THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: *Egonda-Ntende, Obura & Muhanguzi JJA]*

CIVIL APPEAL NO. 184 OF 2017

(Arising out of Miscellaneous Application No. 41 of 2017)

(Arising out of Miscellaneous Cause No. 162 of 2016)

BETWEEN

KABAKA OF BUGANDA::APPELLANT

AND

MALE H MABIRIZI KIWANUKA:::RESPONDENT

(*An appeal from the judgment of High Court of Uganda (P. Basaza – Wasswa, J, delivered at Kampala on the 5th June 2017)*

JUDGMENT OF FREDRICK EGONDA-NTENDE JA

Introduction

1. This appeal arises out of discovery proceedings. The brief facts of the case are that the respondent, Mr. Mabirizi filed High Court Misc. Cause No.162 of 2016 where he sought declaratory orders and injunctions against the appellant's alleged imposition of registration at a fee, of persons living on official mailo land registered in the appellant's names pursuant to Article 246 (3) (a) of the 1995 Constitution of Uganda, the Traditional Rulers (Restitution of Assets And Properties) Act, Cap.247. He also sought declaratory orders against the respondent's alleged collection of a 10% charge of the sale value of land / kibanja on official mailo registered in the

names of the appellant and orders directing the appellant to refund any monies collected as inter alia: registration fees, ground rent and charges on land/kibanja sales from people living on official mailo land registered in the appellant's name under the said law.

2. There were numerous applications that arose from Misc. Cause No.162 of 2016 among which was Misc. Application No. 41 of 2017 which is the subject of this appeal. The respondent, brought this application under Articles 26, 28, 50 & 139 of the 1995 Constitution of the Republic of Uganda, Section 98 of the Civil Procedure Act and Order 10 rules 12, 14,15,17,21 and 24 of the Civil Procedure Rules SI 71-1. He sought for orders that the appellant be directed to make discovery on oath of the documents described in the application for his inspection. On 5th June 2017, the application was partially granted.

3. The appellant being dissatisfied with the judgment of the learned trial judge now appeals on the following grounds:

> 'The learned Hon. Lady. Justice of the high court erred in law and in fact in: -
>
> (a) Deciding Misc. Application No. 41 of 2017 before the disposal of the pending application for security for costs and as such caused a miscarriage of justice.
> (b) Holding that the documents sought under paragraph 1(a), (c), (d) and (e) of the Respondent's Misc. Application No. 41 of 2017 are specific, whereas not.

(c) Holding that the documents sought under paragraph 1(a), (c), (d) and (e) of the Respondent's Misc. Application No. 41 of 2017 are relevant for the fair determination of the main case No.162 of 2016, whereas not.
(d) Directing to make discovery on Oath of the Bank Statements in the names of Buganda Land Board with Bank of Africa (U) Ltd Main branch and Stanbic Bank (U) LTD, Forest Mall branch of Account Nos. 011813350009 and 9030005607948 respectively.
(e) Failing to consider and apply all the conditions necessary before directing an Order of discovery on oath of the impugned documents'

4. The appellant prayed that this court sets aside the ruling and order of the High Court and dismiss Misc. Application No.41 of 2017.

5. The respondent opposed this appeal.

Submissions of Counsel

6. At the hearing, the appellant was represented Mr. Christopher Bwanika, Mr. Robert Sawa and Ms. Nalumansi Charlotte. The respondent represented himself. The parties chose to adopt their conferencing notes as their submissions.

7. On ground one, counsel for the appellant submitted that the learned trial judge erred and misdirected herself in law in deciding Misc. Application No.41 of 2017 before the disposal of Misc. Application No.798 of 2016 thus occasioning a miscarriage of justice. This countered the purpose of the appellant's application for security for costs which was meant to secure the appellant who is incurring costs to defend the main suit that is incompetent and the numerous applications thereunder. The respondent faulted the trial court in avoiding to deal with the issues of the illegality of the suit raised in the application for security. He relied on the case of Rwanyarare

v Attorney General Constitutional Petition No.11 of 1997, Uganda Freight Forwarders Association & Another v The Attorney General & Anor. Constitutional Petition No.22 of 2009. He also relied on Misc. Cause No.395 of 2017. Counsel for the appellant also submitted that the respondent's exaggerated bill of costs is contrary to the principles of public interest litigation.

