THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODER-JSC, MULENGA - JSC, MUKASA-KIKONYOGO; JSC) CIVIL APPEAL NO.9 OF 1999 BETWEEN

1. DAVID MUHENDA
2. ADMINISTRATOR OF ESTATE OF
PERSIS OKAO DAVID
MUHENDA::APPELLANTS
3. DAVID NSUBUGA
4. JAMES MUGENYI

AND

MARGARET KAMUJE :::RESPONDENT

(Appeal from the decision of the High Court at Fort Portal (Rajasingham QC) dated 12-7-95, in H. C. Civil Appeal No. DR. MPF 1 of 1994)

JUDGMENT OF ODER JSC

This is a second appeal. It is brought by the four appellants against the appellate decision of the High Court at Fort Portal (Rajasingham, J) on 12-7- 95 given in favour of the respondent.

The case has a chequered history, made worse by confusions arising from the Courts below due either to inaccurate or missing parts of the record of proceedings. After spending a lot of time in my efforts to unravel it, the picture which emerges is still a hazy one.

Be that as it may, a brief background to the appeal is this. Due to a land dispute between them, the respondent sued her father, Israel Karasuma, in a Grade II Magistrate's Court at Nyaburara in Civil Suit No. 48 of 1976.

The trial Magistrate Grade II accepted the respondent's evidence, and rejected the evidence for the defendant.

On the basis of the three issues framed at the trial of the suit the trial Magistrate found for the respondent, inter alia, as follows in his judgment dated 2-7-76:

(i) The disputed kibanja was given to the respondent by Absolomu Nyabugabwa. She was therefore, the owner thereof.

(ii) The disputed kibanja did not revert to Absolomu Nyabugabwa's heir, Albert Jawa (DW2) on Absolomu's death, contrary to Albert Jawa's allegation in his testimony.

(iii) The defendant did not have a better title to the kibanja as he had his own kibanja adjacent to the one in dispute.

The trial Magistrate did not visit the locus in quo. He apparently relied on the description of the boundary of the suit land as given by the respondent in her testimony.

The defendant in the suit appealed to the Chief Magistrate Fort Portal, against the judgment of the trial Magistrate, but then later withdrew the appeal.

Thereafter the respondent failed to obtain vacant possession of the kibanja judged in her favour, because certain persons unknown to her were in occupation of the land. Eventually an application made by her for execution of the decree in the suit was heard on 14-7-93, by Magistrate Grade I, Moses Mutazindwa Katorogo, who reserved his ruling on the application to 27- 7-93. Before the ruling was delivered on that day, however, the respondent's Counsel in those proceedings, Mr. Nyamutale, was served with an application by which some of the persons occupying the suit property were objecting to execution of the decree, under Order 19 rules 19 and 20 of the Civil Procedure Rules.

According to the Notice of Motion by which the objection application was made there were six objectors/applicants namely - (1) Persis Okao, (2) David Nsubuga, (3) James Sabiti Kachope, (4) David Muhenda, (5) Mr. Nyamutale and (6) Mr. Mugenyi. The application was supported by only one affidavit, deponed by David Muhenda, the 4th objector. In the end the application was decided on the basis of this affidavit alone. There was no affidavit in reply from the respondent's side.

Apart from records of a series of adjournments for purposes of visiting the locus in quo, the record of the objection proceedings does not show that submissions were made either in support of, or in opposition to, the objection application.

The learned Grade I Magistrate visited the locus in quo, but the record of proceedings does not indicate what transpired there. He also drew up a sketch plan of the locus, but it was subsequently lost and all efforts to trace it were fruitless.
In his ruling on the objection application, the learned Grade I Magistrate:

1) Allowed the objection application of the 1st, 2nd, 3rd and 4th objectors.
2) Dismissed the objection application of the 5th and 6th objectors.
3) Granted the respondent's application for execution of the decree in the original suit against the 5th and 6th objectors, and issued a warrant of vacant possession against them.

In his ruling, the learned Grade I Magistrate said that the suit land was well defined and yet he proceeded to uphold the objections of four of the objectors and refused the objections of two of the objectors.

Thereafter, it appears that all the six objectors in question appealed to the High Court at Fort Portal in Civil Appeal No. DR MFP 1/94. The same appeal file also bears the number 52 of 1994. This is only one of the many confusions in this record of appeal. The only Memorandum of Appeal available on record cites *"James Mugenyi"* only as the *"Appellant"* and *"Margaret Kamuje"* (the present respondent) as the *"Respondent."* The Memorandum of Appeal in the High Court stated as follows:

"MEMORANDUM OF APPEAL

The above named Appellant being aggrieved and dissatisfied with the Ruling and Order made by the Magistrate Grade 1 dated 10th December 1993, in which the Appellant's land was ordered for Execution to the Respondent appeals to this Court on the grounds that:

1. The learned Magistrate erred in law and in fact in holding that Appellant and one Nyamutale fell within the suit land - under Civil Suit No. 48/76.
2. The learned Magistrate failed to scrutinise the judgment and orders of Civil Suit No. 48/76 otherwise he would have found as a fact that the late Karasuma had a separate piece of land apart from the one in dispute.
3. The learned trial Magistrate arbitrarily held against the Appellant when at the locus-in-quo the Respondent purported to claim land in the occupancy of several people thus showing that her claim was all along a fraud.

4. The learned Magistrate erred in law in not listening to all the objectors and their witnesses thus arriving at a wrong decision against the appellant.
5. The learned Magistrate erred in law in failing to appreciate that the Appellants were bonafide purchasers for value who had been on the land for more than 23 years.
6. The learned Magistrate erred in law in failing to appreciate that execution was time-barred.
7. The Appellant will pray that further evidence be adduced in this Court.
WHEREFORE the Appellant prays that this appeal be allowed with costs."

The respondent appeared in person and the other appellants/objectors were represented by Mr.Musana as their Counsel.

The learned High Court Judge dismissed the appeal by the six appellants! objectors, concluding his judgment thus:
"1 therefore, give judgment for the plaint ff/respondent to this appeal, Margaret Kamuje, and decree that the land lying between the boundaries herein before described by me is the land in respect of which she sought execution. I dismiss the objection of the six objectors appellants.

1 grant Margaret Kamuje c application for execution and order that it be carried out forthwith. 1 also grant her costs of these hearings into the objections against all the objectors."

The present appeal is against that decision. Only four of those who apparently appealed to the High Court have now appealed to this Court.

