appeal do not prejudice any of the parties of the appeal. I, therefore, dismiss the objection.

I shall now proceed to resolve the grounds of appeal.

Submissions of Counsel for the Appellants

Ground one

Counsel for the appellants submitted that the Justices of Appeal were wrong to have denied the appellants their Constitutional right of legal representation in Civil Appeal No. 93 of 2009.

She submitted that when the case came up for hearing before their Lordships in the Court of Appeal, counsel in conduct of the appeal was absent. According to counsel, their Lordships endeavoured to force counsel who had escorted the Director of the appellants, Mrs. Goodra Behakanira, to proceed with the appeal. That Mrs. Goodra Behakanira applied for an adjournment in order to engage lawyers to represent the appellants and this was denied by their Lordships.

Counsel contended that their Lordships refusal to allow the appellants to be given adequate time to engage other lawyers of their choice contravened **Article 28 (1)** of the **Constitution** which guarantees a right to legal representation.

Ground two

Counsel for the appellant submitted that the Justices of Appeal erred when they dismissed grounds 1 & 2 of the Memorandum of Appeal in the Court of Appeal as having been abandoned by the appellant. According to counsel, the record of proceedings of the Court of Appeal shows that the appellants were not represented by any advocate and therefore couldn't have made submissions in that respect.

Counsel further submitted that the Justices of Appeal erred when they dismissed ground 4 of the Memorandum of Appeal in the Court of Appeal for not being in accordance with **Rule 86 (1) of the Court of Appeal Rules**.

According to counsel, Rule 86 (1) concerns a Memorandum of Appeal and not a ground of appeal.

Counsel further contended that their Lordships erred when they based themselves on Rule 16 and 21 of the mediation Rules, ignored, or refused and or declined to re-evaluate the evidence in annexure “F” to the application on allegations that the documents contained therein are envisaged as being confidential in nature and wrongly dismissed ground 3 of the Memorandum of Appeal in the Court of Appeal. According to counsel, the words in Rule 21 of the said mediation rules cannot make documents in annexure “F” to the application confidential.

Ground three

Counsel submitted that the Justices of Appeal failed to re-evaluate the entire evidence on record and erroneously came to the wrong decision. According to counsel, the Justices of Appeal never evaluated any evidence on the Court record. That the Justices concerns in their Judgment were only on procedure and interpretation of the law and according to counsel, that kind of analysis does not constitute the evaluation of the evidence and material facts which were before the trial Judge.

Counsel contended that the Justices of Appeal adopted the appellant’s conferencing notes but never evaluated or analysed them. That the Justices only considered grounds 3, 5 and 6 of the Memorandum of Appeal in the Court of Appeal.

According to counsel, the entire Judgment of the Justices of Appeal does not show that their Lordships evaluated the evidence and material facts on Court record which caused a miscarriage of Justice against the appellants.

Counsel prayed that this Court re-evaluates the evidence (including all the affidavit evidence) and material facts on record and come to its own conclusion on this matter.

Ground four

Counsel submitted that Justices of Appeal erred when they failed to set aside a Consent Judgment which was a nullity by law.

He submitted that the Justices of Appeal were wrong to have resolved ground 5 in the Memorandum of Appeal before the Court of Appeal, in the way that the said ground was evidence yet it concerned a Consent Judgment.

Counsel contended that the appellants did not raise arguments in support of the said ground 5 as the appellant was unrepresented. That the Justices should have adopted the appellant's conferencing notes on ground 5.

Submissions of Counsel for the Respondents

Ground one

Counsel for the respondents submitted that the appeal before the Court of appeal had been pending for a period in excess of six and a half years by the time it was finally heard on the 9th of May 2016. The appellants had previously adjourned the appeal in excess of ten occasions when it was eventually listed for

hearing on the basis that they were in the process of putting together and paying the decretal amounts owed to the 1st respondent.

According to counsel, the 1st appellant in late 2013 paid the 4.5 billion UGX decretal sum owed by it and as a result, its security known as the Avema shopping Arcade was released by the 1st respondent.

