THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Barishaki Cheborion and Muzamiru Kibeedi, JJA*]

Civil Appeal No. 45 of 2009

(Arising from High Court Civil Appeal No. 86 of 2006 at Mbale)

BETWEEN

Yosamu Egesa Sitamanga=================================== Appellant

AND

Wanyama Joseph======================================= Respondent

(*On appeal from the Judgment of the High Court of Uganda (Muhanguzi, J.), sitting at Mbale and delivered on the 29th day of May 2008.*)

Judgment of Fredrick Egonda-Ntende, JA

Introduction

[1] The pivotal question to be decided in this second appeal is whether at the time the appellant instituted original suit (Busia Land Tribunal Claim No. 19 of 2004) before the District Land Tribunal of Busia from which this appeal arises there had been a decision by a court of competent jurisdiction between the same parties over the same subject in Lunyo "A" village L.C. 1 Court vide Civil Suit No. 2 of 1998.

[2] This question was raised as a preliminary point before the District Land Tribunal as it commenced to hear the appellant's suit. The District Land Tribunal decided that the L.C. 1 Court had no jurisdiction to hear the matter it heard and determined. The District Land Tribunal therefore dismissed the preliminary objection and proceeded to hear the suit before it. After hearing it gave judgment for the appellant.

[3] The respondent appealed to the High Court of Uganda at Mbale and Muhanguzi, J., (as he then was) heard the appeal. There were many grounds of appeal he considered including this very question. After hearing the appeal, the learned judge held that the District Land Tribunal erred in finding that this suit was not *res judicata*. He found that this suit was *res judicata* as there existed a prior decision of a competent court between the same parties over the same subject matter as in the suit that the Tribunal heard. He set aside the decision of the Tribunal and restored the decision of the Lunyo LC 1 Court. He also dealt with other grounds of appeal that dealt with the substantive decision of the Tribunal which he allowed as well.

[4] The appellant was dissatisfied with the decision of the High Court and has now appealed to this court setting forth 7 grounds of appeal. In my view disposing of ground 4, which raises the issue of *res judicata*, is pivotal to the success or otherwise of this appeal. It states,

> 'The Learned Appellate Judge erred in law when he held that the Local Council 1 Court had jurisdiction at the material time to entertain the Respondent's case before them.'

Analysis

[5] Second appeals are permitted against essentially matters of law and this question is a matter of law.

[6] Section 7 of the Civil Procedure Act bars any court from trying a matter that has been tried and determined previously by a competent court between the same parties over the same subject matter. It states,

> 'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has

been subsequently raised, and has been heard and finally decided by that court.'

[7] Did the Lunyo LC1 court have jurisdiction to try this matter starting on the 15th November 1998? Counsel for the appellant contends that it did not have such jurisdiction as the Land Act, Chapter 227, had directed, vide section 98 (7) that the Local Council Courts and Magistrates' Courts would cease trying new cases involving land with effect into the coming in force of the Land Act. The Land Act came into force on the 2nd July 1998 and the trial before the LC court began on the 15th November 1998. The court did not have jurisdiction as at the time it commenced the trial.

[8] Subsequently the Land Act was amended by the Land (Amendment) Act, (Act No. 3 of 2001). Section 98 (7) was substituted with another provision that allowed the Local Council Courts to exercise such jurisdiction they had before the commencement of the said Act. It is contended for the appellant that this provision was given retrospective effect only from the 2nd July 2000 and not earlier. It is further contended for the appellant that The Land Amendment Act referred to by the learned appellate judge as granting jurisdiction to the LC 1 court had not been enacted by the 15th November 1998, when the case in the LC 1 court commenced proceedings.

[9] In answer to these submissions counsel for the respondent contended that section 98 (7) of the Land Act, created a lacuna in law, as there was then no court able to try new cases related to land. Subsequently the Land (Amendment) Act, 3 of 2001, provided for the establishment of Land Tribunals with effect from the 2nd July 2000. In section 98 (7), as amended, Local Council Courts, were to continue exercising jurisdiction they had prior to 2nd July 2000 until the Land Tribunals commenced operations.

[10] Counsel for the respondent submitted that the local council 1 court of Lunyo impliedly had jurisdiction to try the matter which had been filed by the appellant on 15th November 1998.

[11] In my view the appellant appears to be on firm ground here. Clearly as at the time the Lunyo LC 1 court entertained this matter it had been barred from trying new cases under the original provisions of section 98 (7) of the Land Act. It stated,

> 'On the coming into force of this Act, Local Council Courts and Magistrates' Courts shall cease to deal with new cases related to land disputes.'