Four grounds of appeal are set out in the Memorandum of Appeal as follows:
"1. The learned Judge erred in law in making orders interfering with the decision of His Worship Moses Katorogo made in an objector application whereby the learned Magistrate preferred objections of the first, second and third appellants because of the following matters.
(a) The said appellants were not party to Civil Appeal No. 52 of 1994.
(b) The respondent Margaret Kamuje had notified an appeal or cross-appeal against the findings of His Worship Katorogo to contest their successful objections

2. The learned Judge on Appeal did not take into account the principles governing the resolution of objector applications and thereby arrived at a wrong decision in respect of the claims of all the appellants.

3. The learned Judge on Appeal erred in law in exercising his appellate jurisdiction in the following matters:

(a) The learned Judge took fresh evidence by visiting the locus as f he were a Court of first instance.

(b) The learned Judge wrongly disregarded the evidence recorded by the learned Magistrate in the course of the inquiry required by principles governing objector applications and instead relied on the evidence given in separate trial proceedings between the respondent and one Israel Karasuna, a case to which the objectors were not party

(c) In the absence of an appeal by the respondent contesting the Magistrate findings in relation to the position of the boundaries it was not open to the learned Judge on Appeal to revisit the findings of fact made by the Magistrate.

4. The record of the objector proceedings in the Magistrate's Court shows that the Magistrate had made a sketch as a result of his visit to the locus in quo, which is lost and cannot be found. Part of the evidence on record is therefore, missing to the prejudice of the appellants in the conduct of their appeal.

It is proposed to ask the Honourable Court to allow the appeal and grant the following orders:

a) An order setting aside the judgment and decree of the High Court.

b) An order restoring the findings of the Court of first instance in respect of the objections of the first, second and third appellants.

c) An order reversing the findings of the Court of first instance in respect of the objection of the fourth appellant.

d) In the alternative, an order for rehearing of the appeal and/or objector applications.

e) Costs of this appeal."

Mr. Ebert Byenkya, learned Counsel for the appellants abandoned ground four of the appeal.

Under the first ground of appeal, Mr. Ebert Byenkya, submitted that there having been only one appellant before him, the learned appellate judge erred to have interfered with the ruling of the learned Grade I Magistrate which was in favour of the present first, second and third appellants in the objection proceedings. The learned Grade I Magistrate upheld their

objections. They were not parties to the appeal in the High Court, as there was only one appellant in that appeal, namely James Mugenyi. This was evident from the Memorandum of Appeal dated 4-l-94, and filed in the High Court at Fort Portal on 10.1.194. According to the provisions of 0.39 r.l of Civil Procedure Rules an appeal to the High Court is instituted by filing a memorandum signed by the appellant or his advocate.

Secondly, the learned Counsel contended that certain passages in the proceedings before the High Court at the hearing of the appeal tend to support the view that there was only one appellant.

Thirdly, it is contended that as the present first three appellants were not parties to the appeal before him but were parties to the proceedings in the court from which the appeal arose, the learned appellate judge ought to have followed the procedures stipulated in 0.39., rr.2.ll, 12, 13, 14 and 17 of the C.P.R.

As I understand them, only the provisions of rules 1,2, 3, and 17 appear to be relevant to the learned Counsel's submission in this regard. They provide:
"0.39 r. I (1) Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the Court or to such officer as court shall appoint in that behalf
(2). The memorandum shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

2. The appellant shall not, except by leave of the court, argue or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to grounds of objection set forth in the Memorandum of Appeal or taken by leave of the Court under this rule:
Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had sufficient opportunity of contesting the case on that ground.

3. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs and all the defendants any one of the plaintiffs or of the defendants may appeal from the whole decree, and

thereupon the High Court may reverse or vary, the decree in favour of all the plaintiffs or defendants, as the case may be."

"0.39. r. 17. Where it appears to the Court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent."

Mr. Byenkya's further submission under the first ground of appeal is to the effect that in view of the provisions of the rules of Civil Procedure to which I have just referred the appellate Judge in the instant ease should not have decided the appeal before him without hearing the persons who were parties to the objection proceedings but not parties to the appeal because, as it is, their interest were prejudiced by the decision in the appeal.

Ms. Khalayi, the learned Counsel for the respondent supported the learned appellate judge's decision. Under the first ground of appeal, she submitted that according to the record of proceedings in the High Court Mr. Musana represented more than one appellant in that court. He was recorded as appearing for *"appellants including objectors 1-4 and appellants 5 and 6."* Further, in the course of his submission, Mr. Musana was recorded as having referred to *"appellants"* in several incidences. Consequently the learned appellate Judge in his judgment also referred to the persons who appealed as *"appellants*, "meaning that there were more than one appellant.

Secondly the respondent's learned Counsel contended that the file in this case is incomplete. The learned appellate Judge said so on page 9 of his judgment. If this were so, it is contended, it cannot be said for certain that there were no other Memoranda of Appeal in the High Court. In the circumstances, therefore, the learned Counsel contended, all the six original objectors/applicants before the learned Magistrate Grade I had appealed to the High Court, and the learned appellate Judge, Rajasingham 3, dismissed their appeal.

Ms. Khalayi further submitted that even if three of the present appellants did not appeal to the High Court, rule 27 of Order 39 of the Civil Procedure Rules empowers the High Court to exercise its powers in favour of the party or parties who has not filed a Memorandum of Appeal or a cross-appeal. The learned Counsel also referred to an equivalent rule of the

Indian Civil Procedure Rules as discussed on page 591 of *A.I.R.* where it is said that in exceptional cases the rule enables an Appellate Court to pass such decree as ought to have been passed, or as the nature of the case may require, even if such decree would be in favour of the parties who have notified any appeal or cross-objection against the lower Court's decree.

In the circumstances, Ms. Khalayi contended, the appellate Judge properly made the order interfering with Grade I Magistrate is order upholding the objections of the present first, second and third appellants in the manner he did.

The method of preferring an appeal in the High Court is clearly provided for in 0.39, r.1 of the C.P.R. The provisions of which appear to be mandatory.

In the instant case, the appeal to the High Court, on the face of it, appears to have been instituted by only one Memorandum of Appeal in which *"James Mugenyi" was* cited as the appellant, and *'Margaret Kamuje* "as the respondent.

