THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C.)

CIVIL APPEAL No.11 OF 2004

BETWEEN

MUSONGE MOSES MUSAH.....APPELLANT/CROSS-RESPONDENT

AND

MUWONGE PETER.....RESPONDENT/CROSS-APPELLANT

[An appeal from a decision of the Court of Appeal at Kampala (Engwau, Kitumba and Byamugisha, JJ.A) dated 1st June, 2004 in Civil Appeal No.77 of 2001]

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in advance the judgment prepared by my learned brother, Kanyeihamba,JSC. I agree with him that the cross-appeal should succeed and the matter be remitted to the High Court for assessment of damages. My learned brother has given the background to the appeal and the cross-appeal.

We struck out the main appeal because it was incompetent as it had been lodged out of time without leave of this Court. We then asked counsel for both sides to address us on the viability of the cross-appeal, that is to say, whether after striking out the substantive appeal, the cross-

appeal remained valid for us to hear and determine it on merit. Mr.Tibaijuka contended that we had jurisdiction while Mr. Kuguminkiriza was not certain. Court adjourned the cross-appeal and ordered counsel to put their arguments in writing. When the matter came up for hearing on 19/12/2005, we learnt that counsel had filed their respective written arguments; so we adjourned the matter for our decision to be given on notice. We now give the decision.

The only ground in the Notice of Appeal was framed as follows: -

> **"The *learned justice and lady justices of Appeal erred in law and fact, in that they granted to the present Respondent* "the *reliefs sought in the High Court*" *but inadvertently omitted to direct the trial court to assess the General Damages payable by the above-named Appellant to the above named Respondent, or. alternatively, to make the assessment itself*"**

The respondent prayed for an Order that, in order to avoid a multiplicity of actions, this Court itself should assess the General Damages payable to the Respondent, or alternatively that we make a direction on the matter.

Although we asked both counsel to address us on the viability of the cross appeal, Messrs Tibaijuka & Co. Advocates for the cross appellant did not in the written submissions address us on that point. Counsel had, however,

stated on 17/5/2005 that the cross-appeal is viable. On the other hand, Messrs. Kuguminkiriza & Co., Advocates, for the cross-respondent in their written arguments challenged the viability of the cross-appeal. According to learned counsel since the substantive appeal was struck out, this means that-

> **"*There was technically no appeal in court and hence the cross-appeal that was brought by the respondent fell by the weight of the main appeal.*"**

According to counsel, the cross-appeal could only survive where the substantive appeal is withdrawn. Counsel relied on rule 88 for this view.

With respect I do not quite understand the reasoning of Mr. Kuguminkiriza when he contends that the **cross-appeal fell by the weight of the main appeal.** Assuming that learned counsel meant that the cross-appeal was struck out along with the main appeal, I cannot accept this argument. I do not think that the provisions of rule 88 assist him as he contends in his written arguments. Supposing we had heard the main appeal and supposing we dismissed it, would that amount to a dismissal of the cross-appeal? The answer is no. According to Rule 86(1) of the Rules of this Courts-

> **"*A respondent who desires to contend at the hearing of the appeal in the Court that the decision of the Court of Appeal or any part of it should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the***

***grounds of his or her contention and the nature of the order which he or she proposes to ask the court to make, or make in that event as the case may be.*"**

This is the provision which gives a respondent a right to lodge a cross-appeal. It is an appeal against the decision of the Court of Appeal. Obviously, the only prerequisite is the existence of an appeal which enables a respondent to cross-appeal by Notice. I do not think that it is material that the appeal must be a valid one so as to give rise to the institution of across-appeal.

It seems to me that in terms of subrules (1) and (2) of Rule 90, cross-appeal does not, so to speak, die with the death of an appeal. Subrule(2) of the rule reads-

"***90(2) if it (cross appeal) is not withdrawn, the cross appeal shall proceed to hearing and the provisions of these Rules shall apply as if the cross appellant were an appellant and the appellant a respondent,*"**

I think that the cross-appeal is viable and should be determined on its merits. I now turn to the merits of the cross-appeal. In prayer (d) (ii) in his Amended Plaint the Respondent prayed for general damages against the appellant for breach of contract. Consequently the third issue framed for trial read as follows-

"Whether *the plaintiff is entitled to the remedies prayed for,*"

After the case had been heard in the High Court, the Respondent's counsel in his written submissions before that Court, prayed for a sum of shs.10m/= as damages for breach of contract. And on appeal, in prayer (iii) in his Memorandum of Appeal in the Court of Appeal, the Respondent sought an order granting **"all the remedies prayed for in his submissions in the High Court."** This included general damages.

In his lead judgment with which the other members of the Court of Appeal agreed, Engwau, J.A stated-

"In the result, I would allow the appeal and grant the appellant the reliefs sought in the High Court with costs here and in the court below."

Unfortunately, when the High Court dismissed the respondent's suit, the learned trial judge omitted to consider what he would have awarded as damages had the Respondent succeeded in the suit at the trial. That is what creates the present problem.

Mr. Tibaijuka argued, quite correctly in my opinion, that the phrase "the reliefs sought in the High Court" appearing in the Court of Appeal's award is vague and leaves the damages payable to the Respondent unquantified; and there is, therefore, need for those damages to be assessed.

Under normal circumstances, the Court of Appeal ought to have exercised its powers under rule 31(1) of the Court of Appeal Rules, to remit the case to the High Court with a direction that the latter court itself assess the general damages payable to the respondent in exercise of the powers conferred upon it by section 11 of the Judicature Act (Cap.13). It was not proper for the Court of Appeal to award unquantified damages without assessing the same or giving a direction for their assessment by the High Court.

Mr. Tibaijuka argued that Rule 3 0 of the Rules of this Court and section 7 of the **Judicature Act** are authority for the view that the options which were available to the Court of Appeal are available to this Court. He submitted that we can either remit the case to the High Court with a direction that the court assess the damages payable to the respondent, or we can make the necessary assessment ourselves. He prayed that we take the latter course and award his client at least shs 10m/=

On his part Mr. Kuguminkiri claimed that we have no power to either remit the case to the High Court nor to assess damages ourselves. He asked us to dismiss the cross-appeal with costs. Learned counsel made these contentions without apparently appreciating that our Rule 30 and S.7 of Judicature Act give us the necessary powers. In effect Mr. Kugumikiriza did not challenge the merits of the cross appeal and, therefore, he never commented on the quantum of damages. I have held that Mr. Kugumikiriza's objections to the competence of the cross-appeal has no

merit. Since the Court of Appeal properly allowed the cross-appellant's appeal in that court, the question is what orders should be made. I think that this cross-appeal ought to succeed. However I cannot accede to the submission of Mr. Tibaijuka that we should assess general damages ourselves even though I regret this for the reason that the case has been in the court system for eight years. What the cross-appellant wants are general damages. If we award general damages ourselves we would deprive either party of the opportunity of challenging such an award in the event he is dissatisfied with the award. Remitting the matter to High Court could lead to an appeal by a dissatisfied party resulting in a review of the award by a higher tribunal. In these circumstances I agree that we remit the matter to the trial court to assess damages. This will be done by same trial judge or his successor.

I would award the cross-appellant the costs of this cross-appeal and his costs in the Court of Appeal. Costs in the High Court should be to the cross-appellant to be taxed after the damages are awarded.

As other members of the court agree, it is ordered accordingly.

JUDGMENT OF KAROKORA, JSC:

I have read in draft the judgment prepared by my learned brother, Dr. Kanyeihamba, JSC.

I agree with his reasoning and conclusion that the Cross-Appeal should be allowed. I would also agree with the orders he has made to the effect that the case should be remitted to the High Court for assessment of the general damages. I also agree with him that the Cross-appellant should get the costs in this court.

JUDGMENT OF MULENGA, JSC

I had the advantage of reading in draft the judgment of my learned brothers Tsekooko and Kanyeihamba JJ.S.C. I agree with them that the cross-appeal ought to succeed and that the case should be remitted to the trial court for assessment of damages. I would also award costs here and in the courts below to the cross-appellant.

JUDGMENT OF KANYEIHAMBA, J.S.C

The facts and background of this cross-appeal may be summarized as follows:

The Appellant made representations to the Respondent that he owned registered land comprised in Kibuga Block B plot No. 484, *(hereafter referred to as the suit land)* and that he possessed a certificate of title to that land. Consequently, the respondent bought the suit land from the appellant for a money consideration as evidenced in written exhs. P1 and P2. The respondent paid the requisite deposit in the sum of Shs. 650.000. Later, it transpired that the appellant did not have the certificate of title and claimed that it had got lost during the war. In due course, through the efforts of the respondent, a special certificate of title (Exh. 4) was procured.

When the respondent offered the balance of the purchase price for the suit land and asked for the transfer of the suit land to him by the appellant, the latter refused. A dispute arose and after some correspondence between the parties, the respondent sued the appellant in HCC Suit No. 559 of 1998. There followed some protracted proceedings including the amendment of the plaint to join in a 2nd defendant, M/S Goodways Trustees Limited which had lodged a caveat against the suit property claiming to have bought it also. Later, the 2nd defendant abandoned its claim. The appellant was not present at the trial in which the respondent and his witness gave evidence. Nevertheless, the trial court dismissed the respondent's claim with costs.

The learned trial judge did not state any reliefs he would have given had the suit succeeded. Be that as it may, the respondent appealed to the Court of Appeal in Civil Appeal No. 77 of 2001. That court decided the appeal in favour of the respondent and granted him "*the*

reliefs sought in the High Court with costs here and in the Court below". The court neither assessed the damages nor remitted it to the trial court for the assessment of those damages. The appellant was not satisfied with the decision and order of the Court of Appeal. He filed this appeal. The respondent in turn cross-appealed for an order regarding the assessment of general damages. On 17th May, 2005, when the substantive appeal came up for hearing, Mr. Tibaijuka Ateenyi, counsel for the appellant objected to the competence of the appeal, because it was filed out of time and without leave of court. We upheld the objection and struck out the substantive appeal with costs to the respondent. We then ordered the parties to file written submissions on cross-appeal under Rule 93 of the Rules of this court. Mr. Kuguminkiriza and Mr. Tibaijuka represented the cross appellant and cross respondent respectively, and both have filed written submissions.

There is only one ground of the cross-appeal framed as follows:

> "***The learned Justice and Lady Justices of Appeal erred in law and fact in that they granted to the present respondent 'the reliefs sought in the High Court' but inadvertently omitted to direct the trial court to assess the general damages payable by the above named appellant to the above named respondent, or, alternatively to make the assessment themselves.***"

The pleadings in this cross-appeal also disclose that a plaint involving the same suit land is or was pending determination in the High Court before Rubby Aweri Opio, J.

During their submissions before us on 17th May, 2005, Counsel asked this court to find first whether a cross-appeal is still viable even after a substantive appeal has been struck out by a court. It is my view that the Rules of this court do not distinguish between a substantive claim and a counter claim. For all intents and purposes, the justifications for any claim are the same as those of a counter claim. The rules which govern the filing, replies, defences and disclosures about a substantive appeal are the same as those which relate to a counter claim. One of the reasons for treating a cross appeal as if it were an appeal itself is to avoid multiplicity of suits.

Thus, Rule 90 of the Rules of this court provides;

> ***"90 (2) if it is not withdrawn, the cross-appeal shall proceed to hearing and the provisions of these Rules shall apply as if the cross-appellant were an appellant and the appellant a respondent.***
>
> ***(3) if an appeal is withdrawn under rule 89 within fourteen days after the date when the appeal was instituted, any respondent who has not lodged a notice of cross-appeal is entitled to give notice of appeal not withstanding that the time prescribed by rule 71 has expired, if he or she does so within fourteen days after the date when the appellants notice of withdrawal was served on him or her."***

Mr. Kuguminkiriza, Counsel for the appellant made submissions on the viability of the cross-appeal. He contended that it is not viable because the Rules of this court are silent on the fate of a cross appeal following the withdrawal or the striking out of a substantive appeal. However, considering the provisions of Rule 90 which I cited above, Counsel for the appellant is mistaken in this regard. Mr. Tibaijuka, Counsel for the respondent did not make submissions on the competence of the counter claim. He assumed that it is viable.

In my opinion, the withdrawal or striking out of a substantive appeal has no effect on the cross-appeal.

I will now deal with the merits of this cross-appeal.

In his written submissions, Mr. Tibaijuka, stated, correctly in my opinion, that following its decision, the Court of Appeal ought to have exercised its powers under Rule 31 of its Rules to assess the damages itself or ordered to have the case remitted to the trial court with directions that such assessment be made. Counsel has not given this court any reasonable ground why the cross-appellant did not take that course of action and move the Court of Appeal to do either of the actions he has suggested. The pending retirement of a judge who was still hearing the case which he advances as a reason cannot alone cause the transfer of the jurisdiction of the court. On the other hand. Rule 30 of the Rules of this court provides that;

> ***"on any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the Court of Appeal with such directions as***

***may be appropriate, or order the rehearing of the appeal (or cross-appeal in this case) before the Court of Appeal and as the justice of the case demands, the court may order a trial de novo...*"**

Mr. Kuguminkiriza did not submit on the merits of this cross-appeal and as already observed, he only submitted on its viability and the competence of this court to hear it. Nevertheless, in my opinion, this court has the jurisdiction to hear the cross-appeal. On the facts, evidence and submissions presented, I would allow this cross-appeal. No reasonable grounds have been given for this court to do what the courts below ought to have done.

I would therefore order that the case be remitted to the High Court for assessment of general damages. I would award the costs of this cross-appeal in this court and the courts below to the cross-appellant.

JUDGMENT OF BART M. KATUREEBE, JSC

I have had the benefit of reading in advance the Judgments of my learned brothers, Tsekooko and Kanyeihamba, JJ.SC, and I agree with them that the cross-appeal should succeed, for the reasons given in their respective Judgments.

I also agree that the matter be referred to the High Court for assessment of damages.

Dated at Mengo this 18th day of October, 2006.