Counsel submitted that when the matter came up for hearing in the Court of Appeal, none of the appellant's representatives on record were in Court. Instead, Mr. Robert Kasaija appeared for the appellant although he had not then filed a Notice of Additional Instruction or a Notice of Change of Advocates. Both Robert Kasaija and Mrs. Goodra Behakanira on behalf of the appellants sought for an adjournment of the hearing of the appeal. According to counsel, Mrs. Goodra Behakanira's main ground for seeking adjournment was that the 1st appellant had paid the decretal sum and the 2nd appellant needed time to be able to pay the remaining decretal sum due from it.

Counsel contended that the 1st respondent opposed the adjournment application on the basis that it was merely an effort to further delay the matter beyond the six and a half years that had lapsed since the filing of the appeal as every prior adjournment application had been on the basis that payment of the 2nd appellants liability was to be made shortly by the Government of Uganda, a promise which never materialised.

He further submitted that the Court of Appeal Justices disallowed the adjournment and accordingly proceeded with the appeal. That the appeal was heard on the basis of the appellants counsel's detailed conferencing notes and Mrs. Goodra Behakanira's additional comments on the submissions.

Counsel contended that since the appellants deliberately chose not to have their lawyers attend the hearing of their appeal in order that they may force a further adjournment or delay of six and a half years, they cannot be heard to say that they were denied their constitutional right to be represented by counsel as that is a right that is exercised by ensuring ones lawyers are in attendance when the matter is fixed to be heard by the court as opposed to ensuring that one's lawyers are absent in order that an adjournment may be forced.

Ground two

Counsel submitted that ground two of this appeal offends the provisions of **Rule 82 of the Judicature (Supreme Court Rules) Directions S.I.13-11** which requires grounds of appeal to indicate the basis of objection to the decision appealed against specifying the points which are alleged to have been wrongly decided.

He contended that a mere contention by the appellant that particular grounds of appeal should not have been dismissed without providing any basis for this contention does not constitute an objection such as would allow the Appellate Court to comprehend and adjudicate the complaint nor permit opposite counsel to respond.

Ground three

Counsel submitted that the Justices of the Court of Appeal extensively re-evaluated the evidence adduced in the High Court in their Judgment. Their Lordships dealt with the law governing setting aside Consent Judgments; the contention under Rule 20 of the Judicature (Commercial Court Division) Mediation Rules 2007 that the Consent Judgment ought to have been signed by the Registrar as opposed to the Mediation Judge; the alleged absence of a Mediation report as required by Rule 19 of the Mediation Rules; and the refusal

by the trial Judge to consider annexure “F” based on Rule 21 of the Mediation Rules which confers confidentiality on documents used in Mediation.

Counsel contended that the Justices clearly re-evaluated the evidence on record following the principles set out in *Kifamute Henry versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997*. According to counsel, no further re-evaluation of the evidence of the trial Court is required.

He submitted that there was no evidence on record to support the setting aside of the Consent Judgment as found by the trial Judge and the Court of Appeal Justices.

Counsel contended that in the instant case, there was no fraud, mistake, misapprehension nor contravention of Court policy as would have been required to justify the setting aside of the Consent Judgment as set out in *Attorney General and Uganda Land Commission versus James Kamoga & anor, S.C.C.A No.8 of 2004*.

Ground four

Counsel for the respondent submitted that the Consent Judgment was between the 1st Respondent as the lending bank and the 1st and 2nd appellants as the borrowers. The 2nd, 3rd and 4th respondents were not privy to the lending contract or the securitisation agreements and accordingly were not parties to the Consent Judgment. According to counsel, the 2nd, 3rd and 4th respondents should never have been parties to the appellants Application to set aside the Consent Judgment.

Counsel agreed with the Justices of Appeal finding that the contention as to the Consent Judgment being a nullity by reason of the 2nd, 3rd & 4th respondents not

being parties to it was not taken in the High Court Application to set aside the Consent Judgment and therefore could not be taken for the first time in the Court of Appeal nor can it be a ground in this second appeal.

CONSIDERATION OF THE APPEAL

This being a second appeal, in resolution of the issues raised, I am guided by what this Court held in *Kifamunte Henry vs. Uganda SCCA No. 10 of 1997*;

“on a second appeal, a second appellate court is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law.”

We shall now proceed to consider the grounds of appeal.

Resolution of ground one

On this ground of the appeal, the Justices of the Court of Appeal were faulted for having heard the appeal when the appellants were not represented by counsel and thus denied the appellants their Constitutional right to legal representation.