However, there are credible indications that all the six objectors whose objection application had been tried by Magistrate Grade I, Moses Mulindwa Katorogo, were appellants in the High Court, or at least the Memorandum of Appeal dated 4-7-94 and filed in the High Court on 10-1-94 was intended to be on behalf of all the original objectors. The following reasons appear to support that view.

First, in paragraph *5* of the Memorandum of Appeal it was stated:
"5 The learned Magistrate erred in law in failing to appreciate that the appellants were bona fide purchasers for value who had been on the land for 23 years." (Underlining is mine)

Secondly, in the titles of the appellate High Court proceedings, and the judgment of the appellate Judge, all the six original objectors/applicants were listed as
"Applicants/Appellants."

It is doubtful in my view, if the learned appellate Judge would have signed the proceedings before him and his judgment so titled if there was only one appellant.

Thirdly, at the commencement of the hearing of the appeal, the appellate Judge's notes of proceedings read:

"13-6-95 Mr. Musana for the appellants. Plaintiff in person/respondent. Mr. Musana appears for appellants including objectors 1 - 4 and appellants 5 and 6.

The plaintiff respondent appeared to suggest that her land had a structure as it is now. Since appellants maintain that they have permanent structures on the land, it seemed possible that what she was claiming was a land other than the portions occupied by that appellant" (The underlining is mine)."

Fourthly, in his submission as Counsel for the appellants in the High Court Mr. Musana said, inter alia:

"Plaintiff sold her portion of the land to Tigwezire. Appellants do not dispute that plaintiff is entitled to a portion of Nyabugaba's land, but it is not this portion. It was land in Karasuma 's portion."

Further on in the record proceedings in the High Court Mr. Musana is recorded to have said this in his submission:

"Ground of appeal is failure to hear appellants. He acted solely on affidavit. Ground No. 5 appellant's bona fide purchasers of 23 years standing in 1993."

Fifthly, certain passages in the learned appellate Judge's judgment also indicate that there were more than one appellant before him. For instance, at the commencement of the judgment he said:

"This is an appeal from a ruling by the then Grade one Magistrate, Mr. Katorogo on an application for execution by the respondent Margaret Kamuje and objection to the grant of execution by these six objectors."

Another passage of the judgment reads:

"The present surviving objectors Nyamutale and Mugenyi appealed the ruling of Magistrate Katorogo..."

Sixthly, the manner in which the appeal in the High Court was instituted appears to be comparable with the manner in which the objection application was brought before the learned Magistrate Grade 1, Katorogo. Only one of the objectors, David Muhenda, swore the

affidavit in support of the Notice of Motion for all the other five objectors/applicants. Did James Mugenyi in instituting the appeal in the High Court in his names alone merely follow a practice which had begun by the manner in which the objection application was instituted? There is no answer to that question but the comparison interesting.

The four were:
1. Parsis Okao
2. David Nsubuga
3. James Sabiiti Kachope, and
4. David Muhenda.

In the peculiar circumstances of this case, I think that the powers of the High Court provided for in rules 3, 17 and 27 of Order 39 of the C.P.R. would support the decision of the learned appellate Judge.

I have already set out the provisions of rules 3 and 17. This rule applies to the situation in the instant case if only one of the original objectors appealed to the High Court as contended by the present appellant's learned Counsel.

Rule 27 provides:
"The High Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or Order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal"

Although due to the underlined expression, the rule appears to apply only to respondents, my view is that it also applies to appellants by analogy.

In an exceptional case such as the present rule, 27 in my view, empowers the High Court in its appellate jurisdiction to pass such a decree as ought to have been passed, or, as the nature of the case requires even if such a decree would be in favour of parties who have not filed any appeal or cross-appeal against the lower Court's decision. Even if the respondent did not cross-appeal, the power may be exercised in her favour.

The present case is exceptional because of the very long delay which occurred from the time the respondent obtained judgment in her favour in the suit she filed in 1976 to the time the appeal to the High Court was filed and heard on *13-06-95.* She obtained the decree on 2-7-76. Thereafter her efforts to enforce the decree by attachment procedures were frustrated by persons who, apparently, settled on the disputed land after she obtained judgment. Her efforts to evict the persons were apparently resisted by force.

Another reason, in my view, for the case being exceptional is that the learned Grade I Magistrate who upheld four of the six objector's applications against the respondent's application to execute her decree did not indicate

when the various objectors/applicants acquired interest in or possession of the respective areas of land which they claimed as the basis for objecting to execution of the decree obtained by the respondent.

In the circumstances, my view is that, the orders made by the appellate Judge in the instant case were within his powers to make. He, therefore, properly interfered with the Orders of the Grade I Magistrate which upheld four of the original objectors' applications.

For the reasons given, the first ground of appeal should fail.

In his submission under the second ground of appeal, Mr. Byenkya referred to rules 55 to 60 of Order 19 of the Civil Procedure Rules. He contended that in objection proceedings, the decisive factor is *"possession"* of the subject matter of the objection when an objection to an attachment is made. The Court should carry out an investigation to determine whether the property the attachment of which is being objected to is in the possession of the judgment debtor on his own account or on account of some other person. For this proposition, Mr. Byenkya relied on certain decided cases, namely; *Sokempex Interstate Co. Ltd. v. Eurafro General Import and Export Co. Ltd. (1981) HCB 75 Chotabhai M Patel v. Chatrabhai Patel & Anor. (1958) E.A. 743* and *Harilal & Co. v. Buganda Industries Ltd. (1960) E.A. 318.* Learned Counsel contended that in the instant case, the learned appellate Judge erroneously considered the appellants' legal title to the disputed kibanja. Such investigation would be appropriate only under rule 60 of Order 19 of the C.P.R. Under the provisions of rule 60, where an objection is upheld, the party against whom an order is made may institute a suit to

establish the right which he claims in the property in dispute but, subject to the result of such a suit, if any, the order shall be conclusive. In the instant case, Counsel contended, the order upholding the objections of the first four objection applicants ought not to have been disturbed by the learned appellate Judge, because the objectors (who are the appellants in the instant appeal) were in possession of the disputed suit property.

In reply, Ms. Khalayi submitted that the decided cases on which the appellants' learned Counsel relies and others he did not refer to also support the view that in objection proceedings the party objecting has to establish whether he is the owner of the property in dispute or whether he holds it on trust for the judgment debtor or for some other person or has some interest in the property. The Court must consider this before making an order against the objector.