8. In reply the respondent's submission was that the application for security for costs was set down for hearing in the same sitting as that of discovery and the appellant did not plead nor raise the issue of illegality/ irregularity of the course of action adopted. The contentions about lack of cause of action and award of costs are not part of this appeal. He relied on the case of Fangmin v Belex Tours & Travels S C Civil Appeal No.6 of 2013 (unreported) for the submission that parties should stick to their pleadings. He cited various decisions in support of his submission that he has a locus to bring the main suit among which included Advocates Coalition for Development and Environment & Anor, v Attorney General & 2 Ors H.C. Misc. Cause No. 1000 of 2004 (unreported).

9. On grounds 2 and 3, Counsel for the respondent submitted that none of his occupants has been compulsorily required to register at fee. Therefore, the discovery of the documents in Miscellaneous Application No.41 of 2017 is not relevant for the determination of the main cause. The documents that the respondent sought for discovery are of no probative evidence and value since the appellant does not dispute collection of the money but the involuntariness of it. In reply, the respondent contended that the documents are relevant for the fair determination of his case against the appellant and the learned trial judge properly exercised her discretion in holding so.

10. On ground 4, the respondent contends the documents sought for discovery in paragraphs 1 (a), (c), (d) and (e) of Misc. Application No.41 of 2017 are too general and could not be specific in the absence of the respondent's disclosure of the people he represents, showing their consent and leave of court to institute a representative suit. He relied on the case of White v Spafford & Co. (1901) 2 K.B 241. That the discovery on oath and inspection of the above documents would be prejudicial to non-complaining unaffected third parties who voluntarily registered and wish their affairs to be kept private. In reply, the respondent maintained that the documents he seeks discovery of are specific. He relied on a letter on record by one of the officials of the kingdom published to the public.

11. On ground 5, the appellant submits that the main suit and Misc. Application No.41 of 2017 is a fishing expedition through which the respondent sought to obtain information from the appellant with a chance of making a case out of the information that might be provided. That the order for discovery on oath should not be available to a party who is before court illegally and whose suit is incompetent ab initio. Counsel of the appellant relied on the case of Gale v Denman Pictures Houses Ltd (1930) KB 588. That court is responsible for protecting against unreasonable investigation into a party's affairs and must deny discovery. The bank statements sought to be discovered are the property of a third party. The respondent maintained his submission that the learned trial judge properly exercised her discretion.

Analysis

12. Before I handle the main appeal, I shall first consider Miscealleonous Application No. 231 of 2017 and Miscealleonous Application No.271 of 2017 originating from this appeal. These applications were brought by the respondent, Male Mabirizi mainly under Rules 2(2), 43, 44, 82, 86 and 87 of the Judicature (Court of Appeal)

Rules SI 13-1. The applications are supported by a number of affidavits sworn on behalf of the appellant and by the respondent. The gist of the respondent's affidavits is that this appeal is incompetent before this court on various grounds and should therefore be struck out.

13. The respondent being the applicant in these applications contended that some essential steps were not taken by the appellant in instituting this appeal. It is his submission that the 60 days within which the respondent was to file the appeal had lapsed without any appeal being filed. He also alleged that the letter requesting for typed proceedings was neither filed in the lower court nor served on them. It was his prayer that this appeal be struck out on this ground. On the other hand, the appellant contended that all the essential steps were followed.

14. Rule 83 (1) of the Judicature (Court of Appeal) Rules SI 13-1 provides that appeals must be instituted by filing in court the record of appeal and memorandum of appeal within 60 days from the date when the notice of appeal was lodged. The decision in Misc. Application No.41 of 2017, from which the appellant appeals was delivered on 5th June 2017 and the notice of appeal was filed on 8th June 2017 according to annexure B of the respondent's affidavit in reply. Since the notice of appeal was lodged on 8th June 2017, the appeal ought to have been filed by around 9th August 2017.

15. However, Rules 83 (2) and 83 (3) permit an appellant to exclude, from the computation of the 60 days' limit, time taken by the Registrar to prepare and deliver copies of the typed proceedings to the appellant, provided that the application for proceedings was in writing, made within thirty days from the date of the decision against which it is desired to appeal and that a copy of the said letter/application was

served upon the respondent. See Horizon Coaches Ltd v Francis Mutabazi & Others, Supreme Court Civil Appeal No.20 Of 2001 (unreported).