As the record indicates, multiple adjournments were granted in this case at the request of the appellants in the Court of Appeal. The appeal was adjourned 10 times in a period of six and a half years from December 2009 until when it was finally heard on 9th May 2016.

The appellants multiple requests for adjournment of the appeal were sought on the basis that the parties were in their advance stages of settling the money owed as agreed in the Consent Judgment.

On the 9th of May 2016 when the appeal came up for hearing in the Court of Appeal, one of the appellants Directors, Mrs. Goodra Behakanira was present in Court. The record showed that they had been served with the relevant hearing notices. Learned counsel, Mr. Robert Kasaija appeared as a substitute on behalf of the appellants. Mr. Robert Kasaija informed Court that he had just been instructed that morning. There was nothing on Court record to indicate that Mr. Robert Kasaija had been instructed as counsel for the appellants. The Court record indicated M/s. Muhumuza & Co. Advocates and M/s. Murangira Kasande & Co. Advocates as counsel for the appellants. There was no notice of withdrawal, notice of change of advocates nor was there a notice of joint instructions filed.

The appellant's representative Mrs. Goodra Behakanira sought for a two weeks adjournment in order to engage other lawyers.

The Justices of Appeal denied the appellants request for an adjournment on the basis that no sufficient reason had been given of the absence of the lawyers on record and that Court was not satisfied that the appellants had advanced sufficient reasons to grant an adjournment. However, the Justices of Appeal granted a short adjournment from 11am to 3pm to enable the appellants to engage other lawyers to represent them.

During the break, Mr. Robert Kasaija from R. Kasaija & Partners and another law firm known as New Mark filed a Notice of Change of instructions to represent the appellants but when Court convened after the break at 3.30pm, Mr. Robert Kasaija did not reappear in Court and neither did any representative from New Mark show up in Court to represent the appellants.

Considering the fact that the appeal had been pending in Court for more than 6 years and several adjournments had been granted to enable the parties to settle the matter out of Court but failed, the Justices of Appeal decided to proceed with the appeal without legal representation for the appellants.

According to Counsel for the appellants, their Lordships refusal to grant the appellants a further adjournment to engage other lawyers of their choice contravened **Article 28 (1)** of the **Constitution of the Republic of Uganda**.

Article 28 (1) provides:-

- (1) **“In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”**

As a general rule, sufficient reason has to be demonstrated to secure an adjournment. Under **Order 17 Rule 1** of the Civil Procedure Rules, the Court may at any stage of the suit if sufficient cause is shown, grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the suit.

An adjournment is not granted as of right but is only granted for sufficient cause with the exercise of discretion by the Court.

This Court had occasion to handle a matter where a party sought an adjournment due to lack of legal representation in *Famous Cycle Agencies Ltd & 4 ors vs Mansukhlal Ramji karia & others, SCCA No.16 of 1994*, this Court held:-

“Under this rule the granting of an adjournment to the party to the suit is thus left to the discretion of the court. The discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner, and upon proper material. It should be exercised after considering the party’s conduct in the case, and the opportunity he had of getting ready and the truth, and sufficiency of the reason alleged by him for not being ready.

But the discretion will be exercised in favour of the party applying for adjournment only if sufficient cause is shown. Sufficient cause in my opinion refers to the acts or omission of the applicant for adjournment. What is sufficient cause depends upon the circumstances of each case. Generally speaking, where the necessity for the adjournment is not due to anything for which the party applying for is responsible, or where there has been little or no negligence on his part an adjournment would not normally be refused. But where the party has been wanting in due diligence or is guilty of negligence an adjournment may be refused.

Under the corresponding rule of the Indian “Code of Civil Procedure” by Manohar and Ditale, 10th Edition, page 543, circumstances which have been held to constitute sufficient cause for adjournment include where a party is not ready for the hearing by reason of his having been

taken by surprise; where he could not reasonably know of the date of hearing in sufficient time to get ready for the same; where his witnesses fail to appear for the hearing owing to no-service of summons on them when such no-service is not due to the fault of the party; where the absence of witnesses is due to bona fide mistake on the part of the party; where a party is not ready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him get ready; and where the refusal of an adjournment to a party will enable the opposite party to successfully evade a previous interim order against him.”