Ms. Khalayi also relied on the case of *Uganda Mineral Waters Ltd. v. Amin Piran and Kampala Minerals Ltd. (1994 - 95) HCB. 87.* So, the learned Counsel contended, the factor of ownership of the disputed property is also important and must be taken into account by the Court investigating an objection to execution of a decree.

The rules of Civil Procedure which are relevant to this matter are, in my view, rules 55(1), *56, 57,* 58 and 60 of Order 19. The rules provide:

"55(1) Where any claim is preferred to, or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.

Provided that no such investigations shall be made where the Court considers that the claim or objection was designedly delayed.

(2)……..

56. The claimant or objector shall adduce evidence to show that at the attachment he had some interest in the property attached.

57. Where upon the said investigation, the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, in the occupation of a tenant or other person paying rent to him, or that being in possession of the judgment debtor at such time, it was so in his possession not on his own account or as of or in trust for some other, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

58. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some person in trust for him, or in occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

59.……..
60. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, f any, the order shall be conclusive."

Application of the principles and procedures contained in these rules were considered in the case of *Chotabhai M Patel* (supra), *Sokempex Inter-State Co. Ltd.* (supra) and *Uganda Mineral Waters Ltd.* (supra); They may be summarised as follows:

(i) **Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such a property is not liable to attachment the Court shall proceed to investigate the objection with the like power as regards examination of the objector, and in all other respects as** if **he was a party to the suit.**

(ii) The objector shall adduce evidence to show that at the date of the attachment he had some interest in the property attached.

(iii) The question to be decided is, whether on the date of the attachment, the judgment debtor or the objector was in possession, or where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own **account or in trust for the judgment debtor. The sole question to be investigated is, thus, one of possession of, and**

some interest in the property.

(iv) Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for

the judgment debtor or some other person. To that extent the title may be part of the inquiry.

In the instant case, the present appellants were amongst six objectors who objected to execution by eviction from the suit property which had been decreed to the respondent in the original suit. The grounds of the objection application as stated in the notice of motion and the supporting affidavit were to the effect that the suit property was not a subject matter of the Civil Suit MFP.48 of 1976 and hence should not be subjected to execution; that the decree holder (the respondent) was not the proprietor of the suit property, and that the decree holder had no cause of action against the objectors; and that the objectors were in possession because they were also the owners of, or part owners, thereof.

The objection was based, therefore, on a claim of legal title as well as possession and the learned Grade I Magistrate decided it on that basis. He found that the land owned by and possessed by the first to the fourth objectors was outside the land claimed for execution; whereas the land claimed by the fifth and sixth objectors belonged to the respondent.

In the High Court, the learned appellate Judge also based his decision on possession and title of the objectors and on the respondent's title.

In the circumstances, I do not think that the learned appellate Judge based his decision on wrong principles.

For those reasons, the second ground of appeal should also fail.

Under the third ground of appeal, Mr. Byenkya submitted that the learned appellate Judge took fresh evidence by visiting the locus in quo. He said that the visit was futile, yet he relied on what he had seen and heard from the parties at the locus. In taking additional evidence, as he did, the learned appellate Judge did not comply with the provisions of rules 22, 23 and 24 of Order 39, which govern the principles and procedures which the High Court should follow in admitting additional evidence on appeals. Mr.

Byenkya also relied on *Alice Janet Namisango v. Chrisestom Galiwango (1986) HCB. 37:* and *James Nsibambi v. Lovinsa Nankya (1986) HCB. 87.*

-

In her reply under the third ground of appeal, Ms. Khalayi submitted that the appellate Judge's visit of the locus-in-quo was proper, because there was no record of the Magistrate's visit of the locus.

The appellate Judge went there only to match the definition of boundaries of the suit land as set out in the Magistrate's judgment. Regarding ground 3(b) of the appeal Ms. Khalayi submitted that the learned appellate Judge had powers to review the evidence for himself in order to determine the matter. Learned Counsel relied on *Selle v. Associated Motor Boats Co. Ltd. (1968) E.A. 223* and *Sanyu Lwanga Musoke v. Sam Galiwango, Civil Appeal No. 48 of]995* (SCU) (unreported). In the instant case, she contended, David Muhenda's affidavit dated 19-2-93, filed in support of the objection application, stated that part of the land sought to be handed over to the respondent in execution of the decree formed part of the Estate of Kezia Rujumba. The claim could not have been true because Kezia Rujumba had been struck out as a co-defendant in the original suit because she did not own the suit property. In order for the appellate Judge to conclusively determine the case, he had to look at the record of proceedings before the trial Grade II Magistrate, together with the affidavit which alleged that the disputed land did not include the land originally owned by Kezia Bokara. The learned appellate Judge also had to compare the boundaries of the suit property as described in the evidence before the trial Court.

The learned Counsel concluded that in order for the learned appellate Judge to reach a conclusive decision, he had to scrutinise all the evidence on record.
Rules 22, 23 and 24 of Order 39 of the C.P.R. provide as follows:
"22(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court, but if: (a
the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
(b) the High Court requires any document to be produced of any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

The High Court may allow such evidence or document to be produced or witness to be examined.
(2) Where any additional evidence is allowed to be produced by the High Court the Court shall record the reason for its admission.

23. Whenever additional evidence is allowed to be produced, the High Court may either take such evidence or direct the Court from whose decree the appeal is preferred or any other Magistrate c or subordinate Court to take such evidence and to send it when taken to the High Court.

24. Where additional evidence is directed or allowed to be taken the High Court shall specify the points to which the evidence is to be confined and record on its proceedings the parts so specified."

In the instant case, the learned appellate Judge, indeed, visited the locus-in- quo. In his notes of the proceedings he said:

"At the invitation of the parties and since it was within the City limits, I visited the land and asked the respondent to show me the boundaries of the land she claimed. When she did so, she included the house of the appellants. She said she had meant that she had no house on the land. When I read out the description of the land as claimed by her and recorded in her evidence in 1976, She said the Magistrate had recorded something other than she had meant: The visit having proved futile, I returned to Court."

In his judgment, the learned appellate Judge stated the reason for his visit to the locus-in-quo, to be to match the definitions of the land as set out in the record of the case and to which the trial Court's judgment related. I understand this to mean to compare the boundaries on the ground with the evidence at the trial. Hence he said this:
"I have visited the scene and found no difficulty in matching the definition of the boundaries of the land set out in the record in this case and to which the judgment related.

