THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CARAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA

CIVIL APPEAL NO.18 OF 2008

BETWEEN

YOWASI KABIGURUKA …… APPELLANT

AND

SAMUEL BYARUFU …… RESPONDENT

[Appeal from the judgment and orders of the High Court at Mbarara (Mugamba, J.) dated 20th December, 2007 in High Court Civil Appeal No.09 of 2006].

JUDGMENT OF ENGWAU, JA.

This is a second appeal from the judgment and orders of the first appellate court in High Court Civil Appeal No.09 of 2006, dated 20th December, 2007 in which the appellate judge set aside the judgment of the Magistrate Grade I at Mbarara and ordered a retrial with each party to bear its own costs.

The background facts of this appeal are fairly simple and straightforward. The appellant instituted a civil case in the Magistrate Grade I Court at Mbarara vide Civil Suit No. MMB 106 of 1993. In

that suit, the appellant sought, inter alia, a declaration that the land in dispute belonged to him, for a permanent injunction restraining the respondent from further trespass, an eviction order, general damages for breach of contract and costs of the suit.

The appellant claimed that at all material times, he was the registered proprietor of the suit land comprised in Leasehold Register Vol.1460, Folio 9 Plot 17 Block 4, Karora, Nyarubungo, Rugando, Rwampara. According to the appellant, the respondent on 29th November, 1993 unlawfully and without lawful justification, trespassed on a portion of this land by fencing it off.

The respondent denied the allegation and contended that he owned the suit land customarily and that the appellant's Title was obtained fraudulently by enclosing his customary holding into the Land Title.

The Magistrate Grade 1 on the 5th of June, 2003, entered judgment in favour of the appellant with the following orders:

(a) a declaration order that the land in dispute is owned by the appellant;

(b) granted general damages in the tune of Ug.Shs.500,000/=;

(c) costs of the suit;

(d) permanent injunction restraining the respondent from further trespass and

(e) interest of 6% in (b) and (c) from the date of judgment till payment in full.

Being aggrieved by the judgment and orders of the Magistrate Grade I, the respondent lodged his appeal in the High Court at Mbarara on 17th May, 2006, against the whole judgment and orders of the Magistrate Grade 1 delivered on 5th June, 2003. Obviously, the appeal was filed out of the stipulated statutory period within which to file an appeal.

Consequently, the respondent applied for leave to appeal out of time vide High Court Miscellaneous Application No.01 of 2003. The application was heard and dismissed by the High Court. The respondent then went ahead and sought leave to appeal against High Court refusal to grant him leave to appeal out of time vide High Court Miscellaneous Application No.27 of 2003 which application was granted.

In Civil Appeal No.87 of 2004, the Court of Appeal allowed the respondent to file his appeal out of time against the judgment of Magistrate Grade 1. The judgment of the Court of Appeal was apparently delivered on 5th April, 2006. In this judgment, however, the Court of Appeal did not specify the period of time within which the respondent would file his appeal in the High Court. The respondent filed his appeal 12 days after the expiry of the statutory period of 30 days. The 1st appellate judge proceeded to consider the appeal. The following are some extracts from the judgment of the High Court as the 1st appellate Court:

"This is an appeal against the decision of Mr. Kaboggoza Musoke, Magistrate Grade 1, Mbarara. The appeal was filed in

this court on 17th May 2006 in the wake of the Court of Appeal ruling that this court extends the period within which the appellant was to file his appeal. For the record that ruling was delivered on 5th April 2002 sic(5th April 2006). Counsel for the respondent raises a preliminary objection to the effect that under S.79 of the Civil Procedure Act, which governs appeals to this court in civil matters, the appeal was filed out of time and should therefore be struck out.

Counsel for the appellant on the other hand opposed the objection saying the matter had to be treated differently since it resulted from the ruling of the Court of Appeal. Authority was quoted to this end. With respect I am not persuaded. An appeal to this court must be lodged within thirty days of the decree or order. An extension is possible in the discretion of this court for good cause shown. Neither was good cause shown nor was leave to appeal out of time given. The appeal was past the statutory time by twelve days.