In the instant case, an adjournment was sought by the appellants on the ground that they needed time to engage other lawyers. There was no notice of withdrawal, notice of change of advocates nor was there a notice of joint instructions filed by the appellants counsel to enable Mr. Robert Kasaija who was appearing for the appellants to represent them. The record showed that the appellants had been served with a hearing notice.

Counsel for the appellants did not give Court sufficient reason for their absence to warrant an adjournment.

In the exercise of their discretion, the Justices of Appeal nevertheless granted the appellants an adjournment of 4 hours to enable them to engage their new lawyer, Mr. Robert Kasaija who was present in Court. The appellant's representative, Mrs. Goodra Behakanira returned to Court without a legal representative despite the fact that Mr. Robert Kasaija had filed a notice of

instructions to represent the appellants. No reason for his absence was given to Court.

Article 28 of the Constitution grants a right to legal representation but Court cannot allow this right to be abused by litigants.

The appellants were notified of the Court hearing. Their original lawyers did not come to Court. The Justices of Appeal gave the appellants adequate time for them to engage other lawyers as seen above.

Article 28 (1) of the Constitution provides for a right to a fair and speedy hearing. This appeal had been pending in the Court of Appeal for a long period of time.

I find that the Justices of Appeal judiciously exercised their discretion to refuse a further adjournment considering the fact that the appellants had been given adequate time to engage other lawyers and the fact that the appeal had been pending for over 6 years with unfulfilled settlement claims by the appellant.

I would dismiss ground one of the appeal for those reasons.

Resolution of Ground two

On this ground of appeal, the Court of Appeal Justices were faulted for dismissing grounds 1, 2 and 4 of the appeal before them.

The Court of Appeal Justices when handling the grounds of appeal before them considered Mrs. Behakanira's oral submissions made in Court in addition to the appellants conferencing notes as the appellants submissions since the appellants was unrepresented. The Justices on doing this took into consideration that counsel for the respondent was also relying on the said conferencing notes while making his oral submissions in Court.

The conferencing notes on record did not address grounds 1, 2 and 4 but only addressed grounds 3, 5 and 6 of the memorandum of appeal in the Court of Appeal. Mrs. Behakanira, the appellant's representative did not make any oral submissions in Court in reference to grounds 1, 2 and 4. Grounds 1, 2 and 4 were not addressed by the appellants in any other way. The Court of Appeal Justices considered the grounds as having been abandoned by the appellants thus their dismissal. I do not fault the Justices of Appeal on that finding.

Additionally, counsel for the appellants contended that the Justices of Appeal were wrong to have dismissed ground 4 of the Memorandum of Appeal in the Court of Appeal for not being in accordance with **Rule 86 (1) of the Court of Appeal Rules**. He argued that **Rule 86 (1)** concerns a Memorandum of Appeal and not a ground of appeal.

Ground 4 of the Memorandum of Appeal in the Court of Appeal states:-

“The learned trial Judge erred in law and fact when he failed to set aside the Consent Judgment.”

Rule 86 (1) of the Court of Appeal Rules provides:-

“86. Contents of memorandum of appeal.

(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of

objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.” (Underlying is for emphasis)

It is clear from **Rule 86 (1)** above that grounds of appeal are contents of a Memorandum of Appeal, therefore Rule 86 (1) applies.

The appellants did not precisely set out the exact ground of objection for which they were faulting the trial Judge in ground 4 of the appeal before the Court of Appeal Justices in order to comply with the provisions set out in Rule 86 (1).

I find that the Justices of Appeal were right to have dismissed ground 4 of the appeal as it contravened Rule 86 (1) of the Court of Appeal Rules.

As regards ground 3 of the Memorandum of Appeal in the Court of Appeal, counsel for the appellants faulted the Justices of Appeal for dismissing it in her submissions of ground two of this appeal. However, ground 3 was not part of the three grounds mentioned in ground two of the Memorandum of Appeal in this Court.

Ground two before this court states:-

“The learned Justices of Appeal erred in law and fact when they dismissed grounds 1, 2 and 4 of appeal in Civil Appeal No.93 of 2009 and erroneously came to wrong decisions in their judgment.”