16. The respondent deponed in his affidavit that the appellant did not serve him with a copy of the letter requesting for the record of proceedings. The appellant on the other hand in the affidavit in reply deponed by Kizito Bashir Juma in Misc. Application No. 271 of 2017 averred that the applicant was served but he refused to accept service. He deponed in the affidavit at paragraph 9 that;

> "That I am informed by the respondent's lawyers, that upon grant of leave to appeal, they (respondent's lawyers) filed a letter requesting for proceedings on the 6th day of July 2017, copy of which was served on the applicant but he declined to receive the same arguing that it was out of time…"

17. Annexed to the respondent's affidavit in reply is the said letter which indicates that it was filed in High Court on 6th July 2017 upon obtaining leave to appeal that was granted on 28th June 2017. Annexure G is an affidavit of service sworn by Baguma Cyrus on 11th July 2017 and filed in court on 17th July 2017. He deponed that;

> "THAT upon receipt of the full reasoned ruling delivered on the 28th June 2017, I drafted a letter requesting for a record of proceedings and filed it. (a copy of the filed letter is attached and marked "B")
>
> THAT on the same day, after I had filed the said letter, I returned to our Chambers where I found the Respondent who had also come to serve on us a copy of his submissions in Misc. Application No.798 and 19 of 2017 and I thereupon notified him that I had a letter that I wanted to serve on him.
>
> THAT I gave the letter to the respondent, who perused it and refused to acknowledge receipt saying that it was out of time.

THAT I return a copy of the said Letter to this Honorable Court Marked as annexure "B" to this affidavit."

18. Rule 83 (3) does not stipulate the time within which the service of the copy ought to be effected on the applicant. The service is, however, mandatory. See National Housing & Construction Co. ltd v Salome T.B Kyomukama C.A Civil Application No. 133 of 2009, (unreported). From the evidence above, I am persuaded by the appellant's submission that the respondent was served with the letter requesting for the certified copy of the proceedings in High Court but he refused the service. Baguma Cyrus in his affidavit of service deponed that upon receiving the ruling in Misc. Application No.41 of 2017, he drafted a letter requesting for a record of proceedings. He does not say that the letter was drafted and filed in court on the same date as the respondent alleges. This letter was filed in High Court on 6th July 2017, the same date which the respondent went to the respondent's counsel's office to serve him his written submission in Misc. Application 798 of 2017. This is in line with what was deponed by Baguma Cyrus in the affidavit of service filed on 17th July 2017.

19. The letter requesting for the certified copies of the record of proceedings was filed in High Court on 6th July 2017. This was within the 30 days limit as the ruling in Misc. Application No.41 of 2017 was delivered on 5th June 2017. The appellant served the respondent with a copy of the letter though he refused to accept the service. The memorandum of appeal and the record of appeal were filed on 18th August 2017. The appellant was within the 60 days limit in which to file an appeal.

20. The respondent contends further that the appellant, having lacked any valid representation in High Court Civil Division Misc. Application No.41 0f 2017 is precluded from filing this appeal. He submitted that the advocates who represented the appellant had no instructions. He was of the view that the application was heard *ex parte* because the respondent lacked any valid affidavit in reply/opposition of High Court Civil Division Misc. Application No.41 0f 2017. In particular, he referred to the affidavit in reply deponed by Mukasa Twaha in which he claimed that the said Mukasa Twaha had no authority to act on behalf of the appellant.

21. Whether or not there is an affidavit in reply to an application has nothing to do with whether that proceeding is heard *ex parte* or not. It is *ex parte* only in case of the absence of the other party and or its representative. This was not the case. That application was therefore not *ex parte*, regardless of whether the affidavit in reply was competent or not. The application was opposed by the legal representatives of the appellant. And there was an affidavit filed in reply by the appellant's officer, Mr Mukasa Twaha who stated in part:

> "THAT I am also the Legal officer of the kingdom of Buganda under the office of the Attorney General of Buganda, the designated principal legal office for the Kingdom of Buganda whose titular head is the Respondent herein and I swear this affidavit in that capacity."

