

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
*(Coram: Egonda-Ntende, Cheborion & Tuhaise, JJA)*

**Civil Appeal No. 0101 of 2011**

(Arising from High Court Civil Appeal No. 001 of 1997 at Mbarara)

**BETWEEN**

Ephraim Mwesigwa Kamugwa =====Appellant

**AND**

The Management Committee of Nyamirima Primary School=====Respondent

*(An Appeal from the decision of the High Court of Uganda, [Bashaija, J.],  
dated 8<sup>th</sup> August 2011)*

**Judgment of Fredrick Egonda-Ntende, JA**

**Introduction**

- [1] This is a second appeal against the decision of the High Court in Civil Appeal No. 01 Of 1997. The appellant instituted Civil Suit No.31 of 1984 in the Chief Magistrate's court of Mbarara at Bushenyi against the respondent seeking an order for vacant possession of the suit land, a permanent injunction restraining the respondents from using or occupying the disputed land and costs for the suit.
- [2] The trial court entered judgment in favour of the appellant. It found that the land in dispute belongs to the appellant and that the respondents are trespassers on the said land. Dissatisfied with the decision of the trial court, the respondent appealed to the High Court. During the hearing of the appeal, counsel for the respondent brought to the attention of the court that some part of the typed record of proceedings in the trial court was missing. Counsel for the respondent also wrote a letter dated 14<sup>th</sup> March 2011 addressed to the Deputy Registrar of the High Court at Mbarara seeking a formal direction as to the missing part of the record of proceedings that were availed to court. In that regard, the appellate judge found that the impugned record was incomplete and issued an order for a fresh trial and directed the file to be remitted to the trial court.

[3] Dissatisfied with the decision of the High Court on appeal, the appellant filed this appeal on the following grounds;

‘(1) The learned judge sitting as the first appellate court, erred in law when he failed to give a reasoned Judgment after ordering the parties to make and file written arguments.

(2) The learned appellate judge erred in law when he adopted an alien procedure in determining the appeal before him by issuing directions instead of a judgment.

(3) The learned appellate judge erred in law for not subjecting the matter to exhaustive scrutiny and draw his own inferences and conclusions.

(4) The learned appellate judge erred in law when he visited confusion and errors in the lower courts record on the appellant which appellant had contended that there were no such errors.’

[4] The respondent opposes this appeal.

### **Submissions of Counsel**

[5] At the hearing of the appeal, the appellant was represented by Mr. Musoke Peter Allan and the respondent by Mr. Mugisha Daniel.

[6] Mr. Musoke submitted on all the four grounds of the appeal together. He submitted that the record of proceedings of the trial court was correct and complete. That the handwritten notes constitute the missing part of the record of proceedings in the trial court thus rectifying the record. That the dates contained in the handwritten notes correspond with the dates in the typed record of proceedings. That in appeals from the magistrates’ courts to the High Court, the parties do not prepare the record of proceedings. It is the duty of the court to prepare the record and transmit it to the High Court. He further submitted that the judge who first presided over the appeal had settled this question at page 30 of the record of proceedings. To that end, that the High court failed to exercise its duty as an appellate court when it departed from the judge’s view that the record was complete.

[7] Counsel for the appellant further submitted that although in the record of proceedings the part where the plaintiff closed his case is not indicated in the typed proceedings, it is referred to at page 65 of the handwritten notes. That

Rule 86 of the Court of Appeal Rules does not require that each and every part of the record must be typed though the record ought to be complete. Counsel for the appellant referred to the letter from the respondent counsel dated 14<sup>th</sup> March 2011 on record for the submission that the matter had been settled by the judge who first presided over the matter.