It is clear in ground 2 above that grounds 1, 2 & 4 were the only three grounds of appeal that the appellants faulted the Court of Appeal Justices for having dismissed.

Rule 98 (a) of the Supreme Court Rules prohibits raising of a new ground or argument on appeal save with leave of the Court. The Rule provides:

**“At the hearing of an appeal—
no party shall, without the leave of the court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 88 of these Rules”**

The appellants here were simply trying to raise a new ground of appeal without seeking leave of Court. They cannot be allowed to raise and argue a ground on which they had not appealed. The same would not be permitted by **Rule 98 (a)** of the Rules of this Court.

I find that Ground two has no merit and I dismiss it.

Resolution of ground three

It was the appellant’s contention on ground 3 that the Court of Appeal Justices failed to re-evaluate the entire evidence on record and therefore came to a wrong conclusion.

I have carefully read the Judgment of the Justices of the Court of Appeal, it is clear that the Justices carefully evaluated the evidence before coming to a conclusion to dismiss the appeal.

In their Judgment, the Justices of Appeal clearly set out the principles upon which a Consent Judgment can be set aside as laid out in *Attorney General and Uganda Land Commission versus James Kamoga & Anor, S.C.C.A No.8 of 2004*.

Upon setting out the law that governs setting aside Consent Judgments, the Justices of Appeal proceeded to handle the grounds of appeal before them. When handling the grounds of appeal, the Justices considered the facts, evidence and submissions of both parties.

In their judgment, the Justices of Appeal adopted the oral submissions of the respondents and the oral submissions made in Court by Mrs. Behakanira (the appellants representative) in addition to the appellants conferencing notes on record as the appellants were unrepresented. The learned Justices clearly set out what the appellants and respondents submitted on the grounds before them. The Justices found that the appellants had not made submissions in their conferencing notes on grounds 1, 2 and 4 which they dismissed and proceeded to handle the rest of the grounds in the appeal, being grounds 3, 5 and 6.

The Justices of Appeal thereafter extensively dealt with and resolved the following issues raised in grounds 3, 5 and 6 of the appeal before them:-

- a) Whether the Consent Judgment could be set aside,
- b) The contention under **Rule 20 of the Judicature (Commercial Court Division) Mediation Rules 2007** that the Consent Judgment ought to have been signed by the Registrar as opposed to the Mediation Judge,

- c) The alleged absence of a Mediation report as required by **Rule 19 of the Mediation Rules** and;
- d) The refusal by the trial Judge to consider annexure “F” following **Rule 21(2) of the Mediation Rules** which confers confidentiality on documents used in Mediation

It is therefore wrong for the appellants to argue that the Court of Appeal Justices never evaluated any evidence on the Court record.

In re-evaluation of evidence by a first appellate Court, there is no set format to which they should conform. In *Uganda Breweries Limited vs. Uganda Railways corporation (Civil Appeal No.6 of 2001) [2002] UGSC 1* this Court held:-

“There is no set format to which a re-evaluation of evidence by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court.”

In the instant case, it is clear from the Judgment of the Court of Appeal that the learned Justices of Appeal were alive to their duty as the first appellate Court to re-evaluate all the evidence and came to its own findings.

We therefore dismiss ground 3.

Resolution of ground four

Under this ground of appeal, the Court of Appeal Justices were faulted for not setting aside a Consent Judgment that was a nullity by law.

According to the appellants, the Justices of Appeal were wrong to have resolved ground 5 in the Memorandum of Appeal before the Court of Appeal, in the way that the said ground was evidence yet it concerned a Consent Judgment.

Ground 5 in the Memorandum of Appeal before the Court of Appeal stated:-

“The Consent Judgment is a nullity at law as it was entered into in the absence of other defendants, and the Consent did not settle the issues pleaded in the plaint and the counter claim thereof.”

The Justices of Appeal found that the above ground was not part of the evidence adduced before the trial Judge to set aside the Consent Judgment and thus the Court of Appeal could not be obliged to consider it as part of the errors that were made at trial.

In our view, the Justices of Appeal when handling ground 5 of the appeal before them were looking at the grounds upon which the appellants sought an order to set aside the Consent Judgment at the trial Court. The issue raised in ground 5 above, should have been one of the grounds to set aside the Consent Judgment at the trial.

