THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO. 30 OF 1997.

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA.

HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.

HON. LADY JUSTICE C.N.B. KITUMBA, JA.

BRITISH INDIA GENERAL
INSURANCE COMPANY LIMITED…… APPELLANT

VERSUS

MOHANLUL SOLANKI ALIAS
DOLATRAI MOHANLALA MULJI…… RESPONDENT

(Appeal from the Judgment of the High Court of Uganda at Kampala by His Lordship Mr. Justice E.S. Lugayizi dated the 30th June, 1997, in Civil Suit No. 266 of 1996)

JUDGMENT OF HON. A.E.N. MPAGI-BAHIGEINE, JA.

This was an appeal from the judgment and orders of the High Court at Kampala (Lugayizi J) dated 30.6.1997. The court ordered the appellant's name to be struck off the certificate of Title LRV 619 Folio 20 Plot 5 Entebbe Road.

This dispute has had a chequered history but its genesis can briefly be gleaned from paragraphs 5, 6 and 8 of the Amended Plaint:

5. Prior to the year 1995, the registered proprietor of the suit premises were JAL FAKIRJI DASTUR and DOLATRAI MOHANLAL MULJI as tenants in common in equal shares. That these former proprietors by the year 1979 were debtors to the plaintiff/company and were taking steps to settle their indebtedness to the plaintiff.

6. That after a compromise was made and in order to settle this indebtedness to the plaintiff, the said former proprietors transferred the suit premises in favor of the plaintiff and executed the transfer on the January, 1992, and the copy of the transfer is annexure "B" and consequently the plaintiff/company was registered as proprietor of the suit premises.

8. On the 7th day of March, 1996, the Chief Registrar of Titles one Jonathan N. Tibisasa directed that "the registration of The British India General Insurance Company Limited be cancelled and that the registration of Jal Fakirji Dastur and Dolatrai Mul1i be reinstated forthwith." Thereafter that is on the 11th day of March, 1996, the Plaintiff's name was cancelled from the Register Book and thereby the plaintiff lost title to the suit premises. In carrying out these wrongful acts the Chief Registrar of Titles was following the requests made by the defendant's lawyers namely Katende Sempebwa & Company Advocates, contained in Annexture "E" -G".

On 11th August 1995 the High Court struck out HCCS No. 420 of 1992 filed by Ali Mbaziira and Suud Amir Zziwa, (PW1 and PW3 respectively in HCCS No. 266 of 1996, the subject of this appeal), against (1) Mansur Hudda,

(2) Dolatrai Mohall Mulji, (the respondent in this appeal) and

(3) Piroj Amrolia as joint owners of the suit property.

It was struck out on ground of nondisclosure of a cause of action.

On 11/3/1996 the appellant's name was cancelled from the certificate of Title on the orders of the Chief Registrar of Titles issued on 7/3/1996 (paragraph 8 of the Amended Plaint).

Subsequent to that cancellation, the appellant filed Miscellaneous Application No. 655 of 1996 against the Commissioner for Land Registry/Chief Registrar of Titles challenging the

cancellation of its name. On 2/12/1996 the learned judge ordered the reinstatement of the appellant's name on ground of procedural irregularity in its removal or de-registration.
The appellant in its amended plaint filed against the respondent for continuing to disturb his possession sought a declaration from court that the respondent had no interest in the suit premises and an order for the reinstatement of its name on the register (which had been already effected through Misc. Application No. 655/1996) and loss of earnings. It is important to note that the respondent is only one of the three tenants in common of the suit property.

The respondent resisted the appellant's claim on ground of fraud on part of the appellant in effecting the transfer into its names (paragraph 6 of the written statement of Defence.) He counterclaimed the following reliefs:
(i) general damages for loss sustained;

(ii) an order of eviction against the Plaintiff, its purported agents ASLI MBAZIRA and SUUD AMIR ZZIWA and any person deriving rights from them;

(iii) (i) a declaration that the defendant is in common with the estate of Jel Fakirji Dastur, the lawful owner of the said property; and that

(ii) the Plaintiff's suit be dismissed and judgment be entered for the Defendant on the Counterclaim.

(iv) Costs.

The learned judge found the appellant to be non existent and dismissed the suit with costs.
He however allowed the counterclaim with the following orders:
"that the defendant is in common with the* estate of *Jal Farkirji Dastur, the lawful owner of the suit premises; that the plaintiff and its purported agent All Mbaziira and Suud Amir Zziwa and any person deriving rights from them be evicted from the suit premises."

The Advocates, M/s. Kityo and Company Advocates whom the judge found to have filed the suit without authority were ordered to pay the costs of the defendant/respondent. The dismissal of the appeal prompted this appeal.

