IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: WAMBUZI, CJ; ODOKI, JSC AND ODER, JSC)

CIVIL APPEAL NO. 10 OF 1987

BETWEEN

EPHRAIM ONGOM ODONGO) :::::::::::::::::::::::::: APPELLANTS
ESTERMOA MUGUMBA)

AND

FRANCIS BENEGA BONGE :::::::::::::::::::::::::: RESPONDENT

[Appeal from the Judgment of THE High Court (Okello, Ag. J) dated 1/12/1986 in Civil Appeal No. CMA 5 of 1985]

JUDGMENT OF ODOKI, JSC

This is a second appeal from the Judgment of the High Court of Uganda dismissing an appeal filed by the appellants against the decision of a Magistrate Grade I at Nebbi.

The brief facts of the case are that the respondent brought an action against the appellants for an order of eviction claiming that the appellants had unlawfully occupied his land situated at Aguda in Pukwero Parish in Jonan County of Nebbi District. It was the respondent's case that he had inherited the disputed land from his ancestors who had occupied it prior to 1913, and from 1941 onwards, and that the land had been dedicated to cultivation only. The appellants' defence was that the land in question belonged to their ancestors, and in particular one Okwera who died in 1929 leaving the

land vacant until 1984 when they re-occupied it and built their houses on it. It was common ground at the trial that the ancestors of both parties had lived on the disputed land at different times. The trial magistrate visited the locus in quo, interviewed some unnamed elders, recorded what they told him, and drew a sketch plan of the area. The main issue at the trial was to which of the two ancestors did the land in dispute belong. The trial magistrate found that the land in dispute belonged to the respondents ancestors and gave judgment in his favour.

The appellants appealed to the High Court on substantially similar grounds as those presented before this court. The learned judge, after finding that the trial magistrate had accepted and acted on hearsay evidence that the proceedings at the locus in quo contained some irregularities, held that those errors did not occasion a miscarriage of justice because the evidence adduced by the respondent had proved his case on a balance of probabilities. The learned judge dismissed the appeal. Hence this appeal.

At the commencement of the hearing the appeal, Mr. Ulwormundu, learned counsel for the the respondent sought to argue an application to strike out the appeal under r. 80 of the Rules of this Court, on the ground that the appeal was filed out of time. As his formal application had not been listed for hearing we allowed his to make an informal application in this regard. We heard the application and dismissed it, and I now give my reasons.

According to the affidavit in support of the application sworn by Mr. Ulwormundu the notice of appeal was filed on 4th December, 1987. Counsel further states that the record of appeal does not contain a copy of a letter applying for the record of proceedings in the High Court, nor did he find any such copy when he checked the High Court file at the beginning of 1987. It was therefore counsel's submission that since the record of appeal was filed after the period of 60 days allowed for filing the appeal, and the appellants could not benefit from the proviso to r. 81 (I) of the Rules of this Court, the appeal was filed out of time and should be struck out.

In his affidavit in reply Mr. Owiny Dollo, learned counsel for the appellants, deposed that in the first appellate court, the appellants were represented by M/S Obol Ochola & Co. Advocates while the respondent was represented by M/S Ekemu & Co. Advocates. But at the hearing of the appeal, Mr. Ulwormundu who was practicing under the firm of M/S Ringwegi & Co. Advocates held a brief for M/S Ekemu & Co. Advocates. The notice of appeal, filed on 4/12/1986, was therefore served on M/S Ekemu & Co. Advocates and not Mr. Ulwormundu. On 12/12/86, M/S Obol Ochola & Co. Advocates applied to the High Court for the record of proceedings and served a copy of that letter to M/S Ekemu & Co. Advocates. A copy of this letter was annexted to the affidavit. On 9/9/87 M/S Ekemu & Co. Advocates ceased to act as counsel for the respondent when M/S Ringwegi & Co. Advocates served the appellants with a notice of change of advocates.

Mr. Owiny Dollo submitted that the appellants had complied with the requirements of the proviso to r. 81 (1) and sub-rule (2) because they had applied for a copy of the proceedings and served a copy of the letter to the advocates who were then acting for the respondent. He argued that counsel for the respondent should have obtained confirmation from the High Court that they did not receive the letter. Counsel submitted further that the Deputy Registrar issued a certificate of completeness on 18/8/87 when he handed over the record of proceedings. Since the appeal was filed on 9/9/87, it was counsel's submission that it was within the period of 60 days from the supply of the record of proceedings.

Under r. 81 (1) of the Rules of this Court, a civil appeal must be instituted within 60 days of the date when notice of appeal was lodged. However, under the proviso to this sub-rule, where an application for a copy of the proceedings in the superior court has been made within 30 days from the date of the decision against which it is desired to appeal, in computing time within which the appeal is to be instituted, there must be excluded the time certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy of proceedings. Under sub-rule (2) of r. 81, an appellant is not entitled to rely on this proviso unless he has made a written application for a copy of proceedings and copied the application to the respondent.