The learned appellate Judge then went on to describe the boundaries of the suit property as he matched them with the descriptions given by the parties in evidence at the trial; and concluded his the judgment as I have already set out in this judgment.:

In the circumstances, my view is that the learned appellate Judge did not visit the locus-in-quo to take additional evidence and that no additional evidence was taken. If what the respondent apparently said at the locus-in-quo, amounted to additional evidence it did not assist her case. The learned appellate Judge found the visit futile. Further, in view of the purpose of the visit as stated by the learned appellate Judge, the .visit was not intended for taking additional evidence.

In the case of *Alice Janet Namisango* (supra). Odoki J. (as he then was) is reported to have said:
"By visiting the locus-in-quo an appellate Court would be descending into arena of the trial Court and taking additional evidence which can be allowed only in exceptional circumstances as indicated above. It is a procedure which should not be indulged in by appellate Courts save in exceptional circumstances."

I agree with that statement although it appears to have been made obita. In any case, I think that the present case was an exceptional one. In this connection this case is an exceptional one because the Court from whose decision the appeal to the High Court arose, did not make notes of what happened at the locus when that Court visited it or, if it did, such notes are not available on record. Secondly the sketch drawing of the locus in quo which that Court made got lost and was not available to the appellate High Court Judge. Lastly the findings of that Court regarding the boundaries of the disputed kibanja were inconsistent with the boundaries as found by the trial Court according to the evidence adduced by both sides to the suit.

The learned appellate Judge should have, of course, made notes of what transpired at the locus in quo during his visit there. He apparently did not. To my mind, his failure to do so did not occasion a miscarriage of justice.

Next, the duty of the learned appellate Judge as the first appellate Court in this case. In that capacity, he had a duty to submit the evidence as a whole to a fresh

and exhaustive examination and was entitled to reach his own decision on the evidence. A first appellate Court must weigh conflicting evidence and draw its own conclusions. It is not merely to scrutinise the evidence to see if there was some evidence to support the lower Court's findings and conclusions, and only then can the Court decide whether the trial Court's findings should be supported. In doing this the Court should make due allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses. In short, an appeal from a trial Court is by way of a retrial and appellate Court is not bound to follow the trial Court's finding of facts if it appears either that it failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with evidence generally. See *Selle and Another v. Associated motor Boat Company Ltd. and Others 1968) EA. 123; Pandya v. R. (1957) E.A. 336* and *Sam Galiwango, Civil Appeal No. 48 of 7995* (SCU) (unreported).

In the instant case the learned appellate Judge was hearing an appeal against orders upholding objection applications. This was unlike a second appeal. The learned appellate Judge had before him evidence from the Court which tried and decided the original suit and the evidence on the basis of which the objection proceedings were based and decided. In the circumstances, the duty of the learned appellate Judge on the matter was equivalent to that of a first appellate Court. Such duty is restated in the cases to which I have already referred in this judgment.

The crucial issue in this case, in my view, is the identity of the suit property (the kibanja) which the trial Grade II Magistrate decreed to the respondent. Why did the learned Grade I Magistrate uphold the claim of four objectors regarding the suit property, and in respect of which the respondent was enforcing the decree passed in her favour? Were the objectors claiming the same or parts of the same suit property?
In her evidence, describing the Kibanja, which the trial Grade II Magistrate accepted, the respondent said this:

"In 1956, April 12, my uncle Absolomu Nyabugabwa gave me a kibanja at Harukoto village. When he gave me the kibanja, there was Kasi Byabafumu and Sabiiti Kagoro. He showed me that the boundaries of the kibanja. In the East the boundary is Fort Portal Kasese Road, in the West there is a Jack and in the South there is Kezia

the mother of D.I who was struck out the boundary is fence and path.
The defendant wants to take the whole kibanja .. ... I left the defendant who was my real father in the Kibanja I returned and found the defendant still in the house.... I did not wish to have a dispute with my father. I sold the house to Francis Tuwezire for . 2500/=. Francis entrusted the house to Mary Silver, who was struck out. After sometime, Francis instructed Mary Silver to demolish the house and it was demolished. I then wrote to Francis copy to Kezia to the effect that the argument was attended since the house was demolished. In August 1975, I took porters to clear where I wanted to build another house, Mary Silver came with other people armed with pangas and sticks. They chased me away.

In cross-examination, the respondent said:
"I never sold the house when it was .till new. It is Vanisi Rujumba my aunt who accused me for having pledged the house. She gave me 7 iron sheets and 4 windows. She had prevented me to pledge it. I lost the suit and the house was declared to belong to 2 of us with that aunt. I never exchanged that house. 'The kibanja is mine."

In answers to questions from the trial Court, she said:
"The defendant was staying in the house of my uncle which was in the same kibanja. I requested him to keep my house and a child who is in the house. Absolomu had partitioned the same kibanja in 3 parts. He gave one part to the defèndant and another one to Kezia, my aunt. He had a mailo land."

I have already referred to the answers which the trial Magistrate gave to the issues framed at the trial. However, in terms of specific findings, these are what appear to emerge from his judgment:

1) The disputed kibanja belonged to the respondent, not to Israel Karasuma the defendant.
2) The boundaries of the disputed kibanja were well described by the respondent in her testimony.
3) The trial Grade II Magistrate rejected defence evidence that:
(a) the disputed kibanja was given to Vanisi Rujumba by Israel Karasuma;
(b) Absolomu Nyamugabwa, the respondent's father reclaimed the disputed kibanja from Vamisi, because she was mentally disturbed.
4) Mary Silver Bakara was struck out as a co-defendant in the suit between the respondent and Israel Karasuma, because she informed the trial Court that the disputed kibanja belonged

to Israel Karasuma and not to her. This is the person who chased away the respondent with a panga and sticks when the respondent wanted to build a new house on the disputed kibanja. She is the same person on whose account objections were made and heard by the learned Grade I Magistrate.
5) Kezia the mother of Mary Silver Bakara, the respondent's aunt, was given her own kibanja by Absolomu Nyabugabwa the respondent's uncle and mailo owner. This appears to be the same Kezia whose land bordered with the disputed kibanja (the suit property) on the East.

Against the judgment and findings of the trial Grade II Magistrate, six objectors filed an objection application to prevent execution of the decree granted in favour of the respondent.