- [8] He further submitted that a re-trial cannot be ordered to correct the record as it would occasion a miscarriage of justice because this is a 35 years old case that started in 1984 and one of the witnesses is 100 years old. That a re-trial would amount to punishing the appellant. Counsel for the appellant submitted that after hearing a case, court should pronounce judgement and a decree should follow. He referred to section 25 of the Civil Procedure Act for this proposition. This was the expected step after ordering submissions but instead court made the direction contrary to Article 134(2) of the Constitution. He further referred to section 23 of the Civil Procedure Act and Order 21 rules 1, 4 and 5 of the Civil Procedure Rules.
- [9] Mr. Musoke further contended that the directions issued by the learned judge are administrative in nature yet courts are not permitted to hear cases and make administrative arrangements. He cited the cases of Mulewa & Anor. vs Republic [2002] 2 EA 488 and Haiderali Lakhoo Zaver Vs Rex (1952) 19 EACA 244 for the proposition that the appellate court ought to have set aside the judgment if it is sending the matter for retrial. Counsel for the appellant prayed that the direction of the High Court be set aside and the decision of the trial court be upheld.
- [10] In reply, Mr. Mugisha submitted that a proper decision cannot be reached unless there is a full record of appeal. That the record does not show how the plaintiff closed the case and how the defendant opened its case. That the record is incomplete, not arranged in a chronological order and therefore confusing.
- [11] That according to section 8(e) of the Civil Procedure Act, the first appellate court was within its powers to order for a retrial of the matter. That in case this court finds that the case has taken long in the system, he prayed that this matter be referred to the High Court so that there can be an opportunity of revaluation of the evidence for the benefit of both parties
- [12] In conclusion, counsel for the respondent prayed that this matter be referred to the High Court for the hearing of the appeal or in the alternative to the chief magistrate' court for a retrial.

## Analysis

- [13] All the four grounds will be handled jointly since they are inter-related. This is an appeal from the order of the High Court directing the parties' file to be remitted to the Chief Magistrate court at Bushenyi for a retrial. The High Court acting in the capacity of a first appellate court found that some parts of the record of proceedings in the trial court was missing from the record availed on appeal. The learned appellate judge therefore ordered for a retrial in an order he entitled 'Directions' on the ground that the High court could only act on a proper record because it is a court of record.
- [14] What is the law with regard to an incomplete record on appeal? The law on missing record of proceedings has long been established. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances, the appellate court has the power to either order a retrial or reconstruction of the record by the trial court. See East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 33.
- [15] Where reconstruction of the missing part of the record is impossible for whatever reason but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the court may proceed with the partial record as long as none of the parties to the appeal is prejudiced. See Jacob Mutabazi v. The Seventh Day Adventist Church, Court of Appeal Civil Appeal No. 088 of 2011.
- [16] However, where reconstruction of the missing part of the record is impossible and court forms the opinion that all the available material on record is insufficient to take the proceedings to its logical end, a re-trial should be ordered. See Nsimbe Godfrey v. Uganda, Court of Appeal Criminal Appeal No. 361 of 2014 (unreported), and East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331.
- [17] It appears that handwritten notes were availed to the High Court to rectify the record. These notes were annexed to the typed proceedings and marked pages 63 to 76 and appear at pages 100 to 113 of the record of appeal.
- [18] I have with great care gone over the record of the trial including the hand written notes of the trial magistrate. I am able to piece together what happened. The proceedings of 21/01/1993 are incomplete on the original type written record at

page 20. It is clear the plaintiff's advocates was not present. Next are the partial records of the proceedings of 17/02/1993. These are on pages 21 and 22 of the initial record of proceedings. This record does not show how the proceedings of that day began.


