THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODER, TSEKOOKO, MULENGA, KANYEIHAMBA AND KATO JJ.S.C.)

CIVIL APPEAL No. 16 OF 2002

BETWEEN

1 . **KAMPALA DISTRICT LAND BOARD]**
2 . **GEORGE MITALA]**
APPELLANTS

AND

1. **VANANSIO BABWEYAKA]**
2. **EDWARD KIZITO]**
3. **ROBERT TUMUSIIME]**
RESPONDENTS
4. **ROBERT KIKOMEKO]**
5. **SENGENDO SSEMPALA]**
6. **APOLLO NABEETA]**

[Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo, DCJ, Okello and Twinomujuni JJ.A) dated 6th August, 2002 in Civil Appeal No.20 of 2002]

JUDGMENT OF TSEKOOKO, JSC

This is a second appeal arising from the judgment of the Court of Appeal which allowed an appeal by the Respondents against the decision of the High Court. The facts of the case may be simply stated: -
The first appellant is a body corporate created under the Land Act, 1998, and is responsible for administration and management of land in Kampala District.

The respondents, who are some of the twenty original plaintiffs at the trial, were occupants of a plot of land situate at Ndeeba in the suburb of the City of Kampala, Kampala District, and described as plot 1028 block 7 Kibuga, hereinafter referred to as the "suit land". On 8th November, 2000, the 1st appellant allocated the suit land to the 2nd appellant for a lease. A formal lease was subsequently offered to the latter. He accepted the lease offer and was on 20/11/2000 registered as the proprietor of the suit land. A Certificate of Title in respect thereof was accordingly issued to him.
The respondents who felt aggrieved by the leasing sued the appellants jointly and severally seeking, inter alia, declarations that the respondents were bona fide/lawful occupants and/or customary owners of the suit land; that the 1st appellant wrongfully leased the suit land to the 2nd appellant and that the latter obtained the lease thereof wrongfully, unlawfully and fraudulently.
Both appellants filed their respective Written Statements of Defence in which they denied the respondents' claim.
After pleadings in the High Court were closed, Katutsi, J, held a scheduling conference at which facts agreed upon were recorded as follows: -

1. *The 6 plaintiffs are occupants of the suit property.*
2. *Second defendant is the registered proprietor of the suit property described as leasehold Vol.287 Folio 9 Block 7 Plot 1028 at Ndeba.*
3. *The first defendant is the statutory owner of the suit property.*

Thereafter 21 sets of documents for the respondents were admitted in evidence.

None was admitted for the 1st appellant but "photocopies of drafts for compensation for all the plaintiffs" were admitted as exhibit DI for the second appellant.

This was followed by the framing of five issues this way: -

1. *Whether the plaintiffs are lawful or bonafide occupants of the suit land.*
2. *Whether the plaintiffs are customary owners of the suit land.*
3. *Whether the suit land was available for leasing to the second defendant at the time of the grant of lease.*
4. *Whether the second defendant obtained the certificate of title lawfully.*
5. *Remedies.*

It should be noted that although the plaint alleged that the lease was registered fraudulently, fraud was not made an issue.

The suit was fixed for hearing on 1/11/2001. Apparently the hearing did not take place. Somehow, on 31/10/2001 counsel for the respondents filed their written submissions. The 2nd appellant filed his written submissions on 1/11/2001 which was followed by the written submission of the 1st appellant which was filed on 5/11/2001.

The learned trial judge delivered his brief judgment on 21/12/2001. In it, he alluded to section 30(1) of the Land Act, 1998. He then stated:

> "***There is no evidence on record nor is it agreed that plaintiffs were persons occupying the land by virtue of the repealed laws mentioned above. There is no evidence nor was it conceded or argued that the plaintiffs entered upon the suit property with the consent of the registered owner. There is no evidence to suggest that the plaintiffs were customary tenants whose tenancy had not been disclosed or compensated for by the registered owner. In short there is nothing on record to bring the plaintiffs under the ambit of section 30 (1) of the Land Act, 1998***"

The learned judge then briefly discussed who is a "bona fide occupant" in terms of S.30 (2) of the Act. Thereafter he held that the respondents were not bona fide occupants. So he answered the first and second issues in the negative. In consequence he answered the third and fourth issues in the affirmative. It is a little puzzling that the learned trial judge fixed a date for hearing evidence, but he apparently cancelled that and relied on documents. He then decided the suit on basis that there was no evidence.

In the Court of Appeal there were eight grounds of appeal. The seventh ground of appeal complained that the judge erred when he decided the case against the respondents without affording them proper hearing.