It is necessary to reproduce the essential elements of that application and the supporting evidence in order to see clearly whether, as it was alleged, the suit property was not the subject matter of the suit between the respondent and Israel Karasuma, the implication being that the respondent was seeking to execute her decree by claiming the objectors' property, which was different from the suit property.
Paragraphs 2, 3 and 4 of the six objectors' notice of motion dated 22-2-93, stated:

"2. The land in possession of the Objectors/Applicants was not a subject matter of Civil Suit No. MFP48 of 1976 and hence is not to be subjected to execution by the Respondent/Plaintiff.

3. The defendant was not a proprietor of the Objectors/ Applicants' land before and at the time Civil Suit No. MFP48 of 1976, was litigated and disposed of.
4. The respondent/Plaintiff has no cause of action against the Objectors/Applicants SAVE against the Fort Portal Municipal Council, f at all which is the Land Lord."

David Muhenda's affidavit was the only evidence put on record in support of the objection application. The relevant parts of the affidavit stated:

"4. That part of the land in respect of which the Respondent/ Plaintiff seeks execution forms parts of the Estate of the late MARY BAK4RA as evidenced by

(a) *The building plans presented to and approved by the Local Authorities in 1970 (see Annexture "A"*
(b) The yearly Tenancy Agreement with Fort Portal Municipal Council and the

description of the land in Harukooto Plot No. 05.A 144 (see Annexture "B').
(c) The Rates demand notes (such as Annexture "C" hereto) addressed to Bakara from Fort Portal Municipal Council.
(d) General Receipts of payment of rent (such as Annextures "D" and "E" hereto) paid by Bakara
to Fort Portal Municipal Council.
5. That in view of the contents of paragraph 4 hereof and as an Administrator of the Estate of the late Mary Bakara (see Annexture "P9 the Respondent/Plaintiff has no claim on the land known as HARUKOOTO PLOT NO. 05.A. 144. Fort Portal Municipal Council is the land lord and Mary Bakara (deceased), the tenant with a house.
6. That part of the land in respect of which the Respondent/ Plaintiff seek executions for vacant possess ion forms part of the Estate of Kezia Rujumba (deceased) as evidenced by:
a) The Building Plans presented to and approved by the Local Authorities in 1965 (see Annexture "C").
*b) The yearly Tenancy with Fort Portal Municipal Council and the description of land is Harukooto Plot No. 05.A. 102 (see Annexture 'R '*9
c) The Rates demand note (see Annexture "I" hereto (and receipts of payment to Fort Portal Municipal Council (see Annexture "J" and "K").
d) Receipts of payment of rent (such as Annexture "L" and "M" hereto) paid to Fort Portal Municipal Council. 7. That on the demise of the said Kezia Rugumba Mrs. PERSIS OKAO assumed the administration of the deceased's Estate (see Annexture "N").
8. That in view of the contents of paragraphs 6 and 7 hereof the Respondent has no claim on the land known as HAR UKOOTO Plot No. 05.A. 102. Fort Portal Municipal Council is land lord and Kezia Rugumba (deceased) the tenant with a house therein.
9. That part of the land in respect of which the Respondent Plaintiff seeks execution for vacant possession belongs to my relative. (The late E VANSI KACHOPE RUJUMBA) She gave the portion of land to her surviving children, David Nsubuga and James Sabiiti Kachope Kayoyo who after her death obtained letters of Administration to the deceased's Estate (see Annexture "P" and one in CONSIMILI CASU with MARIA BAKARA (see photograph 4 and 5 hereof) and KEZIYA RUJUMBA (see paragraphs 6, 7 and 8 hereof)
10. That part of the land in respect of which the Respondent Plaintiff seeks execution for vacant possession belonged to my late relative ISRAEL KARASUM4 (deceased) and

father of the Respondent/Plaintiff

11. That the late Karasuma and the Respondent/Plaintiff disputed the ownership of the land mentioned in paragraph 10 hereof between themselves (see Annexture "Q" *and "R* '9.)

12. That in view of paragraph 11 hereof the Respondent /Plaintiff sued the late Karasuna as she had vowed in Annexture 'R" hereof hence Civil Suit No. 48 of 1976. MARGARET KAMUJE VERSUS KARASUMA and the subsequent appeal.

13. That in view of the contents of paragraphs 10, 11, and 12 hereof the land mentioned in paragraphs 4, 5, 6, 7, 8 and 9 were never a subject of Civil Suit No. MFP 48 of 1976 and hence cannot be a subject matter of execution arising there from and again the ownership is different.

14. That the foregoing notwithstanding the late Karasuma sold the land the subject matter of Civil Suit No. MFP 48 of1976, before the suit was no - case (sic) and execution is not possible."

All the Annextures and photographs mentioned in the affidavit are not available on the record of this appeal.

It must be observed that the "Respondent/Plaintiff" (as the present respondent was referred to in the Notice of Motion and the supporting affidavit) did not file any affidavit in reply, which would have answered or explained the allegations against her, made in the Notice of Motion and the Affidavit. This is surprising, because, her Counsel, Mr. Nyamutale, said at the objection proceedings that he had been served with the relevant papers. He perused the affidavits and the Annextures. This is what he said on 27-7-93, before the Grade I Magistrate who heard the objection application:

"This morning, I have been served with some fresh papers, which papers are objecting to the execution. I have quickly perused the affidavit which is following the application and have read the Annextures attached thereto.

These Annextures refer to Tenancy Agreements with Municipal Council (Fort Portal) to understand (sic) unless Court visits the site and looks at the actual site complained of And since they have put in the Affidavit he (sic) requires to put in some fresh submissions. We

just go to the site and then I can make my submissions. That is my prayer. I propose an early date as the case has been for too long."

The learned Grade I Magistrate subsequently visited the locus-in-quo and drew a sketch plan thereof but the sketch subsequently got lost. Nor are there notes of what transpired at the locus-in-quo, if indeed the learned Magistrate recorded any.

The essence of the findings made by the learned Grade I Magistrate in his ruling on the objection application may be summarised as follows:

1. According to the record of proceedings at the trial of the suit by the Grade II Magistrate, the suit property was well defined; the boundaries being defined as Fort Portal -Kasese Road on the East, one Jack on the West; Kezia on the South with a path and fence between them.

2. At the locus-in-quo, the respondent, on oath, described, and the Grade II Magistrate observed, the boundaries of the suit property to be: Fort Portal - Kasese Road on the East; one Jack, Idreda and Ton; and one Kakyomya, who acquired land from Mugasa and a trench in the West, where the area is swampy. David Muhenda's description of the suit property, also made on oath at the locus, is similar to that by the respondent, except he said that Kezia is on the South. He did not mention one Kakyomya.