[12] This Act came into force on the 2nd July 1998. Effective from that date Local Council Courts could not try new cases related to land disputes though they could continue to try existing cases that they were seized with prior to the coming into force of the Act. The amendment of this law which repealed the said provision barring them from trying new cases came into effect on the 2nd July 2000 vide section 1 (2) of the Land (Amendment) Act, (Act No. 3 of 2001). It was substituted with the provision,

> '(7) Until Land Tribunals are established and commence to operate under this Act, Magistrates Court and Local Council Courts shall continue to have Jurisdiction they had immediately before the commencement of this Act.'

[13] Under section 10 of the Interpretation Act repealed provisions continue to have effect until the commencement of the Act repealing them or substituting them. It states,

> 'Where any Act repeals wholly or partially any enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into force.'

[14] As the new subsection 98 (7) came into effect on 2nd July 2000, vide section 1 (2) of The Land (Amendment) Act, (Act 3 of 2001), the repealed provisions continued to have effect until the 2nd July 2000. Lunyo LC1 court, at the time it commenced entertaining the said suit on

15th November 1998, had been barred from doing so. It was not a competent court to try the land dispute between the parties.

[15] In the circumstances I would allow ground 4 of the appeal. The Lunyo LC 1 Court was not competent to try this matter. The matter was therefore not *res judicata.*

[16] It is now necessary to deal with the other grounds of appeal. Ground 3 related to the consideration by the learned appellate judge whether this matter was *res judicata* in light of the hearing and decision by Lunyo LC1 court, a matter that had not been directly raised in the grounds of appeal before him. However, as I have now held that the matter is not *res judicata* as the Lunyo LC 1 court had been barred from entertaining new land cases at the time it entertained this matter, it is unnecessary to consider the same. The complaint is moot. I am left with grounds 1, 2, 5, 6, and 7.

Grounds 1, 2, 5 and 6.

[17] I will set them out in full.

> '(1) The learned Appellate Judge misdirected himself on the law when he failed to adequately evaluate the evidence on record; and thus came to wrong conclusion.
>
> (2) The learned Appellate Judge misdirected himself in law when he considered only the strength of the Respondent's case and only looked for what he considered to be contradictions and inconsistencies in the Appellant's case.
>
> (5) The learned Appellate Judge misdirected himself in law when he called the Appellant's corroborative evidence as contradictions and inconsistencies.
>
> (6) The learned Appellate Judge erred in law when he held that the Appellant's case was riddled with grave contradictions, inconsistencies and lies, thus occasioning miscarriage of justice to the Appellant.'

[18] In considering the above grounds of appeal it is important to note that this is a second appeal as we have already noted above. In light of section 72 of the Civil Procedure Act this court can only consider matters of law and not of fact. Secondly the question of whether the High Court fulfilled its duty to re-evaluate the evidence on record of the trial court is a matter of law and if the first appellate court failed in its duty this court will be obliged to re-evaluate the evidence on record of the trial court. However, if the High Court did not err in its duty to re-evaluate the said evidence, this court, as a second appellate court is not under an obligation to re-evaluate the evidence on record of the trial court. See Nazmudin Gulam Hussein Viram v Nicholas Roussos [2006] UGSC 21. Katureebe, JSC, (as he was then), stated in part,

> This court has also decided .... in ***MILLY MASEMBE - Vs-SUGAR CORPORATION AND ANOTHER CIVIL APPEAL NO. 1 OF 2000,*** where it decided that the appellate court's exercise of the power to review the evidence depends on whether the trial judge failed to take into account any particular circumstances or probabilities or whether the demeanor of the witness whose evidence was accepted was inconsistent with the evidence generally. Mulenga,JSC stated as follows:-
>
> ***"In a line of decided cases, this court has settled two guiding principles at its exercise of this power. The first is that failure of the appellate court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as a second appellate court, is not required to, and will not re-evaluate the evidence as the first appellate court is under duty to do, except where it is clearly necessary"*** (emphasis added).

[19] The appellant's grounds set out above under this section all basically attack the re-evaluation of the evidence of the trial court by the High Court contending that the judge did not properly re-evaluate the evidence of the trial court. Grounds 2, 5 and 6 are simply repetitive of ground 1.

[20] I have examined the judgment of the High Court. In considering grounds 1,2, and 4 of the appeal before it, the High Court, in great detail examined

the case for each party and the evidence in support thereof. It concluded that the version of the respondent was more probable than the version of the appellant, for reasons that it provided. It held that the suit land was not clan land as alleged by the appellant. The suit land belonged to 2 brothers that sold it to the respondent. I am unable to fault it in anyway. I would dismiss grounds 1, 2, 5 and 6.