22. It is thus untenable for the respondent to claim that the matter was heard *ex parte* because there was no valid affidavit in reply to the application. There was a valid reply to the respondent's affidavit in support of his application and according to the record the matter was heard *inter parties*. This ground is unsustainable and therefore fails.

23. On the issue of counsel acting without instructions, the respondent contended that the David. F. K Mpanga had no authority to give M/S Kalenge, Bwanika, Ssawa & C0. Advocates instructions to represent the appellant in the matter. He was of the view that according to the special power of attorney on record, only Bashir Juma Kizito was granted authority to represent the respondent.

24. It is true that on the record there is a notice of instructions to M/S Kalenge Bwanika Ssawa & Co. Advocates filed on 29th August 2016 to represent the respondent as lead counsel in the defence of High Court Misc. Application No. 162 of 2016. These instructions were given by Mr. David F.K Mpanga according to annexure 'A' attached to respondent's affidavit in support of motion in Misc. Application No. 231 of 2017 dated 22nd August 2016. David F.K Mpanga, being the person currently holding the position of "Ssaabawolereza" / Attorney General of the kingdom has the power to issue out such instructions on behalf of the appellant. Besides, the appellant had not objected to the representation. This is a matter for the appellant and not respondent.

25. The respondent should concentrate on the case he is presenting to the court rather than diversionary matters that do not relate to the merits of the case for the respondent.

26. The respondent accused the appellant of fraudulently manipulating the court record. He alluded to the discrepancy in the date of applying for the copy of proceedings on the registrar's certificate and the non-payment of court fees for the said document. The appellant contended that these were mere errors with no bearing on the merits of the case.

27. The respondent's assertions are without merit. It is true that the registrar's certificate indicates that M/s Kalenge, Bwanika, Ssawa & Co. Advocates, the appellant's counsel applied for the proceedings on 6th June 2017 which is contrary to the pleadings of the appellant. The letter requesting for the certified copy of the proceedings on page 535 of the record indicates that it was filed in High Court on 6th July 2017. It is evident that this was a mistake because the letter from the Registrar to the appellant's counsel notifying them that the record of proceedings was ready indicates that the appellant applied for the certified copy of the record of proceedings on 6th July 2017. This letter is dated 14th August 2017 and is at page 536 of the record of appeal.

28. Counsel for the appellant conceded that he did not pay court fees when filing the Registrar's certificate of correctness. He claimed that it was an error and not a scheme by the appellant to defraud the government of revenue as alleged by the respondent. It was submitted that the appellant has since paid the fees and prayed that the mistake be rectified by court. A copy of the receipt of payment is attached to the submission in rejoinder as evidence of payment and it indicated that the payment was made on 12th October 2017.

29. In the case Yese Ruzambira v. Kimbowa Builders & Construction Ltd (1976) HCB 278, Manyindo J., (as he then was), held that the remedy of non-payment of court fees was to rely on Rule 6 of the Court Fees, Fines and Deposits Rules, which was to order the defaulting party to pay the necessary fees. The Supreme Court cited this decision with approval in the case of Lawrence Muwanga v. Stephen Keyune, Supreme Court Civil Appeal No. 12 of 2001 (unreported) where it held that;

"A complaint against non - payment of court fees is a minor procedural and technical objection which does not; and should not, affect the adjudication of substantive justice as envisaged in Article 126 (2)(e) of the 1995 Constitution of Uganda ...'

30. In the case of Amama Mbabazi & Another v Musinguzi Garuga James Court of Appeal Civil Appeal No.12 of 2001 (unreported), this court was of the view that court can order for payment at any stage of the proceedings where it finds that fees were not paid, and if the fees are paid the document and/ or any proceedings relating thereto shall be as valid as if the proper fees had been paid in the first instance.

31. Applying the foregoing principles to this case it would follow that the appeal ought to be determined on its merits in light of the fact that the court fees, the subject of the respondent's complaint, were paid before the hearing of this appeal. Even if the fees complained of had not been paid it would be possible for this court to order payment of the same.

32. I find no merit in Court of Appeal Misc. Application No. 231 of 2017 and Court of Appeal Misc. Application No.271 of 2017 and would dismiss the same with costs.