At the trial, the grounds upon which the appellants sought an order to set aside the Consent Judgment were the following:-

- 1) The appellants Directors had signed the Consent Judgment under a mistake/misrepresentation as to the true content of the judgment.**
- 2) In signing the Consent Judgment, the parties were not of the same mind/were not in agreement.**
- 3) The mediation proceedings were so fundamentally defective that they did not bind the applicants.**

4) That it was just and equitable that the application was allowed.

None of the above grounds raised at trial to set aside the Consent Judgment mention the contention that the ***“Consent Judgment is a nullity at law as it was entered into in the absence of other defendants,”*** as stated in ground 5 in the Memorandum of Appeal before the Court of Appeal Justices.

Clearly, the Justices of Appeal could not fault the trial Judge on a matter/issue that was not raised before him. The trial Judge may be faulted on matters they handled and not what was never before them.

The Justices of Appeal were alive to their duty as the first appellate Court to re-appraise only the evidence that was adduced in the Court below under **Rule 30 (1) of the Judicature (Court of Appeal) Rules.**

We do not fault the Justices of Appeal for that finding.

Setting aside the consent Judgment

We find it necessary to handle the question whether the consent judgment should be set aside.

The law is now settled on the conditions for reviewing and or setting aside a Consent Judgment. In ***Attorney General & Another versus James Mark Kamoga & Another (Supra)*** the Supreme Court of Uganda laid down the principles upon which the court may interfere with a Consent Judgment as stated by the Court of Appeal for East Africa in ***Hirani versus Kassam (1952)***

EA 131 which approved and adopted the following passage from *Seaton on Judgments and Orders*, 7th Ed., Vol. 1 p. 124:

“Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement.”

Subsequently, that same Court reiterated the principle in *Brooke Bond Liebig (T) Ltd versus Mallya 1975 EA 266* and the Supreme Court of Uganda followed it in *Mohamed Allibhai versus W.E. Bukenya and Another Civil Appeal No.56 of 1996* (unreported). Therefore, it is a well settled principle that a Consent Judgment has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy.

In the instant case, there was no fraud, mistake, misapprehension or contravention of court policy found upon perusal of the record of appeal. The Consent Judgment was entered into freely by both parties and has been partially fulfilled.

When the matter came up for hearing in this Court, counsel for the appellants told Court that the parties were in advanced stages of settling the remaining loan sum of 15.6 million US\$ as per the Consent Judgment. Counsel further told Court that despite the fact that negotiations of settlement of the claim were ongoing, she did not have instructions from her client to withdraw the appeal. She therefore requested Court to proceed with the appeal maintaining the

submissions on record and that if a settlement was reached before the Judgment is delivered, then he would inform Court and they would then withdraw the appeal.

No settlement claim has been filed and neither has the appeal been withdrawn.

The fact that the 1st appellant has already paid to the 1st respondent the sum of 4,500,000,000/= UGX in settlement of its obligations under the Consent Judgment in late 2013 and counsel for the appellants averment that the 2nd appellants is working on settling the remaining loan sum of 15.6 million US\$, the appeal to set aside the Consent Judgment is contradicted.

The conduct of the appellants in this appeal indeed showed that they were simply buying time to pay off the remaining 15,600,000 US\$ owed by the 2nd appellants to the 1st respondent to satisfy the Consent Judgment.

I find no reason to set aside the Consent Judgment. The 2nd appellant should therefore respect the Consent Judgment and pay the remaining loan sum of 15.6 million US\$.

The appeal is hereby dismissed and costs are awarded to the 1st respondent in this Court and the Courts below.

I so hold.

Dated at this...4TH...day...of.....OCTOBER.....2018

.....
Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

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

Coram: *Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, Buteera, JJ.S.C*

CIVIL APPEAL NO. 01 OF 2017

Between

1. Betuco (U) Limited
2. J & M Airport Road HotelAPPELLANTS
Apartment and Leisure Centre Limited

And

1. Barclays Bank of Uganda Limited
2. Victor Mathias Ssekatawa
Joint Receiver and Manager RESPONDENTS
3. Kereto Mariam
Joint receiver and Manager
4. K.K. Security (U) Limited

(Appeal from the Judgment of the Court of Appeal of Uganda Kampala before the Honourable Justices; Bossa, JA, Kakuru JA, and Musoke, JA dated on the 7th day of November, 2016 in Civil Appeal No. 93 of 2009)

JUDGMENT OF MWONDHA, JSC

I had the opportunity of reading in draft the judgment of my learned brother Hon. Justice Buteera JSC. I agree with his reasoning, analysis and decision that this appeal be dismissed with costs for lack of merit.