The memorandum of appeal comprises five grounds:

> **"1. The trial Judge misdirected himself on point of law when he allowed the counter claim. The orders he made thereto are null and void.**
> **2. The trial Judge misdirected himself in holding that the transfer of the suit premises in favor of the appellant was fraudulent and in so doing the trial Judge was overruling himself in view of his order he made in an earlier suit Miscellaneous Application No. 655 of *1996.***
> **3. The trial Judge misdirected himself on point of law and facts when he ordered the cancellation of the appellant's name from the Land title, contrary to his earliest made orders made in Miscellaneous Application No. 655 of 1996.**
> **4. The trial Judge didn't sufficiently scrutinize the evidence regarding the identity of the respondent Mulji who was disputed by the respondent.**
> **5. The trial Judge erred in law in holding that the appellant Company did not exist and in ordering Ms. Kityo and Company Advocates to pay the costs of the suit."**

Regarding Ground No. 1 Mr. John Kityo for the appellant argued that the judge, having ruled that the plaintiff did not exist as a legal entity in Uganda, should have proceeded to strike out the suit under Order 7 rule 11(a) Civil Procedure Rules, and should not have considered the counterclaim and made orders which could not be enforced against a non existent appellant. He added that some of such orders had not been sought, like the cancellation of the certificate of title. He prayed court to set aside all the orders made as they are null and void.

In reply Professor Sempebwa for the respondent pointed out that the judge having found on evidence that the plaintiff was not in existence dismissed the suit which he was bound to do, but that since this was only one of the issues framed there was no obligation nor requirement for him to strike out the suit at that stage. Out of judicial caution the judge proceeded to consider the other issues on the evidence adduced. He submitted that it was misleading to urge that some of the reliefs granted were never prayed for. The judge, having found fraud, was under an obligation under Section 76 of the Registration of Titles Act to cancel a certificate of title induced by the fraud. Professor Sempebwa prayed

Court to reject this ground of appeal.

Regarding striking out the suit under Order 7 rule 11(a) Civil Procedure Rules, I cannot think that such a course would have had the desired finality under the circumstances of this case as the matter would have been resurrected under Rule 13 of the same Rules, apparently after amendment of some sort. I have already referred to the protracted history of this dispute. The learned judge was therefore correct to discuss all the issues. It could have been otherwise if the first issue had been raised as a preliminary objection. Then the judge could have been entitled to strike it out and dismiss it on that ground alone.

Considering the issue of entertaining the counterclaim after dismissing the main suit, I think it is clearly a cardinal principle that where an action is dismissed, the defendant may nevertheless proceed with his counterclaim and is entitled to judgment on it. ***Roberts v Booth (1893) 1 Ch. 52; Jones v Macaulay (1891) 1 QB. 221.*** Also see ***Charles Lwanga vs. Centenary Rural Development Bank, Civil Appeal No. 30/99,*** where this court reiterated the elementary principle that it was the duty of the respondent to prove its counterclaim and we criticized the Judge for not ruling on it. Though in this case the plaintiff was found to be non existent, the defendant can ordinarily counterclaim against the plaintiff along with some other persons not parties to the main action, provided that the counterclaim relates to or is connected with the subject matter of the plaintiff's claim

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The **Counterclaim pleaded as follows:**

"(a) The Defendant repeats the averments in the defence and states that the Plaintiff through its purported agents ALl MBAZIRA and SUUD ZZIWA are unlawfully occupying the suit property thereby causing loss to the Defendant and his co-owner Jal Fakirji Dastur's estate.

(b) The Defendant claims:

(i) **general damages for loss sustained;**

(ii) an order of eviction against the Plaintiff, its purported agents ALl MBAZIRA and SUUD AMIR ZZIWA and any person deriving right from them;

(iii) costs."

The respondent counterclaimed for an eviction order against the appellant and its purported agents Ali Mbaziira and Suud Amir Zziwa, PW1 and PW3 respectively.

The learned judge was therefore correct when he proceeded to grant the reliefs sought in the counterclaim against the "agents" of the appellant. The principle is that the counterclaim is a cross action and is not affected by anything, which relates solely to the plaintiffs claim. **McGowan v Middleton 11, Q B 464.**

Turning to Mr. Kityo's argument that cancellation of the appellant's Title was never prayed for, Section 76 of the Registration of Titles Act (Cap. 205) states:

"76. Any certificate of title, entry, removal of encumbrance, or cancellation, in the Register Book, procured or made by fraud, shall be void as against all parties or privies to such fraud".

Some of the incidences of fraud found by the learned judge included the following. Removal of the caveat lodged by the respondent by M/s. Kityo and Company Advocates, purportedly on the instructions of the respondent; the instrument of transfer registering the appellant was not dated; it did not indicate the consideration and did not bear the appellant's seal, nor was it signed by the respondent. The appellant's agents PW1 and PW3 contradicted themselves as to where they had signed the document.