33. I now turn to the appeal. Rule 66 of the Court of Appeal Rules requires that the Memorandum of Appeal should have grounds that are numbered consecutively. In this case the grounds in the appellant's memorandum of appeal are not numbered. They are referred to as (a), (b), and so on, using the letters of the alphabet. Though this infringement is minor I would draw the attention of counsel for the appellant to the need to stick to what is provided for under the rules. I will substitute the letters of the alphabet with numbers.

Ground 1

34. The appellant filed Miscealleonous Application No. 798 of 2016 on 20th September 2016 for orders that the applicant furnishes UGX 500,000,000/= to court as security for costs. The gist of grounds of this application was that the respondent instituted H C Miscealleonous Cause No. 162 of 2016 which is frivolous and vexatious. The appellant also claimed that the respondent did not disclose his true identity and has no known property sufficient to cover costs in the event he lost the suit and the numerous applications arising thereunder.

35. Looking at the record of proceedings at page 26 paragraph 20 (supplementary record of appeal), the learned trial judge stated that there was a total of 13 applications arising out of the main suit. One out of the 13 had been disposed of leaving 12. Out of the 12 two had been filed by the appellant, one by a one Wameli & Co. Advocates seeking to be added as a party to the main cause. The parties were given an opportunity to deliberate on the order of hearing the applications.

36. Court thereafter made an order that Misc. Application No.41 of 2017 should be heard first; followed by Misc. Application No.789 of 2016 that was consolidated with Misc. Appeal No.19 of 2016 and then followed by all the applications for temporary injunctions that were consolidated in Misc. Applications No.731 of 2016, No.1011 of 2016 and 252 of 2017. Misc. Application 751 of 2016 by M/S Wameli & Co. Advocates was to be heard last.

37. The reason advanced by Mr. Mabirizi as to why it was important that Misc. Application No.41 of 2017 be heard before the application for security for costs was

that the documents subject to his application for discovery on oath and inspection were relevant in arguing his case in Misc. Application No.798 and the other applications more so those dealing with the application for a temporary injunction.

38. The purpose of security for costs as provided under Order 26 rule 1 of the Civil Procedure Rules is to secure the interests of the defendant who may incur costs to defend a suit instituted by a plaintiff who cannot pay his/her costs. See Amrit Goyal v Harichand Goyal and 3 others, Civil Application No.109 of 2004 (unreported). The main considerations in such applications are whether the applicant is being put to undue expense of defending a frivolous and vexatious action, whether the defendant has a good defence to the suit, and whether such a defence is likely to succeed.

39. In light of the above the learned trail judge made the order in consideration of the reason advanced by the respondent which we believe was justifiable given the circumstances. There was no mistrial nor a miscarriage of justice occasioned to the appellant by deciding Miscealleonous. Application No. 41 of 2017 before the disposal of Miscellaneous. Application No.798 of 2016. The trial judge's decision was not a tactic to avoid dealing with the issues raised in the application for security for costs otherwise it would not have been scheduled to be heard after the hearing of the application for discovery.

40. Ground 1 fails.

Grounds 3, 4 & 5

41. Grounds 3, 4 and 5 can be conveniently considered together.

42. The respondent filed an application for discovery of documents by way of chamber summons under Order 10 rules 10, 12, 14,15,17,21 and 24 of the Civil Procedure

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40. Ground 1 fails.

Grounds 3, 4 & 5

41. Grounds 3, 4 and 5 can be conveniently considered together.

42. The respondent filed an application for discovery of documents by way of chamber summons under Order 10 rules 10, 12, 14,15,17,21 and 24 of the Civil Procedure

Rules and Article 26; 28, 50 & 139 of the Constitution. The documents sought for discovery were as follows;

> '(a) The particulars/ specifications of all titles for official mailo land returned to the respondent by virtue of Article 246 (3) (a) of the Uganda 1995 Constitution, the Traditional Rulers (Restitution of Assets and Properties) Act Cap 247 and the Institution of Traditional or Cultural Leaders Act, 2011: in terms of county, Block number & Plot Number and where there are no such, other relevant particulars such as folios and volumes.
>
> (b) The particulars of all encumbrances so far created on the same lands including but not limited to mortgages and leases and their terms of agreement, if any.
>
> (c) Details of the Registration of all individuals in occupancy of that land indicating the amount paid by each person showing variances, if any.
>
> (d) A copy of the bank statements of Bank of Africa (U) Ltd Main Branch Account No. 01181350009 in the names of Buganda Land Board PROJ, for the period of its existence, being the account on which the moneys from the mass compulsory and paid for registration of people of official mailo land was deposited.
>
> (f) A copy of the bank statement of Stanbic Bank (U) Ltd Forest Mall Branch Account No. 9030005607948 in the names of Buganda Land Board, with a swift code of SBICUGKX, for a period of its existence, being the account on which the money from compulsory leasing official mailo land is deposited.
>
> (e) Details of any official sales or donations whatsoever since 1993, if any.'