Ground 7

[21] It states,

> '(7) The learned Appellate Judge erred in law when he relied on unauthentic and untenable Sale Agreements which purported to pass title to the Respondent.'

[22] Counsel for the appellant submitted that the sale agreements tendered in evidence by the respondent were not signed by anyone. Secondly that they were written in the same hand writing meaning that only one person was party to it.

[23] The High Court dealt with the said agreements in the following words,

> 'Similarly court has considered the two sale agreements which the respondent presented to court as evidence of his purchase of the land in dispute. Both agreements were locally written by hand in the rural village as compared to those drawn by professional people usually in urban areas. Both of them are signed by both the buyer and seller and merely list the names of various witnesses who did not sign thereon.
>
> The tribunal rejected the two agreements as forgeries. Court finds that there was no useful evidence to justify the tribunal's refusal to admit the two agreements. Those agreements were tendered by one of the signatories. None of the witnesses or other signatories to the agreements testified to deny them or to show any forgery on any of the two agreements. On the contrary, on top of the respondent who was signatory to both agreements, other two witnesses, who showed that they were present when those

> agreements were executed, testified to the authenticity of the two sale agreements. Those are Ouma Robert and Asitaluko Onyoba Okemu.
>
> In the circumstances court finds that the tribunal misdirected itself on a matter of fact relating to the evidence of how the respondent purchased the suit land and came to occupy it. By refusing to admit the two sale agreements and declaring them as forgeries without justification, the tribunal was unfair to the respondent.'

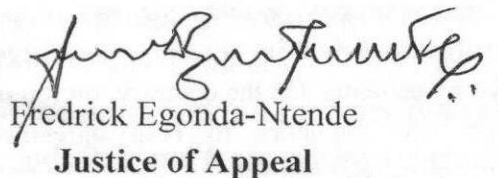
[24] I am unable to fault the High Court on accepting the said agreements. The complaint by the appellant simply has no merit.

[25] In the result the appellant has succeeded on ground 4 and lost on grounds, 1,2, 5, 6 and 7. As the appeal has succeeded in part, I would allow this appeal in part and dismiss it in part. I would grant the appellant 1/7 of his costs of the appeal. I would grant the respondent 5/7 of his costs on appeal and all his costs below.

Decision

[26] As Barishaki Cheborion and Muzamiru Kibeedi, JJA, agree, this appeal is allowed in part and dismissed in part. The judgment of the High Court is affirmed in part. The appellant is entitled to only 1/7 of his costs on appeal while the respondent is entitled to 5/7 of his costs on appeal and all costs below.

Dated, signed and delivered at Kampala this 2nd day of July 2020



Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

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AND

Wanyama Joseph================================ Respondent

(*An appeal from the Judgment of the High Court of Uganda (Muhanguzi, J.), sitting at Mbale and delivered on the 29th day of May 2008.*)

Judgment of Muzamiru Kibeedi, JA

I have had the advantage of reading in draft the Judgment prepared by my Lord Egonda Ntende, JA and I agree with him that this appeal should partially succeed. I concur with the Orders he has proposed.

Dated at Kampala this 2nd day of July 2020

Muzamiru Kibeedi
JUSTICE OF APPEAL

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 45 OF 2009

(Coram: Egonda-Ntende, Cheborion Barishaki & Muzamiru. M. Kibeedi, JJA)

YOSAMU EGESA SITANGA::APPELLANT

10 **VERSUS**

WANYAMA JOSEPH:::RESPONDENT

(Appeal from the judgment and orders of E.K Muhanguzi, J delivered on 29th May, 2008 in Tribunal Claim No. BT. 019 of 2004)

JUDGMENT OF BARISHAKI CHEBORION, JA

15 I have had the benefit of reading in draft the judgment of my learned brother Egonda-Ntende, JA and I agree that this appeal should succeed only in part.

I also agree with the orders he has proposed.

Dated at Kampala this ....2nd.... day of ....July.... 2020.

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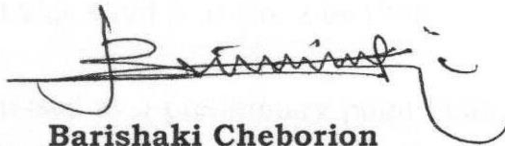

Barishaki Cheborion

JUSTICE OF APPEAL

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