This being the first appellate court, I note the duty incumbent on it to re-examine and re-evaluate the evidence on record. See Kezekia Otim vs. George Akileng & others [1 982] HCB 42. ***I have looked at the entire record inclusive of the judgment of the trial court. It emerges the two litigants claim separate pieces of land which are contiguous one to another, never mind the merits in their claims. It was also alleged one party trespassed into the property of the other, which allegation one of the parties denies.***

Evidence was heard but no visit was made to the locus in quo. It was stated in Yeseri Waibi vs. Edisa Lusi Byandala [1982] HCB 28 ***that the practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill gaps for then the trial Magistrate may run the risk of making himself a witness in the case. The case at hand merited a visit to the locus in quo by court in order to determine whether the alleged trespass was actual.***

Given my ruling earlier in this judgment concerning the competence of this appeal, I should not have gone further. Indeed I shall not go into the merits of the grounds which have been laid out in the memorandum. Nevertheless a court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon. See Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor [1982] HCB 11. ***In the premises this court would be failing in its duty if it were, at this moment in time with knowledge of what transpired, to merely strike out the memorandum of appeal and allow the judgment of the trial court to prevail. The need to visit the locus in quo cries loud.***

Consequently the judgment of the Grade I Magistrate is set aside and a retrial is ordered. Parties are to bear their costs".

It is upon the above judgment and order that this appeal is premised on the following grounds:

1. ***The learned appellate judge erred in law and fact when, having held that the appeal was filed out of time, proceeded to re-examine and re-evaluate the evidence on record.***
2. ***The learned appellate judge erred in law and fact in stating that the case in hand had merited a visit to the locus in quo in order to determine whether or not the alleged trespass was actual.***
3. ***The learned appellate judge erred in law and fact when he decided that failure to visit locus in quo was an illegality meriting his intervention in the circumstances of the case.***
4. ***The learned appellate judge generally misdirected himself on the law and facts and reached wrong decisions setting aside the judgment and decree of the trial Magistrate and in ordering a retrial thereby causing a miscarriage of justice.***

In the Notice of Cross-Appeal, on the other hand, the respondent raised two grounds, namely:

1. ***That the learned trial judge erred in law and fact when he failed to hold that the Appeal was filed within reasonable time.***
2. ***That the learned trial judge erred in law and fact when he failed and/or refused to award costs to the Appellant now Respondent.***

In the joint scheduling memorandum, the following issues were framed for determination:

(i) Whether or not the learned Appellate Judge in the circumstances of this case erred in law and fact that he proceeded to re-examine and re-evaluate evidence on record?

(ii) Whether or not the Appeal was filed out of time?

(iii) Whether the learned Appellate Judge erred in law and fact when he decided that failure to visit the locus in quo was an illegality meriting his intervention in the circumstances of the case.

(iv) Whether or not the learned Appellate Judge was justified in the circumstances of this case to use the inherent powers of court to order a retrial?

(v) Whether the learned Appellate Judge generally misdirected himself on the law and fact and reached wrong decisions?

At the commencement of hearing the substantive appeal and Cross-appeal, Mr. Peter Walubiri, learned counsel for the appellant, argued first the 2nd issue followed by the 1st issue and the rest in their order. Mr. Richard Mwebembezi, learned counsel for the respondent also followed the same pattern, and for convenience, I shall consider issues (i) and (ii) together and (iii), (iv) and (v) jointly.

Issue No.(ii)

Mr. Walubiri pointed out that according to the record of appeal, the judgment of the High court appears at page 30 thereof. In that judgment, the respondent filed his appeal on 17th May, 2006 after the Court of Appeal had granted an extension of time vide Civil Appeal No.87 of 2004. In this case the Court of Appeal granted leave without setting the time during which the respondent would lodge his appeal.

It is the respondent's case that the appeal was filed within a reasonable time of 12 days. In counsel's opinion, reasonable time must be seen in the context of the law. Section 79(1) (a) of the Civil Procedure Act provides:

> ***"79. (1) except as otherwise specifically provided in any other law, every appeal shall be entered –***
>
> ***(a) within thirty days of the date of the decree or order of the court.***
>
> ***(b) …….***
>
> ***(c) ……"***

It is the contention of counsel Walubiri that the appellate judge was right to hold that the appeal was filed out of time. Having made that finding, the appeal should have come to an end at that stage. In counsel's view, cross-appeal on that ground should be dismissed.

Mr. Mwebembezi did not agree. He pointed out that the Court of Appeal granted an extension of time within which to appeal in the High Court but did not specify the time within which the respondent was supposed to file papers. Counsel further pointed out that whereas the order was granted on the 5th April, 2006 but the order was extracted on the 10th May 2006 and the appeal was eventually filed on the 17th May, 2006.

It is the contention of counsel that section 79(1) C.P.A was no longer applicable because having failed to comply, the respondent had resorted to section 96 C.P.A, which provides:

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired".

Learned counsel submitted that this court the High Court, when exercising its powers under section 96 C.P.A to enlarge time, it is not limited or bound by the provisions of section 79(1) CPA. In counsel's view, the 1st appellate judge was justified to re-examine and re-evaluate the evidence on record by using the powers vested in him under section 96 CPA.