The learned judge found the transaction to have been tainted with lies, illegality and fraud from beginning to end and proceeded to order cancellation.

I do not hesitate to say that the orders made by the learned judge were enforceable against the "agents" of the non-existent appellant. It has been held that where a person professes to contract on behalf of a principal and the principal is a fictitious or non-existent person, the person so professing to contract may sometimes be presumed to have intended to contract personally and is personally liable on the contract. ***Kelner v Baxter & Ors (1866) LR 2. C.P. 174; Gross (1971) 87 L*** Q ***R 367 (not available).***

This is essentially the common sense approach to proceed against the purported agents personally. PW1, Ali Mbaziira and Suud Amir Zziwa, PW3 would therefore be liable.

This 1st ground of appeal would fail.

I turn to Grounds 2 and 3 which were argued together.
Mr. Kityo submitted that the learned judge erred when he made an order canceling the appellant's title which he had ordered to be reinstated in Misc. Application No. 655/1996, on 2/12/1996. He pointed out that this order was never appealed and that its cancellation was not prayed for. (I have already dealt with this latter point).
It was never clear what issue Mr. Kityo sought to argue. However Professor Sempebwa who also seemed to share this view pointed out that Misc. Application No. 655/1996 which was not part of the record in tr1c lower court was decided on a purely procedural matter, irregular registration of the certificate of title; secondly that
the parties to the application were the appellant and the Commissioner for Land Registry/Chief Registrar of Titles. The respondent was never a party to the proceeding and could therefore not be affected by that decision. I do not think that Professor Sempebwa is precisely correct on this point. While it is true that the respondent was not a party to the application, nevertheless he is an interested party in the property, he was affected by the ruling indirectly.
As to the substance of the application DW1, Mr. Edward Kambwende, Registrar of Titles told the lower court that the judge had ordered reinstatement of the appellant's name because the proper procedure had not been followed by the Registrar when he was de registering it in the first place. He stated:

"… ***I would say it was an irregular registration. In this case Register was taken to court and court ordered party to be re-registered. Registrar did not put up all details of irregularities during the application because the*** **issue** ***before court was different it was whether Registration had properly registered the plaintiff, not merits of the case…*** "

It therefore becomes clear that the issues in both suits were different; I think this is most important. Fraud was not dealt with as an issue in Misc. Application 655/96. Even if it were, fraud is such a complex issue that it could not have been exhaustively delved into on a mere Notice of Motion. On this point I respectfully agree with and desire to adopt the language of my

senior Brother Oder JSC. In the application evidence was by way of affidavit. There were no witnesses to testify and be cross-examined. There were no pleadings and no issues framed. Fraud has to be pleaded and particulars given. Obviously sufficient material before him on the Notice of Motion to determine and rule on the fraud See ***Sanyu Lwanqa Musoke vs. Yakobo Ntate Mayanja Civil Appeal No. 59 of 1995 (SCU),*** where the learned trial judge attempted to tackle the issue of fraud on an application instead of a main suit and reached an erroneous finding, by ordering removal of a caveat from the wrong piece of land.

Professor Sempebwa invited our attention to the case of ***AIwi Abdulrhman Seggof vs. Abed Ali Algered (1961) EA 767*** in support of his contention that it was not open to Mr. Kityo to raise the issue of Misc. Application 655/1996 at this stage, on appeal. For reasons indicated above I do not find this authority useful. It deals with circumstances under which a point of law, which has not been argued in the court below, may be taken on appeal. The circumstances of the issue under discussion differ widely from the authority cited. The learned judge was justified in canceling the title in the main suit. Indeed he remarked that the circumstances of Misc. Application 655/1996 had been overtaken by events of fraud which was unraveled by the evidence in the main suit — Fraud avoids everything. ***Adams v Adams (1892) 1 Ch. D. 869,*** the judge therefore had no other option, but to cancel Title.

Grounds No. 2 and 3 would also fail.

As regards Ground No. 4 that the respondent's true identity was never established, Mr. Kityo argued that the respondent was an impostor with three different passports and different signatures, which he uses on different occasions. He pointed out that PW1, PW2 and PW3 who knew Mulji said that he was a very old man and was not the one in court. He said that the respondent in court was a criminal who was wanted by Police. Professor Sempebwa contended that the burden was upon the appellant to prove that the respondent was not Muiji but its witnesses gave contradictory evidence. He prayed for this ground to be dismissed.