3. During his visit to the locus-in-quo the learned Grade I Magistrate drew a sketch plan of this observation made according to the description, made on oath, by the respondent and David Muhenda.

4. When Civil Suit No. 32/76 (He must have meant No. 48/76) was filed in Court, Kezia Rujumba, Mary Bakara and Vanisi Rujumba were still alive. They were never made parties to the suit. They would have been sued with Karasuna if they were occupying the suit property.

5. The suit property was well defined in evidence and in the trial Magistrate's judgment. It does not include the areas of land for which execution was sought by the respondent.

6. The objection application by the 1st, 2nd, 3rd and 4th objectors was validly made, because the areas of land claimed in the objection were outside the suit property.

7. The objection by the 5th and 6th objectors was unsuccessful because they claimed their interest under the defendant Karasuma who had lost his claim for the suit property in the suit.

8. The respondents' application for leave to execute the decree had been granted by the Chief Magistrate. Consequently the plea that it was time barred had no merit.

9. As the 1st, 2nd, 3rd and 4th objectors were not occupying the suit property; the application for execution against them was unsuccessful and no warrant of eviction was issued against them, but warrant of execution of the decree and of eviction was ordered to be issued against the 5th and 6th objectors.

In his judgment, the learned appellate Judge re-evaluated the evidence in the case as a whole, as he was duty bound to do, and reached his own conclusions The essence of his findings may be summarised as follows:

(1) Mary Silver (Bakara) was the co-defendant in the suit by the respondent against Israel Karasuma. She was struck out when she said that the suit property was not hers, but belonged to Karasuma.
(2) At the trial of the suit, there was no doubt as to the boundaries of the suit property, and that the respondent is the owner thereof.

(3) Nyamutale, objector No. 5 purported to claim land and buildings belonging to Kezia through her to Mary Silver Bakara, the person who at the original suit disowned the suit property. If there had been no delay in execution of the decree in favour of the respondent, Mary Silver Bakara would have been evicted from the suit land.

(4) Mugenyi, objector No. 6 claimed to have purchased the suit property from the defendant Karasuma in 1971. As they lived in a small community he could not have been unaware of the plaintiffs' attempts to build on it when she was chased away by Mary Silver Bakara using pangas and other weapons, and thus the plaintiffs claim to the land whose width is less than 100 meters. Yet he made no attempts to intervene in the suit. He could not claim to be a bona fide purchaser for value of the suit property without notice of the respondent's claim to it. If indeed, he bought it, he must have done with knowledge that Karasuma had no title to it.

(5) Contrary to the finding of the learned Grade I Magistrate, the first four objectors namely; Persis Okao, David Nsubuga, James Sabiiti Kachope and David Muhenda, and like the 6th

objector, Mugenyi, all claim title from Kezia or her daughter Mary Silver Bakara. Silver Mary Bakara, by her own statement at the trial of the suit, owned no part of the suit property. Kezia was not said by anyone at the trial of the suit that she owned or as owning part of the suit property.

(6) The learned Grade I Magistrate, in his attempts to ascertain the boundaries of the suit property appears to have recorded evidence contradicting the evidence at the trial, when all that was required was execution.

(7) The learned appellate Judge visited the locus in quo to compare the boundaries described in evidence at the trial with what was on the ground. This is how he then described the boundaries of the suit:

"There is a roadway between the suit land and that of Jack, the person whose land abutted that of the plaintiff Kamuje as set out in the evidence of Kamuje at the trial. That roadway, which may be of more recent creation, therefore, constitutes an easily ascertainable boundary. There is Kasese-Fort Portal road bordering the full length of one side of this land. That again was a boundary mentioned in the evidence at the trial and poses no difficulty at all.

The third boundary is the swamp at the bottom of the land which parties appear to accept as the boundary and which in any event is not any part of the land in issue in the claims. The fourth boundary according to the evidence at the trial is stated as being the property of Kezia, mother of Mary Silver the original co-defendant who disclaimed the land and a boundary and a path. The Magistrate in the trial referred to a fence in place of the term "boundary" used by the plaint (if in her evidence. If indeed there was a fence there none exists anywhere on this land now. Magistrate Mr. Katorogo assumed that the reference to Kezia meant the house which she may have occupied which is on this land and made no attempt to find any fence or path between that house and the rest of the land. The evidence at the trial is that plaintiff wrote to one Francis who had purchased the house she had built on the land with a copy to Kezia and, as his evidence later showed, to Defence witness Jaawa, that the house having been demolished, she was reclaiming the land. Jaawa says he considered the letter childish and did nothing to challenge her claim. Mary Silver, the daughter of Kezia, however, physically resisted plaintiffs attempt to rebuild and that resistance led to this case against Mary Silver and later Karasuma and to Mary Silver

disclaiming the land. Hence the reference to "in the South Kezia" is to a land or property such as a house belonging to Kezia which was beyond the suit property and not to any house which may or may not have been occupied by her and/or Mary Silver. The path as pointed out by plaintiff as being the one referred to by her borders on a property on which there are twin buildings of recent construction with a distinct footpath between them and the path referred to in the plaintiffs evidence which is now overgrown with grass and shrubs and even has a mound of soil overgrown with weeds. This is hardly surprising after nearly twenty years."

The learned appellate Judge then dismissed the appeal before him and gave judgment for the plaintifl7respondent Margaret Kamuje and decreed that the land lying between the boundaries described in the passage of the judgment, I have just referred to is the land in respect of which she sought execution. He dismissed the objections of the six objectors/appellants. By implication, he set aside the orders of the learned Grade I Magistrate upholding the objections of the first four objectors. He also granted Margaret Kamuje's application for execution and ordered that it be carried out forthwith. Margaret Kamuje was also granted the cost of the hearings of the objections against all the objectors.

I agree with the reasons, conclusions, and orders of the learned appellate Judge. I am unable to fault him.

In the circumstances, I would dismiss this appeal with costs to the respondent here and in the Court below. I would also order that:

1) The objection by the first four objectors be and is hereby dismissed with costs to the respondent. The orders of the appellate High Court and of the Grade I Magistrate in respect of the 5th and 6th objectors should remain undisturbed.

2) Execution be and is hereby issued in favour of the respondent to secure for her vacant possession of, and for eviction of persons now occupying, the suit property which was decreed to her in Civil Suit No. MFP 48 of 1976 and the boundaries of which are as per description of the learned appellate Judge herein before referred to.