Dated at Kampala this^{4th} Day of ^{October}..... 2018

.....
Mwondha

Mwondha
JUSTICE OF THE SUPREME COURT

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Arach-Amoko, Mwangusya, Opio-Aweri, Mwendha, Buteera, J.S.C.

CIVIL APPEAL NO. 01 OF 2017

BETWEEN

1. BETUCO (U) LIMITED
2. J & M AIRPORT ROAD HOTEL,
APARTMENT AND LEISURE CENTRE LIMITED

}APPELLANTS

AND

1. BARCLAYS BANK OF UGANDA LIMITED
2. VICTOR MATHIAS SSEKATAWA
JOINT RECEIVER AND MANAGER
3. KETETO MARIA
JOINT RECEIVER AND MANAGER
4. K.K SECURITY (U) LIMITED

}RESPONDENTS

(Appeal from the Judgment of the Court of Appeal of Uganda at Kampala by Justice Solomy Balungi Bossa, Kenneth Kakuru, & Elizabeth Musoke, JJA, dated 7th day of November 2016 in Civil Appeal No. 93 of 2009)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft, the judgment of my Learned brother Hon. Justice Buteera, JSC. I agree with his decision that this appeal should be dismissed and the order of costs as proposed.

Dated at Kampala this.....4th.....day of.....October.....2018.


OPIO-AWERI

JUSTICE OF THE SUPREME COURT

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

**(CORAM: Arach-Amoko, Mwangusya, Opio-Aweri,
Mwondha, Buteera; JJSC.)**

CIVIL APPEAL NO. 01 OF 2017

BETWEEN

**1.BETUCO (U) LIMITED
2.J&M AIRPORT ROAD HOTEL
APARTMENT AND LEISURE CENTRE LIMITED}:::APPELLANTS**

AND

**1.BARCLAYS BANK OF UGANDA LIMITED
2.VICTOR MATHIAS SSEKATAWA
(JOINT RECEIVER AND MANAGER)
3.KERETO MARIAM
(JOINT RECEIVER AND MANAGER)
4.K.K SECURITY (U) LIMITED }:::RESPONDENTS**

{Appeal arising from the judgment of the Court of Appeal at Kampala (Bossa, Kakuru and Musoke, JJA), in Civil Appeal No. 93 of 2009 dated 7th November, 2016 }

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Buteera, JSC, and I agree with his findings and decision that this appeal has no merit and should be dismissed for the reasons he has given in his Judgment.

As the majority of the members on the Coram agree, this appeal is dismissed with costs to the 1st respondent.

Dated at Kampala this ^{4th}.....day of ^{October}.....2018



**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 01 OF 2017**

Coram: *Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, Buteera, JJ.S.C*

1. Betuco (U) Limited
2. J & M Airport Road HotelAPPELLANTS
Apartment and Leisure Centre Limited

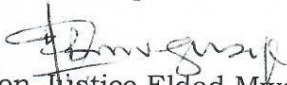
Versus

1. Barclays Bank of Uganda Limited
2. Victor Mathias Ssekatawa
Joint Receiver and Manager RESPONDENTS
3. Kereto Mariam
(Joint receiver and Manager
4. K.K. Security (U) Limited

(Appeal from the Judgment of the Court of Appeal of Uganda Kampala before the Honourable Justices; Solomy Balungi Bossa, JA, Kenneth Kakuru JA, and Elizabeth Musoke, JA dated on the 7th day of November, 2016 in Civil Appeal No. 93 of 2009)

JUDGMENT OF MWANGUSYA, JSC

I have had the opportunity of reading in draft the Judgment of my learned brother Hon. Justice Buteera, JSC, and I agree with the decision that this appeal should be dismissed with costs to the first respondent in this Court and the Courts below.


Hon Justice Eldad Mwangusya
JUSTICE OF THE SUPREME COURT