Okello, J.A, delivered the lead judgment with which the other Justices of Appeal on the panel agreed. At page 7 of his judgment, the learned Justice of Appeal lamented the conduct of the trial by the trial judge in these words:

> ***"At the scheduling conference held on 25/9/2001, admitted facts were recorded. Documentary evidence was received and issues for determination of the court were framed. Thereafter the case was set down for hearing on 1/11/2001. However, the promised hearing was not conducted, thus shutting out oral evidence. Counsel for both parties and the trial court appear to have agreed that the framed issues could be determined on the law (S.C.) admitted facts and the documentary evidence received alone. Counsel for both parties then filed written submissions which were followed by the judgment of the Court. No oral evidence was called.***
>
> ***I think that was a flaw. The judgment of the trial judge indicated that those issues could not have fairly been determined without oral evidence. The trial judge remarked in his judgment on several occasions that there was no evidence to prove this or that. This shortcoming could have been avoided had the promised hearing been conducted. The lacking***

***evidence could probably have been adduced. Learned counsel for the appellants made half-hearted complaint before us about this point and abandoned it. He even abandoned ground 7 which was on the point. I therefore cannot pursue the point any further*"**

This means that the learned Justice of Appeal held that there was a mistrial.
I cannot comprehend why the learned trial judge did not hear oral evidence on 1/11/2001. If there was change of heart by any party about adducing oral evidence,
this should have been recorded. In his lamentation about absence of evidence to prove certain points, as quoted earlier, the learned Justice of Appeal does not blame it on failure by any party to adduce evidence. Could this have been due to the inexperience of the trial judge and advocates in the implementation of the new rules of Order XB of CP Rules which had come into force in 1998? There is no ready answer. However I can certainly say that by the time the trial judge wrote his judgement he was aware that material evidence should have been adduced to enable him decide the case on merit. I think that at that stage it would have been prudent for the trial judge to have stopped writing the judgment. He should have asked the parties to adduce evidence or give reasons for not doing so. Failure to do so rendered the trial a mistrial.

In spite of the misgivings which the Court of Appeal had about the conduct of the trial, the court did not order a retrial but decided the appeal on merits and reversed the decision of the trial judge. It can be said that in normal circumstances, where a trial is conducted properly, the Court of Appeal would be justified in deciding the merits of the appeal on the basis of whatever material there was on the record. But the trial in this case was fundamentally defective.

The appellants filed the following grounds of appeal.

1. ***The learned Justices of Appeal erred in law when they***

held that the occupation of the suit land by the respondents without any lease or licence from the controlling authority constituted their customary right of occupancy.

2. ***The learned Justices of Appeal erred in law and fact when they held the respondents to be customary owners of the suit land without evidence to prove the customs applicable.***

3. ***The learned Justices of Appeal erred in fact when they held that the respondents had occupied the suit land or bought it from those who had occupied it unchallenged for 40 years.***

4. ***The learned Justices of Appeal erred in law and fact when they held that the Kampala District Land Board had no authority over the suit land.***

5. ***The learned Justices of Appeal erred in law when they held that the procedure prescribed in the Land Regulations, S.I No.16 of 2001, was applicable to the allocation of the suit land.***

6. ***The learned Justices of Appeal erred in law and fact when they relied on fraud which had not been pleaded and strictly prove.***"

It is obvious that most, if not all, the objections in the above grounds of appeal hinge on evidence partly contained in the documents admitted at the scheduling conference and partly on speculation about missing oral evidence which was never given because of the procedure adopted by the trial court.
In the light of what I have pointed out above and of the order I intend to propose, it is not desirable to discuss the written submissions filed by both sides.

In my opinion this is a case where oral evidence should be adduced to establish claims of each of the parties.

I would therefore allow this appeal, set aside the decisions and orders of the two courts below except orders made during scheduling conference. I would order that the trial of the suit should proceed by recording whatever oral

evidence each party may wish to adduce. The scheduling conference which was held on 26/9/2001 should form the basis of the resumed trial. The case should be remitted back to the High Court for that purpose.

Considering that it is the error of the trial court which has led to this decision, I would order that each party bears its own costs here and in the Court of Appeal. The costs in the trial court should abide the results of the resumed trial.

JUDGMENT OF ODER, JSC

I have had the advantage of reading in draft the judgment of my learned brother, Tsekooko, JSC. I agree with him that the appeal should be allowed and that the decision and orders of the Court of Appeal and of the High Court should be set aside. The case should be remitted to the High Court for

completion of the trial. I also agree with orders for costs as proposed by Tsekooko JSC.

Since the other members of the Court also agree, the orders of the Court shall be as proposed by Tsekooko JSC.

***J*UDGMENT OF MULENGA *J*SC.**

I have had the benefit of reading in draft the judgment of my brother Tsekooko, JSC. I agree with him that the appeal should be allowed. I also agree with the orders he has proposed.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment of Tsekooko, JSC. I agree with him that the appeal should be allowed. I also agree with the orders he has proposed.

JUDGMENT OF C. M. KATO, JSC.

I have had the advantage of reading the judgment of my brother Tsekooko, JSC, in draft. I agree with him that this appeal should be allowed. I also agree with the orders he has proposed. I would allow the appeal.

Dated at Mengo this 17th day of December 2003.