Mr. Mwebembezi further submitted that this court having not set the time within which to appeal after the extension, the respondent had to resort to the Interpretation Act (CAP3) Section 34(2) thereof provides:

"Where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay and as often as due occasion arises".

It is counsel's submission that the Appeal which was filed on the 17th May 2006 after an Order of extension granted on 5th April 2006 was filed within reasonable time.

Without prejudice to the above submission, even if it were to be found that the appeal was filed outside the time limit, this is a case that should fall within the ambit of Article 126(2)(e) of the Constitution where substantial justice was to be administered without undue regard to technicalities. According to counsel, this being a land matter where the respondent lives and derives livelihood, technicalities should be ignored in favour of substantial justice.

Counsel further pointed out that in the case of Loi Kageni Kiryapawo vs Gole Nicholas Davis, Civil Application No.15 of 2007, the Supreme Court held inter alia:

"Accordingly, we find that the Memorandum of Appeal and the Record of Appeal filed on 1st October 2007 were filed out of time. The Appeal is therefore incompetent. However, in the interest of justice we are not inclined to strike out the appeal …….. We accept the alternative prayer that the respondent be granted extension of time……".

In counsel's view, even if the court was to make a finding that the Appeal was filed out of time, in the interest of justice, it would be left to be heard on merit taking into account the above decision of the Supreme Court.

According to counsel, cross-appeal should be allowed.

It is necessary for me to reproduce the provisions of S.79 CPA.

"79. Limitation for appeals.

(1) Except as otherwise specifically provided in any other law, every appeal shall be entered –

(a) within thirty days of the date of the decree or order of the court; or

(b) within seven days of the date of the order of a registrar, as the case may be, appealed against, but the appellate court may for good cause admit an appeal though the period of limitation prescribed by this section has elapsed.

(2) ……" [Emphasis included].

It is true that this court in Civil Appeal No.87 of 2004, had allowed Samuel Byarufu, now the respondent, an extension of time within which to appeal against the judgment of Magistrate Grade One in Civil Suit No.MB 106 of 1993 delivered on 5th June, 2003 after the High Court had rejected his application for the same. It is also true this court did not give Mr. Byarufu any specific time within which to file his appeal. The appeal was then filed 12 days after the 30 days had expired.

The appellate judge having noted that the appeal was filed out of time and having proceeded to re-examine and re-evaluate evidence on record, in my view, validated the appeal under sections 79(1) and 96 of the Civil Procedure Act. The respondent contended that he owned the land customarily and that the appellant's title was obtained fraudulently by enclosing his customary holding into his land title. This contention, in my view, was good cause for investigation into which land belonged to the appellant vis-à-vis that of the respondent.

The appellant during cross-examination at page 13 of the record of proceedings stated thus: ***He had a kibanja next to the disputed land. My title surrounds his kibanja. It is outside my title……. I heard that is how he got his kibanja by purchase from Rwahinda. It was before I settled……. The defendant's land remained in the middle. The land in the middle was not in the Application…….. His price was high I could not buy it and later he said he was not selling".***

Further in re-examination the appellant stated thus: ***"My land engulfs his kibanja on 3 sides".***

In his judgment, the appellate judge rightly stated thus: ***"I have looked at the entire record inclusive of the judgment of the trial court. It emerges the two litigants claim separate pieces of land which are contiguous one to another, never mind the merits in their claims. It was also alleged one party trespassed into the***

property of the other, which allegation one of the parties denies".

Mr. Walubiri's contention is that the judge should not have considered the merits of the appeal on the ground that it was filed out of time. In the interest of justice, Mr. Walubiri's contention is untenable in the circumstances of this case. The appellant admits that his land surrounds that of the respondent. The judge was justified to order a retrial in order to identify the appellant's land from that of the respondent. The appellant should not use his land title to engulf the respondent's customary land, which he failed to buy in the first place.

Further, it is my considered view that Mr. Walubiri's contention is based on mere technicalities. Under Article 126(2)(e) of the 1995 Constitution of Uganda, substantive justice must be administered without undue regard to technicalities. In my view, this principle applies with full force on this matter. I cannot fault the 1st appellate judge for re-examining and re-evaluating the evidence on record.

In the case of ***Hajati Safina Nababi vs. Yafesi Lule, Civil Appeal No.9 of 1978,*** the Court of Appeal held inter-alia:

"It is axiomatic that a party instructs counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his counsel. He must elect both to conduct it entirely in person or to entrust it to his counsel".

The delay to file appeal, in the instant case, in my view, was again caused by the respondent's counsel, which should not be visited on him, especially when the appellant did not raise it in the submissions before the trial judge. The lawyers for the appellant should be estopped from raising the point on appeal. It would be an injustice to make the client suffer for a mistake of his lawyer.

In Civil ***Appeal No.87 of 2004***, the judgment of the Court of Appeal was apparently delivered on 5th April, 2006. In this judgment, the Court of Appeal did not specify the period of time within which the respondent would file his appeal in the High Court. The respondent filed his appeal 12 days after the expiration of 30 days. Section 34(2) of the Interpretation Act provides:

"Where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay and as often as due occasion arises".

In the circumstances of this case, the respondent who is a layman, filed his appeal 12 days past the statutory period of 30 days under section 79(1) of the Civil Procedure Act. In my view, the respondent acted without unreasonable delay.

It is to be noted further that, according to rule 57 of the Rules of this court, when any order of the court does not specify the time within which to do an act, a person who is affected by such order is supposed to apply to the court to rescind the order. The order of this

court granting leave to appeal did not specify the time and therefore the appellant being the one complaining, should have applied to rescind the order. Having failed to do so, he should be estopped from raising the issue of limitation of time since he himself waived it.

In the net result, I would answer issues (i) and (ii) in the negative.

Issues:

(iii) Whether the learned Appellate Judge erred in law and fact when he decided that failure to visit the locus in quo was an illegality meriting his intervention in the circumstances of the case.

(iv) Whether or not the learned appellate judge was justified in the circumstances of this case to use the inherent powers of court to order a retrial?

(v) Whether the learned appellate judge generally misdirected himself on the law and fact and reached wrong decisions?

Mr. Walubiri submitted that failure to visit the locus in quo is not an illegality. According to counsel, visiting the locus in quo is not mandatory but depends on the circumstances of each case. Counsel pointed out that the trial judge relied on the case of ***Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor. [1982] HCB 11*** out of context. In that case, the tax-officer used the wrong principle for the award. In the instant case, failure to visit the locus in quo is not an illegality.

Mr. Mwebembezi for the respondent conceded that failure to visit the locus in quo is not an illegality. However, counsel pointed out that the respondent contended that he owned the land customarily and that the appellant's title was obtained fraudulently by enclosing his customary holding into his land title. In counsel's view, the respondent raised an allegation of fraud that prompted the judge to state thus:

"A court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made thereon……. In the premises this court would be failing in its duty if it were, at this moment in time with knowledge of what transpired, to merely strike out the memorandum of appeal and allow the judgment of the trial court to prevail. The need to visit the locus in quo cries out loud".

I would agree with the submission of counsel for the respondent that in the circumstances of this case failure to visit the locus in quo was not an illegality. The alleged fraud by the respondent prompted the learned judge to state further thus:

"In the case of Yeseri Waibi vs. Edisa Lusi Byandala [1982] HCB 28, the practice of visiting the locus in quo is to check on the evidence given by witness and not to fill the gap for then the trial Magistrate may run the risk of making himself a witness in the case. The case at hand merited a visit to the locus in quo by

court in order to determine whether the alleged trespass was actual".

I would entirely agree with the learned judge that according to the circumstances of this case, "the need to visit the locus in quo cries out loud" in order to investigate the alleged fraud. It was very necessary to investigate which land belonged to the appellant as opposed to the respondent's land. In that regard, the appellate judge was justified to use the inherent powers of court to order a retrial. It was a necessary order in the interest of justice. Accordingly, issues (iii), (iv) and (v) are covered in the negative.

In the result, I would dismiss this appeal with costs and uphold the retrial order before another Magistrate of competent jurisdiction.

Dated at Kampala this ……..day of…….2010.

S.G. Engwau

JUSTICE OF APPEAL

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

I have perused the judgment of S.G.Engwau, JA in draft. I entirely agree that the circumstances of this case warranted a visit to the locus in quo, failure of which renders a retrial a necessity, though,

regrettably, this suit has dragged on in the court system for far too long, almost sixteen years since 30/05/1994.

I would nonetheless dismiss this appeal with costs and confirm the appellate Judge's order for retrial before another Magistrate of competent jurisdiction.

Since Twinomujuni, JA also agrees the stands dismissed on terms as above indicated.

Dated at Kampala this …24th…day of ...February…2010

Hon A.E.N.Mpagi-Bahigeine
JUSTICE OF APPEAL

JUDGMENT OF TWINOMUJUNI, JA

I have had the advantage of perusing the judgments, in draft, of my senior colleagues, Hon Justice Mpagi-Bahigeine, JA and Hon Justice Engwau, JA, I concur and I have nothing useful to add.

Dated at Kampala this …24th…day of …February…2010

Hon Justice A.Twinomujuni
JUSTICE OF APPEAL