The learned judge found: ***"In the circumstances I am of the view that the plaintiff's side did not prove on a balance of probabilities that the defendant was not the real Mulji".***

The learned judge was alive to the fact that PWI and PW3 were interested parties who once filed HCCS No. 420/92 as agents of the appellant. Their evidence had to be critically examined. Between them their evidence regarding Mulji's identity was so contradictory that PW3 at one point told this court:

> ***"Although PW2 said Muiji went*** in ***1972 court can decide which of us 2 is telling the truth."***
>
> Most importantly PW3 testified:
>
> ***"It's true the defendant is a brother of the wife of Pratful Patel. Mulji is in Mombasa/Pamba Tajan. I am in contact with him. Muiji went to Mombasa when he acquired factory around 1980……***
> ***Pratful's wife is in Kampala."***
>
> I entirely agree with the learned judge's finding that it was a little strange that the witnesses could have failed to produce the real Mulji from Mombasa whom they claimed was in touch with them constantly, let alone summoning the Pratfuls, who they claimed were resident in Kampala, to lend credence to their case.

The respondent's story on the other hand was that he had two surnames Solanki as well as Tankama Mulji the name of his grandfather, which he used interchangeably. I concur/agree with the learned judge that the appellant failed to discharge the burden of proving that the respondent in court was not the real Mulji, co-owner of the suit property.

This ground of appeal would also fail.

Concerning ground No. 5, Mr. Kityo attacked the learned judge's finding that the appellant Company did not exist and also in ordering M/s. Kityo and Company Advocates to pay the costs of the suit. He submitted that the appellant was incorporated in India and registered here under the Company's Act. He pointed out though that it was wound up in India but not registered here. He curiously submitted however that there was insufficient evidence that the Company had been wound up in India as the Court had
not been furnished with a winding up order in accordance with Section 372(2) of the Company's Act.

Regarding the order that he pay the respondent's costs personally as he had filed the suit without authority, Mr. Kityo submitted that the order was made after he had handed over the conduct of the case to Mr. Kagwa. He was therefore condemned without being heard, which was contrary to natural justice.
Professor Sempebwa submitted that there was sufficient evidence for the judge to find that the appellant was not in existence.
Regarding the order for the firm to pay costs, Professor Sempebwa pointed out Mr. Kityo could not challenge it on this appeal, as he is not a party to the appeal. He should have taken appropriate steps by way of a separate reference. He also pointed out that when proceedings are brought on behalf of a company instructions must be given in writing.

The learned judge found:

"Certainly, if the mother company in India ceased to exist, and PWI and PW3 have not* yet *registered here, then it is more than obvious that the plaintiff
does not exist as a legal entity in Uganda. And consequently it cannot lawfully sue or be sued."
It is a little puzzling why Mr. Kityo's submissions differed from the evidence of his clients.

The evidence of PW1 was as follows:

"I decided to bring this suit on behalf of the company I gave instructions (written* ones)** ***to Mr. Kityo of Kityo & Company Advocates to file this matter. It was urgent case. There was no board meeting before hand. There was no general meeting before hand. I did all this as agent/director of the plaintiff Company……
The plaintiff is not incorporated in India now. We discovered that was no longer registered in India. This was in 1975. We have applied to incorporate in Uganda. We have taken 2 months to do so, but have not fulfilled the formalities……"
"The plaintiff Co. has no share-holders therefore the plaintiff company seized to exist (Sic)."

The foregoing was echoed by PW3 as follows:

> ***"I am aware we tried to in corporate the plaintiff here but through bureaucracy we have not succeeded."***

There was therefore more than ample evidence from PW1 and 3° PW3 that the plaintiff did not exist at all contrary to Mr. Kityo's submissions, strange as it may be.

Regarding the contention that the learned judge erred in ordering Mr. Kityo to pay the respondents' costs of the suit personally, obviously this was the corollary of the judge's finding that since the plaintiff/appellant did not exist, it could neither sue nor be sued, which finding cannot be assailed. Nobody could therefore authorize institution of a suit on its behalf.
I would however add that Mr. Kityo should have challenged this order by way of a separate suit/reference, and not by this appeal to which he is not a party, but only counsel. The order as to costs is affirmed.

In the result I would dismiss the appeal with costs.

Dated at Kampala this 23rd day of May 2000.

A.E.N Mpagi-Bageine

Justice of Appeal

JUDGMENT OF G.M. OKELLO, JA.

I have read in draft the judgment of Mpagi-Bahigeine, JA and I agree. As Kitumba, JA also agrees the appeal is dismissed on the terms she proposed.

Dated at Kampala this 23rd day of May 2000.

G.M. OKELLO
JUSTICE OF APPEAL

JUDGMENT OF C.N.B. KITUMBA, JA.

I have read in draft the judgment of Mpagi-Bahigeine, J.A. I entirely agree with it.

Dated at Kampala this 23rd day of May 2000.

C.N.B. Kitumba

Justice of Appeal.