43. The learned trial judge held that the documents under paragraphs 1 (b) and (f) did not satisfy the conditions for which the orders sought for discovery on oath and inspection should be granted. On the other hand, she granted an order for the discovery on oath and inspection of the documents under paragraphs 1 (a), (c), (d) and (e).

44. Discovery is provided for under section 22 of the Civil Procedure Act which states,

> '**22. Power to order discovery and the like.**
>
> Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party – (a) make such orders **as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence**;
>
> (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
>
> (c) order any fact to be proved by affidavit.' (Emphasis is mine.)

45. It is evident that for discovery to occur it must be necessary or reasonable in all matters related to the documents sought to be discovered, produced or inspected. This relates back to the head action filed by the party seeking discovery. The documents in question must advance his or her case or destroy the case for the adverse party.

46. Applications for discovery of documents are governed by Order 10 of the Civil Procedure Rules. Order 10 rule 12 (1) of the Civil Procedure Rules provides that:

> "Any party may, without filing any affidavit apply to the Court for an order directing any other party to the Suit to make a discovery on oath of the documents, which are or have been in his or her possession or power relating to any matter in question in the Suit."

47. The documents being sought for discovery are in the possession of Buganda Land Board, the appellant's agent. The respondent issued a notice to the appellant to produce the stated documents which was not adhered to. The said notice is annexed to the application for discovery (Misc. Application No.41 of 2017) and marked "A".

Nonetheless I take the view that the production of the stated documents is not relevant to the fair determination of the case or saving costs.

48. The question of relevance is normally answered by reference to the pleadings. The basic principle was formulated in Compagnie Financiere et Commerciale Du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55 at 63 and restated in Thorpe v Chief Constable of Greater Manchester Police [1989] 1 WLR 665 at 668:

> '...any document must be disclosed which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences. Discovery is thus not necessarily limited to documents which would be admissible in evidence':

49. The respondent filed Miscellaneous Cause No. 162 of 2016 seeking declaratory orders that the actions of the appellant through its agent, the Buganda Land Board of imposing compulsory registration at a fee, of persons living on official mailo; of collecting a 10% charge on the sale value / kibanja on the official mailo; of requiring individuals with leases from Uganda Land Commission to re-apply and of holding out as the owner of the officio mailo land registered in his names pursuant to Article 246 (3) (a) of the 1995 Constitution of Uganda, the Traditional Rulers (Restitution of Assets And Properties) Act, Cap.247 are illegal, null and void and an infringement of the respondent's and Buganda people's (living on that land) right to property.

50. Further the respondent seeks a permanent injunction against the appellant through its agent the Buganda Land Board. He also seeks for orders directing the appellant

to refund any monies collected as inter alia: registration fees, ground rent and charges on land/kibanja sales from people living on official mailo land registered in the appellant's name under the said law, general damages for each of the individuals affected and the costs of the application.

51. The application was brought by way of notice of motion under Article 26, 50 and 139 of the constitution, sections 33 and 39 of the Judicature Act, section 98 of the Civil Procedure Act, Order 52 of the Civil Procedure Rules and Rule 3 of the Judicature (Fundamental Rights and Freedoms) Enforcement Procedure Rules.

52. Looking at the parties' pleadings and the annexures thereto, both in the head action and in the application for discovery, without attempting to preempt the outcome of the head action, I am inclined to the view that the respondent's action is not sustainable in law. According to his affidavit in support of the motion, the respondent claims to derive his *locus standi* from Article 50 of the Constitution of the Republic of Uganda. It provides:

> "Any person or organization may bring an action against the violation of another person's or group's human rights."