3) The said execution be carried out with due diligence and speed.

As Mulenga and Mukasa-Kikonyogo, JJ.S.C. agree, it is so ordered.

Dated at Mengo this….17th day of... October 2000.

A. H. O. ODER

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE

REGISTRAR, THE SUPREME COURT

JUDGMENT OF MULENGA JSC

I had advantage of reading in draft the judgment of my learned brother Oder JSC. On the whole, I concur with his conclusions, and agree that the appeal should be dismissed. I only wish to add my view on one issue. In the first ground of appeal the learned appellate Judge is

criticised by the first three appellants herein, for reversing the order made in their favour by the Magistrate Grade I. The criticism is based on two reasons, namely;

(a) That those three appellants were not party to the appeal in the High Court; and
(b) That the respondent did not appeal or cross-appeal against the said order of the Magistrate Grade I.

It is unfortunate that the record raises some degree of doubt as to who were the real parties in the High Court appeal from which this appeal arises. On the one hand, in the Memorandum of Appeal drawn by Messrs. J. Musana & Co., Advocates, which is said by the concerned Deputy Registrar to be the only one filed to institute that appeal, only one appellant, James Mugenyi, is cited. On the other hand, in the title of the proceedings and of the judgment of the High Court, all the original six objectors are cited as appellants. The uncertainty is not helped by the fact that the appeal appears to bear two numbers i.e. Civil Appeal No. DR. MFP I of 1994 and Civil Appeal *No.52* of 1994, a fact which has not been satisfactorily explained by the said Deputy Registrar Be that as it may, there are two other pointers that seem to suggest a third scenario. First, in the Judge's notes of appearances on *13.6.1995* at the commencement of the hearing, it was recorded:

"*Mr. Musana for appellants"*

Then, after noting the presence of the respondent in person, the following was added, as if by way of elaborating:

'Mr. Musana appears for appellants including objectors 1st and appellants 5 and 6."

Secondly, when reviewing the background of the case in his judgment, the learned appellate judge said:

'The present surviving objectors, Nyamutale and Mugenyi appealed the ruling of Magistrate Katorogo."

These two quotations suggest to me, that notwithstanding that the Memorandum of Appeal of only one person has been traced, both unsuccessful objectors appealed, and at the hearing of the appeal, the successful objectors also instructed counsel for the appellants to represent

them or protect their interests. In the present appeal, Mr. Byenkya, counsel for the appellants argued that in an appeal, an advocate cannot represent an appellant who has not filed a Memorandum of Appeal, and that therefore, the intimation that Mr. Musana represented anyone who had not filed a Memorandum of Appeal, had no legal consequence. Counsel, however, acknowledged the power vested in the High Court under r. 17 of 0.39 of the Civil Procedure Rules, but insisted that in order to invoke that power, the High Court had to follow the procedure set out in that rule, which it did not do in the instant case. The rule reads:

"17. Where it appears to the court at the hearing that any person who was a party to the suit in the court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the court may adjourn the hearing to a future day to be fixed by the court and direct that such person be made a respondent,,

Although the learned appellate Judge did not expressly invoke provisions of that rule, there is indication that he was of the view that the successful objectors should also be parties to the appeal. This is even apparent from the beginning of his judgment. The learned Judge treated the appeal as if it were against the whole, rather than a portion, of the ruling by the Magistrate Grade I.

In those circumstances, I agree with Mr. Byenkya, the appellate Judge ought to have directed, in accordance with the said r. 17, that those objectors be made respondents. In my view, however, failure to so direct, as well as failure to adjourn the hearing as a consequence, did not occasion injustice. The purpose of the procedure provided for in that rule is to give opportunity to such an interested person to be heard. In the instant case the successful objectors were represented. I would therefore not accept the contention by Mr. Byenkya that they were not heard. Their advocate, Mr. Musana, did not confine his address to the appellate Judge, to Mugenyi's case alone, though he highlighted it. He supported the holding of the Magistrate Grade I that the land they had claimed was separate from the land decreed to the respondent by the Magistrate Grade 11.1 am satisfied, particularly having regard to the extraordinary delay in resolving this dispute, that substantive justice will be better served by terminating it at this stage, rather than to order a rehearing in the court below as proposed by Mr. Byenkya, on the ground of non-compliance with that technical procedure.

By parity of reasoning, I would hold that in the circumstances of this case, the fact that the respondent did not appeal or cross-appeal did not, preclude the learned judge from

considering the decision of the Magistrate Grade I as a whole. The rationale for his approach, with which I agree, can be discerned from his view of the objectors' claims. He observed:

"The appellant Nyamutale purports to claim land and buildings which belonged to Kezia and through her to Mary Silver Bakara, the person who at the original trial disclaimed ownership. If the Magistrates and the court staff had, at that time taken the necessary action applied for by the plaintiff to that action, these claimants would have had nothing to claim because Mary Silver Bakara would have been evicted. The delay in executing the decree has produced these claimants and further frustrated the efforts of the plaintiff to obtain her property.

This observation applies to all the objectors except objector No.6, Mr. Mugenyi"

In seeking execution of the decree, the respondent, as decree-holder, sought to obtain the whole land as defined in the decree. The learned appellate Judge considered the land which was subject of the decree as one whole, with clearly defined boundaries. In order to do that it was inevitable to review that part of the Magistrate Grade I's order, which had the effect of fragmenting the land, even if the respondent had not cross-appealed against that part. In my view that was not erroneous. Clearly the learned appellate Judge had the power to do so by virtue of provisions ofr.27 of 0.39 of the Civil Procedure Rules. Mr. Byenkya acknowledged that power, but argued that the power could not be exercised against a person who is not a party. I have already indicated in this judgment, my view that the first three appellants herein, through representation by Mr. Musana, Advocate, participated in the appeal in the High Court.

Dated at Mengo this .... 17th day of .. .October 2000.

J.N.MULENGA

JUSTICE OF THE SUPREME COURT

JUDGMENT OF L.E.M. MUKASA-KIKONYOGO, JSC

I have had the benefit of reading the judgment in draft prepared by my learned brother A.H.O.Oder. I concur with him that this appeal should be dismissed in this Court and the Court below. I also agree with the orders proposed by him. I have nothing useful to add.

Dated at Mengo this ....17th day of ...October 2000.

L.E.M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT