

THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TIBATEMWA – EKIRIKUBINZA, CHIBITA, MUSOKE, MUSOTA &
MADRAMA, JJSC)

CIVIL APPEAL NO 16 OF 2020

10 1. NAMYALO KEVINA}
2. SSEMAKULA LAWRENCE} APPELLANTS

VERSUS

JOHN BAPTIST KAWANGA}RESPONDENT

15 *(Appeal from the decision of the Court of Appeal before Alfonse Owiny –
Dollo, DCJ, Kakuru and Tuhaise JJA in Civil Appeal No. 130 of 2017 arising
from High Court Civil Suit No. 51 of 2012)*

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JSC

20 This is a second appeal arising from the decision of the Court of Appeal as
a first appellate court having decided an appeal from the decision of the
High Court in which the appellants suit was granted. The Court of Appeal
reversed the decision of the High Court and the appellants being aggrieved
appealed to this court.

25 The background to the appeal is that the plaintiffs, who are now the
appellants, had filed an action in the High Court jointly and severally against
the respondent and the Commissioner for Land Registration for inter alia
a declaration that both defendants knowingly connived and fraudulently
transferred land comprised in Buddu Block 333 Plots 7 and 26 situated at
Kigo in Masaka district (hereinafter referred to as the suit property). They
sought for an order of cancellation of the titles, eviction orders, general
30 damages for the continuous trespass on the suit land, special damages for
inconveniences, exemplary damages, aggravated damages, interests and
costs of the suit arising from the trespass. It was asserted that the first

5 plaintiff, who is the first appellant in this court sued in her capacity as a trustee for the beneficiaries of the estate of the late Geraldo Lule (hereinafter referred to as the deceased). She is also a beneficiary. The second plaintiff is a beneficiary and represents all surviving beneficiaries.

10 The respondent denied the claim and asserted that he was a bona fide purchaser for value having bought the suit property from an administrator of the estate of the deceased, one Mr. Adrian Mukasa Sekyajja who had been granted letters of administration in 1974 and was registered on the title deeds to the suit property in his capacity as an administrator of the estate on the 17th of December 1974.

15 The facts were that the deceased (Mr. Geraldo Lule) died in 1970 survived by three children namely Adrian Mukasa Sekyajja (a son and heir), Kevina Namyalo, a daughter (the first appellant) and Nseratudde Nassi, a daughter. Adrian Sekyajja was granted letters of administration to the estate of the deceased in 1974 but later died in 1983 and Kevina Namyalo applied for and
20 was granted letters of administration to the estate of the deceased. Kevina approached the first respondent to hand over the certificates of title for land of the estate of the deceased and he handed over some titles. On carrying out a search the first appellant discovered that the suit land had been transferred to the first respondent hence she took the action of filing High
25 Court Civil Suit No. 51 of 2012 for inter alia cancellation of title.

The High Court allowed the suit and issued the following declarations:

1. It is hereby declared that the plaintiffs are the lawful registered owners of the land comprised in Buddu Block 333 plots 7, 26, and 37 situated at Kigo Masaka district.

30

2. It is hereby declared that both the first and second defendants knowingly connived and fraudulently transferred land comprised in Buddu Block 333 plots 7, 26, and 37 situated at Kigo Masaka district to the 1st defendant and the 2nd defendant should therefore

5 cancel the aforesaid titles and register the same in the names of
the second plaintiff.

3. An order of eviction is hereby issued ordering the first defendant
to vacate the above land.

10

4. The plaintiffs are hereby awarded general damages for the
inconvenience suffered and the physical and mental suffering
inflicted on them to the tune of 20,000,000/= (twenty million)
shillings.

15

5. Plaintiffs are hereby awarded 10,000,000/= (ten million) shillings as
exemplary damages to (against) the defendants.

20

6. The plaintiffs are also awarded 20,000,000/= (twenty million)
shillings as aggravated damages.

7. The plaintiffs are awarded interest on d, e and f above at 30% per
annum from the date of this Judgment until payment in full.

25

8. The defendants to pay the costs of the suit.

The first respondent was aggrieved and appealed to the Court of Appeal on
10 grounds of appeal that need not be set out for purposes of this
background. The respondent's appeal was allowed upon the court accepting
his defence as a bona fide purchaser for value. The Court of Appeal held
30 inter alia as hereunder.

a. The respondents who are now the appellants to this court failed to
adduce evidence that could prove their case to the standard required
by law.

35

b. The appellant was neither a lawyer for Geraldo Lule, nor was he
lawyer for Adriene Ssekyajja; so, he had no fiduciary duty to the two,
or to the beneficiaries of the estate of Geraldo Lule.

- 5 c. The appellant acquired the suit land from, and with the consent and participation of Adrienne Ssekyajja; upon meeting a purchase consideration therefore.
- d. The sale of the suit lands to the appellant by Adrienne Ssekyajja was not in breach of his position as a trustee of the beneficiaries of the estate of Geraldo Lule, since it was to enable Adrienne Ssekyajja be registered on the certificates of title to the estate lands, and thereby protect them from waste, or adverse alienation.
- 10 e. The appellant was therefore a bona fide purchaser for value.
- f. The suit was instituted in court after expiry of the period of limitation of suits for the recovery of land.
- 15 g. The second respondent was wrongfully joined as a party to the suit; and is accordingly expunged from the record as a party.

The Court of Appeal allowed the appeal and set aside the Judgment and orders of the trial court as well as any execution thereof and substituted it with the Judgment and orders of the Court of Appeal. They ordered that the appellant is the lawful proprietor of the suit lands and accordingly his name must remain, or be restored on the register of the suit lands. Lastly the appellant was awarded the costs of the appeal and of the High Court.

20

The appellants being aggrieved appealed to this court on seven grounds of appeal that:

25

1. The learned Justices of Appeal erred in law when they failed to fully evaluate the evidence on record as a first appellate court thus leading to a miscarriage of justice.
 2. The learned Justices of Appeal erred in law and fact when they held that the second respondent had locus standi to bring up the suit.
 3. The learned Justices of Appeal erred in law and fact when they held that the trial judge placed much reliance on the evidence of the first respondent.
 4. The learned Justices of Appeal erred in law and fact when they held that the appellant was not a lawyer of Adrienne Ssekyajja before he demised.
- 30
- 35

- 5 5. The learned Justices of Appeal erred in law when they held that the appellant was not à bona fide purchaser for value.
6. The learned Justices of Appeal erred in law and fact when they held that the first respondent, Kevina Namyalo and Adrienne Ssekyajja assented to the appellant's acquisition of the suit land.
- 10 7. The Justices of Appeal erred in law and fact when they held that the suit was barred by limitation.

Appearances:

At the hearing of the appeal learned counsel Mr. Kituuma Magala appeared for the second appellant and informed court that the first appellant was
15 deceased. Learned Counsel Mr. Enos Tumusiime appeared for the respondent. The appellants counsel prayed that the memorandum of appeal be amended so that he can argue a point of law that the Court of Appeal lacked jurisdiction because it was not duly constituted as the third Justice did not participate in the judgement. The respondents counsel objected to
20 raising of a point of law on the issue of jurisdiction of the Court of Appeal in delivery of the judgment appealed from. Both counsel addressed the court on this issue which ought to be considered first.

The appellant's counsel submitted that he had applied in the written submissions for leave to amend one of the grounds of appeal and correct
25 grammatical mistakes.

In reply the respondent's counsel submitted that the parties appeared for prehearing conference twice and the appellant's counsel only raised the issue of substitution of the first appellant who was deceased. The parties were required to submit on this issue but the appellant's counsel did not
30 comply with the court directions to file written submissions. Further counsel opposed the oral application to amend the grounds and submitted that it ought to be made formally and by notice of motion. He prayed that the application for amendment be rejected. Further he submitted that under rule 98 of the Judicature (Supreme Court Rules) Directions, the judgment
35 of the Court of Appeal cannot be set aside except on grounds averred in the

5 memorandum of appeal, Further the appellants counsel never sought leave under rule 17 of the Rules of Court.

The Court ruled that it would deal with the application in the appeal and I now deal with it.

10 The amendment that the applicant seeks is to include a ground that the Court of Appeal lacked the requisite jurisdiction. The question of jurisdiction touches on the validity of the judgment appealed from and is a point of law that ought to be resolved first since the outcome of the Court of Appeal judgment was to set aside the High Court judgment. The decision of a Court made without jurisdiction is a nullity. The statement of law by Hamlyn J of
15 the High Court of Tanzania in **Desai v Warsama [1967] 1 EA 351** to this effect is a correct statement of law when he stated that:

It is well-established law that a judgment of a court without jurisdiction is a nullity and 9 Halsbury 351 sets out the proposition briefly thus:

20 "Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

The issue of jurisdiction touches on the power of the Court to carry out its judicial function of adjudication and corollary powers in respect thereof. An issue of lack of jurisdiction of the lower court can be raised at any stage of the appeal proceedings because it is an assertion that the decision is a
25 nullity. This flows from the proposition that jurisdiction is a creature of statute. Jurisdiction is conferred by law and where purported jurisdiction is not exercised by the envisaged court in terms of its minimum requirement as to number of members of the court for due constitution of the court as stipulated in the law, any decision arrived at without the statutory minimum
30 constitution of the court would be without any jurisdiction. I would therefore determine the preliminary issue first before handling any other issue if the issue has no merit. If it has merit the appeal will be determined on this point alone. In the premises, I will consider the point of law which even arises from the judgment of the Court of Appeal that is on record and both counsel
35 have addressed the Court on it. I would overrule the objection against

5 admitting an additional ground of appeal to argue the issue arising out of the composition of the court at the stage of delivery of judgment.

Submissions of counsel on the Point of Law

10 The issue is whether the learned Justices of the Court of Appeal lacked the requisite Coram to render Judgment in Civil Appeal No 130 of 2017, and in the alternative, whether or not there was a proper Court of Appeal judgment in Civil Appeal No 130 of 2017.

15 The appellant's counsel submitted that the lead judgment was delivered by the Hon Alfonse Owiny - Dollo, DCJ (as he then was) wherein he stated inter alia that since Kakuru, JA agrees with his Judgment and orders proposed therein, orders are hereby given in those terms. He contended that Hon Lady Justice Percy Night Tuhaise was part of the Coram and fully participated at the hearing and subsequent discussion of the appeal by the panel and was in agreement that the appeal should succeed. She was however elevated and took her seat in the Supreme Court hence she did not
20 participate in the final stages of the Judgment.

The appellant's counsel submitted that article 135 (1) of the Constitution of the Republic of Uganda categorically states that *"the Court of Appeal shall be constituted at any sitting if it consists of an uneven number not being less than three members of the court."* He contended that whereas section
25 12 of the Judicature Act cap 13 permits a single justice to hear interlocutory matters, for the Court to hear appeals, there should be a minimum of three Justices. Neither the Constitution nor the Judicature Act allows two Justices to hear a case including an application. He contended that it is evident that the Judgment of Alfonse Owiny - Dollo, DCJ (as he then was)
30 where he stated that Kakuru, JA agreed with the orders proposed therein and signed was without the participation of Hon. Lady Justice Percy Night Tuhaise who was also part of Coram and participated in the hearings. It is stated that she had participated in the subsequent discussions of the appeal but neither took part in the final stages of the Judgment nor signed the
35 same. He contended that, it followed that, the Court of Appeal was not duly

5 constituted during the final stages of the Judgment in contravention of article 135 (1) of the Constitution.

The appellant's counsel submitted that Rule 33 (5) of the Court of Appeal Rules Directions requires the Justices of Appeal to write separate judgments in civil matters and unless the decision being unanimous, the
10 presiding judge otherwise directs. He contended that despite the remarks of Alfonse Owiny - Dollo, DCJ, the judgment was not signed by Tuhaise, JA. Counsel contended that the two Justices without the participation of the Lady Justice Percy Night Tuhaise, could not form a majority and they would have been a majority if the three Justices had all decided and only one of
15 them dissented from the other two who agreed. In the alternative, he contended that Hon Lady Justice Percy Tuhaise ought to have signed the Judgment to signify her agreement to the success of the appeal which she apparently did not do.

The appellant's counsel submitted that as a result, the Judgment of the two
20 Justices without the decision of a third member of the quorum is a nullity. In conclusion, he submitted that the Court of Appeal lacked Coram when it decided the appeal and the Judgment is a nullity for contravention of Article 135 (1) of the Constitution and section 12 of the Judicature Act, Cap 13 read together with the rule 35 (5) of the Judicature (Court of Appeal Rules)
25 Directions. The appellant's counsel further submitted that the decision infringed on the appellant's right to a fair hearing enshrined in article 28 (1) of the Constitution. In support of that submission, the appellant's counsel relied on *John Lubega vs John Ssinabulya and two others; SCCA No 04 of 2019*. Further counsel relied on *David Chandi Jamwa vs Uganda; Supreme Court Criminal Appeal No 02 of 2018* and the joint dissenting judgments of Dr Esther Kisakye, JSC and Jotham Tumwesigye, JSC which hold *inter alia*
30 that denying the appellant a right to be heard in a situation akin to the present case was a fundamental error on the part of the learned Justices of Appeal and it vitiated their judgment.

35 Further, counsel submitted that their Lordships held that the right to be heard is a constitutional right under article 28 of the Constitution which

5 right cannot be derogated from as provided by Article 44 of the Constitution.
They further held that the right to be heard runs through all stages of the
judicial process from the time of hearing the matter to the time of delivering
judgment. In the premises, the appellant's counsel submitted that the
10 Judgment of two Justices out of three with one not having participated in
the appeal prejudiced the appellants of their right to be heard and as such
is a nullity.

Counsel invited this court to remit the matter to the Court of Appeal so that
it is heard and determined by a properly constituted Coram.

15 In reply the respondents counsel relied on the wording in the judgment
appealed against that; "*Lady Justice Percy Night Tuhaise, who was part of
this Coram participated fully in the hearing and the subsequent discussion
of the appeal and was in agreement that this appeal should succeed. She
was however elevated and took her seat at the Supreme Court hence has
not participated in the final stages of the Judgment.*" Further, the learned
20 Justice Kakuru, JA signed the Judgment. The respondent's counsel
disagreed that the third Justice did not participate in the final stages of the
Judgment on the following grounds. Firstly, article 135 (1) of the Constitution
provides that the Court of Appeal shall be duly constituted at any sitting if it
consists of an uneven number not being less than three members. In the
25 circumstances of the case, the court sat and was duly constituted with three
Justices when the appellants and the respondent appeared before the
court. Secondly under article 135 (2), the Deputy Chief Justice presided over
the court and even wrote the lead judgment.

30 Further and in terms of article 28 (1) of the Constitution, the respondent's
counsel submitted that it provides for fair hearing and the wording under
the article is of "*fair and speedy and public hearing before an independent
and impartial court established by law*". That the appellants and
respondents had a fair hearing before the court in conformity with article
28 (1) of the Constitution.

5 Thirdly, counsel submitted that in terms of rule 33 (5) of the Judicature
(Court of Appeal Rules) directions, it is provided that "*in Civil Appeals,
separate judgment should be given by members of the court unless the
decision being unanimous, the presiding judge otherwise directs*". He
10 contended that in the instant appeal, the decision was unanimous and the
presiding judge Hon. Alfonse Owiny - Dollo DCJ, as he then was, stated that
the Hon. Lady Justice Percy Night Tuhaise did not participate in the final
stages of the Judgment, but she was in agreement that the appeal should
succeed. That this showed that the presiding judge was alive to the
15 provisions of Rule 33 of the Judicature (Court of Appeal Rules) directions
and so directed. Therefore, the Judgment of the Court of Appeal conforms
to the provisions of rule 33 of the Rules of the Court.

In reply to the contention that the two Justices who endorsed the judgment
did not form a majority, the respondent's counsel submitted that the two out
of the three justice no doubt were the majority. Further the appellants relied
20 on the dissenting judgment in **David Chandi Jamwa vs Uganda** (supra)
instead of relying on the majority judgment. The majority relied on **Orient
Bank Ltd vs Frederick Zaabwe and Mars trading Ltd, Supreme Court Civil
Application No 17 of 2007** where Judgment was delivered at the time when
one of the Justices of the panel had retired. He invited the court to follow
25 the majority decision in the **David Chandi Jamwa vs Uganda** (supra). Further
in the **David Jamwa** case (supra) the Supreme Court invoked the provisions
of article 126 (2) (e) of the Constitution, "*to administer substantive justice
without undue regard to technicalities*". Further in **Sarah Kulata Bisangwa
v Uganda; Criminal Appeal No. 03 of 2018** it was held that the absence of a
30 third Justice or his signature does not invalidate the decision of the court
which was taken after hearing of the case in accordance with the
Constitution. The respondent's counsel submitted in the alternative to the
earlier prayer that we reject the ground on the merits.

The appellants counsel filed submissions in rejoinder which do not add any
35 further points or reply to the above submissions.

Consideration of the point of law on Jurisdiction of the Court of Appeal.

5 I have carefully considered the point of law raised by the appellant's
counsel. It is based on the fact that one of the Justices of Appeal who heard
the appeal did not participate in the final stages of the Judgment. There was
a lead Judgment that was delivered with the concurrence of the one justice
and the Judgment acknowledged the fact that the third Justice had been
10 elevated to the Supreme Court and did not sign the final judgment or even
write a separate concurring judgment. The lead judgment was written and
signed by the Hon. Alfonse Owiny - Dollo, DCJ who at pages 55 and 56 of
the Judgment of Court wrote that:

15 'Since Kakuru JA (is) in agreement with the Judgment and orders
proposed therein, orders are hereby given in those terms.

20 N.B. (*Lady Justice Percy Night Tuhaise, who was part of this Coram
participated fully in the hearing and subsequent discussion over the
appeal; and was in agreement that this appeal should succeed. She
was however elevated and took her seat at the Supreme Court; hence
she has not participated in the final stages of the Judgment*).

It is very clear from the above passage that one of the members of the court,
Tuhaise, JA, did not participate in the final stages of the Judgment. It is also
clear that the Hon. Deputy Chief Justice indicated that she was in agreement
with the proposed order that the appeal should succeed. The crux of the
25 appellant's objection is that Tuhaise, JA never fully participated in the final
stages of the judgment and did not sign the Judgment. It was also submitted
for the appellant that each member of the panel is required under the Rules
of Court to write a separate judgment expressing how the appeal should be
determined.

30 The composition of the Court of Appeal is prescribed by article 135 (1) of the
Constitution which provides that:

135. Composition of the Court of Appeal.

5 (1) The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the court.

There is no equivalent provision of the Judicature Act on the due constitution of the Court of Appeal other than provisions on powers of a single Justices to exercise powers of the court in any interlocutory cause
10 or matter under section 12 (1) thereof which provides that:

12. Powers of a single justice of the Court of Appeal.

(1) A single justice of the Court of Appeal may exercise any power vested in the Court of Appeal in any interlocutory cause or matter before the Court of Appeal.

A literal translation of article 135 (1) of the Constitution provides that the
15 Court of Appeal shall be duly constituted "at any sitting" if it consists of an uneven number of not less than three members of the court. In other words, the Court of Appeal is only duly constituted if there are not less than three members and secondly, it should be uneven number of members of the Court. This means that the number of members can either be a minimum of
20 3 or more comprising of uneven numbers of 5, 7, 9, 11, 13 members etc. In the circumstances of this appeal it is a fact which is not in dispute that there were three Justices of the Court of Appeal who heard the appeal. Further, the phrase "at any sitting" means at the hearing when counsel is expected to address the court on the grounds of appeal and any corollary issues.
25 After the sitting, the court adjourns the hearing or hearings and indicates to the parties when the decision on the matter will be communicated either on a particular day or with notice. In that sense the words "at any sitting" means, in many respects, at the sitting of the court when it is hearing the parties and sitting at the adjourned judgment. Further, the parties can be
30 heard by way of "written submissions" as stipulated in rule 98 of the Judicature (Court of Appeal Rules) Directions which provides that:

98. Presentation of arguments in writing.

(1) Any party to an appeal does not intend to appear in person or by advocate at the hearing of the appeal may Lodge in the registry statement in writing of his or
35 her arguments in support of or in opposition to the appeal or the cross appeal, if

5 any, as the case may be, and shall, before or within seven days after lodging it, serve a copy of it on the other party or each party in person or separately represented.

The rule then further provides for the timelines for the filing and service of written statements. Rule 98 (4) provides that:

10 (4) No party who has lodged a statement under this rule shall, except with the leave of the court, address the court at the hearing of the appeal.

Further rule 100 of the Rules of the Court of Appeal provides for appearances at hearing and procedure on nonappearance. It provides in rule 100 (6) as follows:

15 (6) For the purposes of this rule, a party who has lodged a statement under rule 98 of these Rules shall be taken to have appeared.

In that context therefore the word "sitting of the court" presupposes a hearing in open court though it also includes opportunity availed to the parties for the hearing of the appeal when the court is open to the parties and the public and duly constituted by an uneven number not being less than three members to hear the appeal or accept the written submissions and give notice of when judgment will be delivered. The sitting of the court can also be taken to be "opportunity to hear the parties". Where the court has heard the parties and the sitting of the court or even in the written submissions where a party is taken to have appeared before the court, then the court adjourns the hearing and may fix the matter for judgment at a later stage. In the circumstances of this appeal therefore, Hon Lady Justice Percy Night Tuhaise was present at the sitting of the court but not at the sitting for delivery of judgment. As stated in the lead Judgment of the Hon. Deputy Chief Justice, thereafter she was elevated to the Supreme Court and did not participate at the final stages of the Judgment. The phrase "*final stages of the judgment*" leaves a lot to be desired because it is not definitive of what those final stages are. Do they include deliberations on the final outcome or is it about presentation? Does it include sitting when delivering judgment? What is reported in the judgment is that Tuhaise, JA, as she then was, had agreed at an earlier stage just before she was elevated to the

- 5 Supreme Court, that the appeal should succeed. It is clear that she did not write any concurring judgment or write a dissenting judgment so her opinion remains that which is reported in the lead judgment. It is not signified in her own writing as a member of the Court. She never sat at the delivery of judgment in the appeal.
- 10 The appellant's counsel further attacked the Judgment on the ground that Hon. Tuhaise, JA was required under the rules and as a member of the Panel which heard the appeal, to write a separate judgment. Rule 33 (5) of the Judicature (Court of Appeal Rules) Directions provides for how the decision of the Court of Appeal shall be embodied that:

- 15 (5) In civil appeals, separate judgments shall be given by the members of the court unless the decision been unanimous, the presiding judge otherwise directs.

In the circumstances of this appeal, there was no unanimous decision per se and as envisaged by rule 33 (5) of the Rules of the Court of Appeal because separate judgments were given. There was a lead judgment which
20 was followed by the judgment of the second Justice of the Court of Appeal who wrote a concurring judgment to the lead judgment. There was no Judgment from Tuhaise, JA who was no longer a member of the Court of Appeal. The essence of the submission of the appellant's counsel is that each judge is required to write a separate judgment unless the decision is
25 unanimous and the presiding judge directs that one judgment shall be written. It can therefore be said without fear of contradiction that there was no direction that there be a Judgment of the court to be endorsed by every judge on the panel (three Justices) in compliance with rule 33 (5) of the Rules of the Court of Appeal. In fact, separate judgments were given and
30 the second justice of appeal concurred with the lead judgment. There was no third judgment, whether dissenting or concurring with the lead judgment.

I have reviewed previous authorities of this court on the same question of whether a judgment delivered at a time when one or some of the members of the court is or are not available either for reasons of elevation to a Higher
35 Court, retirement or when deceased, is invalid.

5 In **Orient Bank Limited vs Frederick Zaabwe and Mars Trading Limited;**
Supreme Court Civil Application No. 17 of 2007, the issue was whether the
court's judgment in a case heard and decided by a quorum of five Justices
is invalid, if at the time it is delivered, one of the Justices ceased to be a
member of the court. The Supreme Court of Uganda distinguished and did
10 not follow the decision of the Supreme Court of India in **Surendra Singh and
Others Vs the State of Uttar Pradesh (1954) AIR 194**. The decision of the
Supreme Court of India was to the effect that an appeal decision of the High
Court constituted by two judges was invalid because, by the date of delivery
of judgment, one of the two judges had died notwithstanding that he had
15 signed the Judgment before he died. They held that a judge who "delivers"
the judgment or causes it to be delivered by a brother judge, must be in
existence as a member of the court at the moment of delivery so that if
necessary, he or she can stop the delivery after changing his or her mind.
In another case scenario they referred to the Supreme Court noted that
20 where judges had signed separate Judgments which had been handed over
to the registrar of the court for subsequent delivery and two of the three
judges had retired and the third judge had died at the time of delivery of
judgment, the judgment could not be delivered and when so delivered is
invalid.

25 The Supreme Court of Uganda was not persuaded by the decision of the
Supreme Court of India in **Surendra Singh and Others Vs the State of Uttar
Pradesh** (supra) that the death or retirement of a judge necessarily
invalidates an undelivered judgment that the judge signed before the death
or retirement. The Supreme Court of Uganda considered the fact that in
30 hearing appeals from the Court of Appeal, article 131 of the Constitution of
Uganda provides that the court is duly constituted when sitting in criminal
or civil appeals other than appeals from the constitutional court when it
consists of an uneven number not being less than five members of the
court. Further, the practice and procedure is governed by the **Judicature
35 (Supreme Court Rules) Directions** and particularly rule 32 thereof. The
Court singled out inter alia rule 32 sub rule (8) which envisages delivery of

5 a reserved judgment by a judge who did not sit at the hearing or by the registrar. It provides that:

"(8) Where judgment, or the reasons for a decision, have been reserved, the judgment of the court, or a Judgment of any judge, or the reasons, as the case may be, *being in writing and signed*, may be delivered by any judge, whether or not he or she sat at the hearing, or by the registrar." (Emphasis mine)

The court noted as follows:

"the only conditionality for the application of the sub rule is that the Judgment in question is written and signed by the judge who took part in the hearing and deciding of the case. The reason that prevents the judge who wrote and signed the judgment to deliver it in person is not a factor for sub rule (8) to apply. For purposes of this appeal, it is immaterial that the judge is prevented by death or retirement provided that at the time of writing and signing the judgment, the judge was a member of the court."

The court further noted that

"on the other hand, the requirement for the judgment to be in writing and signed is to ensure its authenticity and validation as the judgment of the judge/judges making it. In the case of reserved judgments, the writing and signing are invariably done before the judgment is delivered, and its authenticity and validity are thus preserved up to its delivery. Where at any time before its delivery, the judgment is altered because there is a change of mind, the altered judgment has to be similarly authenticated and validated. In either case, the judgment is delivered as the valid judgment of the judge who prepared and signed it." (emphasis added)

The extensive decision of the Supreme Court in the above excerpts does not deal with a situation where the Judgment is not signed or written by the judge who has retired, is elevated or is for some other reason no longer a member of the court. The decision is therefore distinguishable from the circumstances of the appellant's appeal where the judgment was neither written nor signed by the judge who was elevated and is no longer a member of the court. The Supreme Court judgment in **Orient Bank Limited vs Frederick Zaabwe and Mars Trading Limited** (*supra*) is dated 22nd of January 2008 and was a unanimous decision.

5 In **David Chandi Jamwa vs Uganda; Supreme Court Criminal Appeal No. 02**
of 2017, a similar issue was raised and it was noted that the Supreme Court
had not approved the decision of the Supreme Court of India in **Surendra**
Singh and Others Vs the State of Uttar Pradesh (1954) AIR 194 and
10 additionally noted that rule 32 (8) of the Rules of the Supreme Court was in
pari materia with rule 33 (8) of the Judicature (Court of Appeal Rules)
Directions. On the same issue the Supreme Court stated that:

15 "in cases where a judgment is reserved, it is not always the case that the day a
judgment is signed is the day it is delivered. The import of ascertaining the date
on which a judgment is delivered is that, that is the date on which the judgment
takes effect. The fact that the date of signature on delivery of the Judgment are
different does not affect the validity of the signed document. *What is important is*
that at the time a judge signs the judgment, he/she is still a member of the court."
(Emphasis added).

20 Again the above decision is distinguishable on the ground that there was
not written judgment or a signature of the judge who had left the court
authenticating the judgment in the circumstances of the appellant's appeal.
The question was whether indeed one of their Lordships signed judgment
prior to his elevation since his signature was never dated. There are two
factual elements to be pointed out in **David Chandi Jamwa vs Uganda**
25 (supra); one is that one justice had been elevated to the Supreme Court by
the time the decision was delivered and he had left a signed judgment.
Secondly, the head of the panel, Kavuma, DCJ had since retired. He had not
even signed the judgment of court (one judgment). The judgment was only
signed by Hon. Opio - Aweri, JA, who had left the court, and Kakuru, JA by
30 the time the judgment was delivered. It was argued that it could not be
ascertained whether Hon. Justice Kavuma, DCJ had agreed with the
Judgment or dissented. The court noted that Rule 33 (3) of the Judicature
(Court of Appeal Rules) Directions provides that in criminal appeals, one
judgment shall be given as the judgment of the court, that a judge who
35 dissents shall not be required to sign the judgment. They noted that Kavuma,
DCJ, was taken to have dissented from the opinion of the other two Justices
who signed.

5 In the circumstances, I find that the case of **David Chandi Jamwa vs Uganda**
(supra) is distinguishable from the appellant's appeal because it was a
criminal appeal governed by rule 33 (3) which provides that in criminal
appeals, *"one judgment shall be given as the judgment of the court, but a*
10 *judge who dissents shall not be required to sign the judgment."* On the other
hand, in civil appeals, other rules are applicable. Rule 33 (5) of the Court of
Appeal Rules, which applies to civil appeals, provides that:

(5) In civil appeals, separate judgments shall be given by the members of the
court unless the decision being unanimous, the presiding judge otherwise directs.

15 Unlike in civil proceedings, criminal appeals have a substantially different
rule as to judgments. In the circumstances of this case, there is a civil
appeal that was governed by rule 33 (5) of the Judicature (Court of Appeal
Rules) Directions which I have reproduced above. This rule provides that
separate judgments shall be given by the members of the court unless the
decision being unanimous, the presiding judge otherwise directs.

20 In the circumstances of this appeal, there was no unanimous decision and
there was a separate lead judgment of Owiny – Dollo, DCJ (as he then was)
with the concurrence, in a separate judgment, by Kakuru, JA. The case of
the appellant is clearly distinguishable from **David Chandi Jamwa vs**
Uganda (supra) appeal on this ground. The decision in David Chandi Jamwa
25 was delivered in 2019 and there was no unanimous as two out of five
Justices of the Supreme Court dissented from the majority decision.

30 Finally, I have considered the decision of this court in **Sarah Kulata**
Basangwa vs Uganda; Supreme Court Criminal Appeal No. 03 of 2018. In that
appeal, it was argued that the judgment of the Court of Appeal dated 15th of
January 2018 was signed by two Justices of Appeal instead of the requisite
minimum of three. The court considered the rules to the effect that a judge
who dissents is not required to sign the judgment in criminal appeals. The
Supreme Court held that:

35 "there was a majority decision which constituted the judgment of the court. The
absence of the justice's signature does not invalidate the decision of the court

5 which was taken after a hearing of the case in accordance with the Constitution.
In the circumstances we find no merit in ground five which is also dismissed."

The above decision is clearly distinguishable because it relied on a rule which applies exclusively to criminal appeals and does not apply to civil appeals which are governed by rules prescribing separate judgments to be
10 written by each judge unless the decision, being unanimous, the presiding judgment otherwise directs.

In the premises, I find that in civil appeals, where separate judgments have to be written, it is a requirement for all the justices on the panel to write a judgment and to give directions that it should be delivered in his or her
15 absence.

In the circumstances of this case, there is no written Judgment of Tuhaise, JA (as she then was) before she was elevated to the Supreme Court. Her decision was not embodied in a written judgment on the court record and the facts are distinguishable from the previous decisions of this court. In
20 **Orient Bank Ltd vs Zaabwe and Another** (supra), the unanimous decision of the Supreme Court settled the law as provided in the rules that each separate judgment of a member of the panel in a civil appeal has to be written and signed. For that reason, the judgment was invalid and therefore the point of law raised by the appellant's counsel is sustained. I would find
25 that there is no need to consider the merits of the Judgment because it did not comply with the rules on judgment writing under rule 33 (5). Rule 33 (10) of the Judicature (Court of Appeal Rules) Directions. Rule 33 (10) provides that:

(10) Where judgment, or the reasons for a decision, has or have been reserved,
30 the judgment of the court, or a judgment of any judge, or the reasons, as the case may be, being in writing and signed, may be delivered by any judge, whether or not he or she sat at the hearing, or by the registrar.

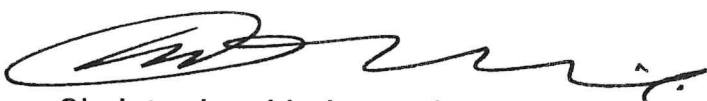
In conclusion, there was no written and signed judgment of Tuhaise, JA (as she then was) in a civil appeal where separate judgments were to be
35 delivered as required by rule 33 (5) of the Judicature (Court of Appeal Rules)

5 Directions. Secondly, there being no written Judgment by Tuhaise, JA (as she then was), she could not have directed a brother or sister judge to deliver it on her behalf as required by rule 33 (10) of the Judicature (Court of Appeal Rules) Directions.

10 In the premises, I find merit in the appellant's appeal and I would allow the appeal on the point of law raised on the issue of incompetence of the judgment on the ground of absence of one member of the panel. I would set aside the judgment of the Court of Appeal as being invalid and of no effect for the reasons I have given above. I would make an order remitting the appeal file to the Court of Appeal to be placed before another panel to hear and determine the appeal. The respondent cannot be faulted for the errors of the court and I would make an order that each party bears its own costs of this appeal.

Dated at Kampala the 7th day of Nov 2023

20



Christopher Madrama Izama

Justice of the Supreme Court

Delivered by the registrar 7/11/23



Ref

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: TIBATEMWA-EKIRIKUBINZA; CHIBITA; MUSOKE; MUSOTA; MADRAMA; JJSC.]

CIVIL APPEAL NO.16 OF 2020

BETWEEN

- 1. NAMYALO KEVINA**
2. SSEMAKULA LAWRENCE :::::::::::::::::::: APPELLANTS

AND

JOHN BAPTIST KAWANGA :::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Court of Appeal before: Hon. Justices: Alfonse Owiny – Dollo, DCJ, Kakuru and Tuhaise, JJA in Civil Appeal No. 130 of 2017 arising from High Court Civil Suit No. 51 of 2012.]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading the judgment of my learned brother, Christopher Madrama, JSC and I agree with him that this appeal succeeds on the grounds he has elaborated in his judgment.

I also agree with his orders as to costs.

Since Hon. Justices: Chibita; Musoke and Musota; JJSC also agree, orders are hereby issued in the terms proposed by Hon. Justice Christopher Madrama, JSC.

Dated at Kampala this^{7th}..... day of^{Nov}..... 2023.

.....^{L. Tibatemwa}.....
PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

Returned by the registrar 7/11/23
[Signature]

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: TIBATEMWA-EKIRIKUBINZA; CHIBITA; MUSOKE; MADRAMA; JJSC.)

CIVIL APPEAL NO: 16 OF 2020

BETWEEN

1. NAMYALO KEVINA
 2. SSEMAKULA LAWRENCE APPELLANTS
- AND

JOHN BAPTIST KAWANGA RESPONDENT


[Appeal from the decision of the Court of Appeal before: [Alfonse Owiny Dollo, DCJ]; Kakuru and Tuhaise; JJA, in Civil Appeal No. 130 of 2017 arising from High Court Civil Suit No. 51 of 2012]

JUDGMENT OF CHIBITA, JSC

I have had the benefit of reading in draft the judgment prepared by my learned brother, Hon. Justice Christopher Madrama, JSC and I agree with his reasoning and his conclusions.

I also agree with the orders he has proposed.

Dated at Kampala this^{4th}7th day of^{Nov}.....2023


Hon. Justice Mike J. Chibita
JUSTICE OF THE SUPREME COURT

Delivered by the registrar 7/11/23

*Isatifa
Rey*

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 016 OF 2020**

**1. NAMYALO KEVINA
2. SSEMAKULA LAWRENCE:.....APPELLANTS**

VERSUS

JOHN BAPTIST KAWANGA:.....RESPONDENT

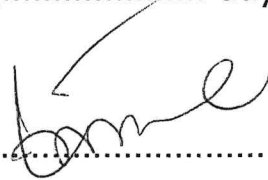
(Appeal from the decision of the Court of Appeal (Owiny-Dollo, DCJ and Kakuru and Tuhaise, JJA) in Civil Appeal No. 130 of 2017 dated 23rd June, 2020)

**CORAM: HON. LADY JUSTICE PROF. LILLIAN TIBATEMWA –
EKIRIKUBINZA, JSC
HON. MR. JUSTICE MIKE CHIBITA, JSC
HON. LADY JUSTICE ELIZABETH MUSOKE, JSC
HON. MR. JUSTICE STEPHEN MUSOTA, JSC
HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA, JSC**

JUDGMENT OF ELIZABETH MUSOKE, JSC

I have had the advantage of reading in draft the judgment of my learned brother Madrama, JSC and I concur with his analysis, conclusions and orders.

Dated at Kampala this 7th day of Nov 2023.



Elizabeth Musoke

Justice of the Supreme Court

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 16 OF 2021
[CORAM: TIBATEMWA-EKIRIKUBINZA; CHIBITA, MUSOKE,
MUSOTA & MADRAMA; JJSC]

- 1. NAMYALO KEVINA**
- 2. SSEMAKULA LAWRENCE:..... APPELLANT**

VERSUS

JOHN BAPTIST KAWANGA :..... RESPONDENT

JUDGMENT OF STEPHEN MUSOTA, JSC

I have had the benefit of reading in draft the judgment by my brother Madrama, JSC.

I agree with his analysis, conclusions and the orders he has proposed.

Dated this 7th day of Nov 2023



Stephen Musota
JUSTICE OF THE SUPREME COURT