- [19] On the 21/01/1993 it is clear that the plaintiff's counsel was absent. From the statement made by counsel for the defendants it appears he had written a letter asking for the matter to adjourned to the 2/02/1993. Counsel for the defendant prayed, **'I pray that this matter be squeezed on 2/2/1993 as prayed by him to avoid excuses.'** The order of court is missing.
- [20] However, in the hand written notes there is an order of court at page 100 of the record (page 63 of the hand written notes) which adjourns the hearing of the case to the 2/02/1993. There are also proceedings for 2/02/1993 which show that the plaintiff's counsel on that day stated that their last witness is sick and he closed the case for the plaintiff. The matter was adjourned to the 17/02/1993 for hearing of the case for the defence.
- [21] There is a complete typewritten transcript of the proceedings of 17/02/1993 starting on page 91 of the record and those of the next hearing date of 22/02/1993. The matter was adjourned to the 11/03/1993 for further hearing. The record of proceedings for 11/03/1993 is available at page 79 of the record of appeal and proceedings of subsequent dates are available until the 2/05/1996 when the court visited the *locus in qou* and the defendant closed its case. Counsel agreed to file written submissions. This is evident on page 90 of the record of appeal. Judgment was fixed for 10/06/1996 but was delivered on 9/09/1996.
- [22] After examining the record of the trial proceedings available on the record and the arguments of the parties, I am satisfied that that there is a complete record available upon which the appeal should have been considered had the learned judge on appeal carefully scrutinized the record. No doubt it would turn out to be a rather tedious and time consuming exercise. This is essential on the part of the court to ensure that we can bring litigation to an end within reasonable time and not contribute to the growth of backlog in our courts. The consequences of inaction are too traumatizing for the parties.
- [23] I would allow all the 4 grounds of appeal.

## Decision

[24] I would allow this appeal with costs. I would therefore order that this case be remitted to High Court for hearing of the appeal as the record is complete though in somewhat confusing order. Costs in the court below to abide the outcome of hearing of the appeal in that court. I would add that given the delay this case has suffered the High Court should fast track the hearing of the appeal before it.

[25] As Cheborion and Tuhaise, JJA, agree this appeal is allowed with costs and it is ordered that it be remitted back to the High Court for hearing. Costs below will abide the outcome of the hearing in the High Court.

Signed, dated and delivered at Kampala this 5 day of August 2019

  
Fredrick Egonda-Ntende  
**Justice of Appeal**

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

**CIVIL APPEAL NO. 0101 OF 2011**

**EPHRAIM MWESIGWA KAMUGWA:.....APPELLANT**

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**VERSUS**

**THE MANAGEMENT COMMITTEE OF**

**NYAMIRIMA PRIMARY SCHOOL:.....RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Mbarara delivered on 8<sup>th</sup> August, 2011 in Civil Appeal No. 001 of 1997 by Hon. Justice Bashaija)*

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**CORAM: HON. MR. JUSTICE EGONDA - NTENDE, JA**

**HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

**HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA**

**JUDGMENT OF CHEBORION BARISHAKI, JA**

I have had the benefit of reading in draft the judgment of my brother Fredrick  
20 Egonda – Ntende, JA and I agree that this appeal should succeed for the reasons  
he has set out therein.

The case should be remitted to the High Court for hearing of the appeal and the  
costs should abide by the outcome of the appeal.

25 Dated at Kampala this.....<sup>5<sup>th</sup></sup> day of.....<sup>August</sup>.....2019

**Cheborion Barishaki**

**Justice of Appeal**

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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA**

*[Coram: Egonda-Ntende, Barishaki Cheborion, Percy Night Tuhaise, JJA]*

**Civil Appeal No. 0101 of 2011**

*(Arising from High Court Civil Appeal No. 001 of 1997 at Mbarara)*

Ephraim Mwesigwa Kamugwa..... Appellant

**Versus**

The Management Committee of Nyamirima Primary School ..... Respondent


*(An Appeal from the decision of the High Court of Uganda, [Bashaija, J.]  
Dated 8<sup>th</sup> August 2011)*

**Judgment of Hon. Lady Justice Percy Night Tuhaise, JA**

I have had the benefit of reading in draft the Judgment of my brother Hon. Mr. Justice Fredrick Egonda-Ntende, JA.

I agree with his analysis, reasoning, and conclusion that this appeal is allowed with costs, and that the costs below will abide the outcome of the hearing in the High court.

Dated at Kampala this ..... day of ..... 2019.

  
Percy Night Tuhaise  
**Justice of Appeal.**