53. Public law is defined as that branch of law concerned with the organization of the state, the relationship between the state and the people who compose it, the responsibilities of public officers to the state, to each other and to the private persons. On the other hand, according to the Black's Law Dictionary, 6th Edition, Page 1196,

> "Private law is that portion of law that defines, regulates, enforces and ministers relationships among individuals, associations and corporations. As used in contradiction to public law, the term means all that part of the law

> which is administered between citizen and citizen, or which is concerned with the definition, regulation and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals."

54. Private law is primarily concerned with the rights and duties of individuals and corporations towards each other. Much as Article 50 gives leeway to any person or organization to bring an action against the violation of fundamental human rights such action must disclose facts, on the face of it, which show that there are fundamental human rights or freedoms that have been violated. Such action must in effect be a public law action. Article 50 cannot be used to enforce private rights.

55. Article 246 (3) (a) and section 7(1) of the Traditional or Cultural Leaders Act of 2001 establish the institution of traditional or cultural leaders as a corporation sole with perpetual succession and clothes it with legal personality. According to the Black's Law Dictionary, 6th Edition at page 341;

> "A corporation sole is one consisting of one person only, and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages particularly that of perpetuity, which in their natural persons they could not have."

56. The respondent is alleging that the appellant has infringed on his and other unnamed persons' right to property provided under Article 26 of the Constitution. However, the appellant is not a governmental or public authority who wields governmental powers. In acting or carrying out the actions complained of there is no assertion that he is exercising governmental authority or purporting to be exercising governmental authority. It is doubtful that in the circumstances the appellant can rightly be a

defendant / respondent in a public law action under Article 50 of the Constitution of Uganda.

57. Secondly the facts as disclosed on the respondent's pleadings point to private rights rather than infringement of fundamental human rights or freedoms. No one is alleged to have been unlawfully deprived of his or her land. Neither is the land in question specified in relation to any particular person as a victim of the violation.

58. The respondent is seeking the discovery of documents containing details of the registration of all individuals in occupancy of the official mailo land and the specifications of all titles for the said land. These are private law rights concerning the appellant as a landlord and his tenants and are governed by laws relating to real property.

59. Since the matter is one that does not qualify as a public law action, it cannot be maintained, in my view, as an article 50 action for enforcement of fundamental rights and freedoms. An application for discovery and inspection may only be necessary or reasonable in case the head action is one that is maintainable at law or is at least arguable. An incompetent action cannot give birth to an order for discovery or production and inspection of documents.

60. The respondent claims that he is representing himself and the people from the Buganda tribe living on the official mailo land. However, these individuals are not named. Neither is it disclosed that he has their consent to bring this action. Equally no permission was granted by the trial court to bring a representative action as required under Order 1 rule 8 of the Civil Procedure Rules.

61. In the case of Rwanyarare v Attorney General Constitutional Petition No. 11 of 1997, (unreported) the petition was filed by Dr. Rwanyarare on his own behalf and for and on behalf of a group called the Uganda Peoples Congress. One of the preliminary objections was that the petition was incompetence because it was not properly before the Court. That Dr. Rwanyarare was not entitled to bring the petition on behalf of people who were not only unknown but who had not even authorised him to do so. Court held that an action could not be brought on behalf of an unnamed group of persons. The court was of the view that the implications on costs and the doctrine of *res judicata* would be too great. The court stated in part;

> "Under Order 1 Rule 8(1) of the Civil Procedure Rules, a person may bring a representative action with leave of the trial court. It would have been at that stage of seeking leave, that the first petitioner would have disclosed the identity of those to be represented and whether he had their blessing to do so. We cannot accept the argument of Mr. Walubiri that any spirited person can present any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example, and as counsel for the respondent rightly submitted, if the first and second respondents lost the action with costs to the respondent but they were unable to raise the costs, how would the respondents recover those costs from the unknown people called Uganda Peoples Congress? What if other members of the Uganda Peoples Congress chose to bring similar petitions against the respondent – would the matter be res judicata? We agree with counsel for the respondent that the first petitioner acted unlawfully to bring the representative action as he did. He could only bring the petition on his own behalf. The group's petition is incompetent." See Uganda Freight Forwarders Association & Anor v Attorney General Constitutional. Petition. No. 22 Of 2009

62. The action on behalf of other persons who are not named and whose consent has not been obtained is a representative action that is unlawful.

63. Courts cannot exercise their discretion to grant orders for discovery on oath and inspection when the main suit is not maintainable in law. The head action, on its face, was improperly brought before the trial court as a public law action and would therefore appear to be incompetent.

64. Apart from the bank statements the documents the respondent is seeking discovery are duplicate certificates of title, the original of which are available in the land registry, and can be searched and perused by the public. The respondent can apply for the inspection of the stated documents through the ordinary channels available under the Registration of Titles Act. And should he be successful in the head action he can recover the search fees as part of his costs.

65. In respect of the bank statements discovery at this time is neither necessary nor reasonable to advance the respondent's nebulous case. This is because it is doubtful if the respondent's action against the appellant is maintainable in law in the first place. Secondly I see no connection between the bank accounts in question and the prosecution of the respondent's claim against the appellant.

66. I would allow grounds 3, 4 and 5 of the appeal.

67. In light of the foregoing it is not necessary to consider ground 2 of the appeal.

68. I would allow this appeal with costs. As **Obura JA** and **Muhanguzi JA** agree this appeal is allowed with costs. The application for discovery in the High Court is dismissed with costs in that court.

Signed, dated and delivered at Kampala this 1st day of October 2018.

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: *Egonda-Ntende, Obura & Muhanguzi JJA*]

CIVIL APPEAL NO. 184 OF 2017

(Arising out of Miscellaneous Application No. 41 of 2017)

(Arising out of Miscellaneous Cause No. 162 of 2016)

BETWEEN

KABAKA OF BUGANDA:: APPELLANT

AND

MALE MABIRIZI KIWANUKA ::RESPONDENT

(An Appeal from the judgment of High Court of Uganda (P. Basaza – Wasswa, J, delivered at Kampala on the 5th June 2017)

JUDGMENT OF EZEKIEL MUHANGUZI, JA.

I have had the benefit of reading in draft the judgment prepared by my brother Hon. Justice Egonda-Ntende, JA. I agree with his reasoning and conclusions on all the grounds of this appeal and that this appeal be allowed with costs in this Court and in the High Court.

The application for discovery in the High Court be dismissed with costs.

Dated at Kampala this ....1st....day of ....Oct....2018

Ezekiel Muhanguzi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL N0. 184 OF 2017

(Arising out of Miscellaneous Application No. 41 of 2017)

(Arising out of Miscelleneous Cause No. 162 of 2016)

(On appeal from the judgment of the High Court of Uganda (P. Basaza-Wasswa, J) at Kampala delivered on 5th June 2017)

BETWEEN

KABAKA OF BUGANDA::APPELLANT

AND

MALE H MABIRIZI KIWANUKA::RESPONDENT

(Coram: Egonda-Ntende, Obura & Muhanguzi, JJA)

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my brother Egonda-Ntende, JA and I concur with his conclusion that grounds 3, 4 and 5 of this appeal succeed and the appeal be allowed with costs and the application for discovery in the High Court be dismissed with costs in that court.

However, as regards ground 1 of the appeal, I am of the different view that the trial Judge ought to have considered the application for security for costs first since it has a bearing on all the other proceedings before the court. The purpose of security for costs as stated by Justice Egonda-Ntende in his judgment based on Order 26 rule 1 and the case of ***Amrit Goyal vs Harichand Goyal and 3 others, Civil Application No. 109 of 2004*** (unreported) is very clear. It is intended to secure the interest of the defendant who may incur costs to defend a suit instituted by a plaintiff who cannot pay his or her costs. In my

view, given the purpose for security for costs, it would be logical that if an application for security for costs is brought, it should be heard and determined before any proceedings in the main cause or any other applications arising therefrom can be determined so as to secure the interest of the respondent from the onset. For that reason, I would fault the trial Judge for hearing the application for discovery before determining the one relating to security for costs.

Be that as it may, I would not agree that just by hearing the application for discovery before that of security for costs a miscarriage of justice was caused in the instant case. For that reason, ground 1 of the appeal would partly succeed as explained above.

As regards ground 2 of the appeal, I agree with my brother Justice Egonda-Ntende that it is not necessary to consider it in view of the findings in grounds 3, 4 and 5.

On the whole, I would agree that the appeal be allowed with costs for the reasons stated in the judgment of Justice Egonda-Ntende.

Dated at Kampala this.....1ST.....day of.....October.....2018.

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Hellen Obura

JUSTICE OF APPEAL