In the instant case, the appellants applied for a copy of proceedings within the prescribed period and copied that letter to counsel for the

respondent. A copy of that letter was produced by the appellants. There is no evidence to show that the Deputy Registrar of the High Court did not receive the letter or that counsel for the respondent did not receive a copy of it. It was not sufficient for the present counsel for the respondent to check on the court file in the High Court. Nor was it of any assistance for the respondent to contend that a copy of the letter was not included in the record of appeal since there is no such requirement in either r. 81 or r. 85 of the Rules of this Court. On the other hand the facts that the Deputy Registrar issued a certificate of completeness of the record tends to support the appellants contention that he applied for a copy of proceedings.

In my opinion therefore, the appellants complied with the requirements of the proviso to sub-rule (1) of rule 81 as well as sub-rule (2) of the same rule and were entitled to the benefit of said the proviso. Since the record of proceedings was supplied to the appellants on 18/8/87 and the appeal was filed on 9/9/87, it was within the 60 days allowed by r. 81 (1). Accordingly, the appeal was filed in time and the application to strike out the appeal was rejected for those reasons.

Tree grounds of appeal were preferred. These are as follows:-

"1. The learned judge erred in law and misdirected himself on the burden and standard of proof and failed to resolve doubts in favour of the appellants.

2. The learned judge erred in law and fact when he held that the irregularities in the trial proceedings and judgment did not occasion a miscarriage of justice.

3. The learned judge erred in law and did not subject/submit the evidence on record as a whole to a fresh and exhaustive examination and scrutiny."

Mr. Owiny Dollo, learned counsel for the appellants, argued the third ground first. He submitted that the first appellate court did not subject the evidence to a fresh and exhaustive scrutiny in order to come to its own conclusions as it was required to do, relying on the authorities of **R. V. Pandya (1957) E. A. 336**, and **James Nsibambi vs Lovinsa Nankya, High Court Criminal Appeal No. 4 of 1980 (1980) H.C.B. 81**. Instead counsel contended, the learned judge considered the evidence in one paragraph without evaluating the evidence adduced by the plaintiff's witnesses. He argued that PW 1 and PW2 were infants in 1941 when their father resettled on the land and therefore their evidence was not strong. As regards PW3 although he was older, he could have been mistaken about the ownership of the disputed land when he gave the hind legs of the hippo he killed to the respondent's father. Mr. Dollo pointed out that DW3, the clan chief who was the oldest witness testified that the disputed land belonged to the appellants and that the plaintiff's father was given land at Nyabok, and not at Aguda. He also pointed out that evidence at the locus in quo showed generally that the land in dispute belonged to the appellants. Therefore, counsel submitted, the learned judge was

wrong in saying that the evidence of PW 1, PW2 and PW3 was not seriously challenged.

Mr. Ulwormundu, learned counsel for the respondent submitted that counsel for the appellants addressed the court on matters of fact and not of law as he ought to have done. He argued that the submission that the evidence of DW3 who was the oldest witness should have been given more weight than PW3 was without substance since PW3 was only one year younger, and DW3 was not a chief in 1941 and therefore he was not testifying as a chief. It was counsel's submission that the trial magistrate who saw both of them was entitled to believe PW3. Mr. Ulwormundu also argued that the first appellate court had properly re-evaluated the evidence by rejecting the plaintiff's hearsay evidence relating to the events prior to 1941 and based its decision on the evidence relating to the period after 1941, The first appellate court also correctly rejected the evidence recorded at the locus in quo because the elders whose evidence the trial magistrate relied on were not called as witnesses.

The duty of a first appellate court is now well settled. It is to reconsider and evaluate the evidence, and come to its own conclusions. In so doing it should subject the evidence to a fresh and exhaustive scrutiny. See **Pandya V. R.** (supra) **James Nsibambi vs Lovinsa Nankya** (supra) and **Selle vs Associated Motor Boat Co. (1968) E. A. 123.**

In **Selle vs Associated Motor Boat Co**. (supra) the principles upon which a first appellate court should act were lucidly stated by Sir Clement de Lestang VP at p. 126 as follows:-

> **"Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demianour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955) 22 E. A. C. A. 270."**

It was strongly argued by Mr. Owiny Dollo that the learned judge inadequately considered the evidence in one paragraph. This paragraph which comes at the end of the judgment reads:

> **"The evidence of PW 1 and PW2 and PW3 about land in 1941 unlike that of the defence are very consistent. They all stated that the land was unoccupied then when their father repossessed it in 1941. This has not been seriously or at all challenged by the defence. It remains uncertain where the defendants' father was since 1941 until his death**

the date of which is also not known. Had he abandoned the land? The age of the witnesses as at 1941 can be taken into account when considering their credibilities for lapses of memory is not confined to persons of tender ages only. In these circumstances I find that properly directing himself to the law and evidence, it is clear that the plaintiff/appellant had proved their (sic) superior claim over the land on balance of probability. The trial magistrate arrived at a correct decision despite some irregularities in the course of the trial. The irregularities did not occasion a miscarriage of justice. Appeal is accordingly dismissed with costs here and below."

It is clear from the above passage that the learned judge re-evaluated the evidence adduced by both parties and made his own findings. He even considered the credibility of witnesses and the irregularities committed by the trial magistrate and finally came to the conclusion that the respondent had proved his case to the required standard. While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of its adequacy remains a question of substance rather than form.

It should also be pointed out that the learned judge had earlier on spent considerable time reviewing some of the evidence relied on by the trial magistrate and had rejected some of it. He did so with regard to the hearsay evidence of PW 1 and PW2 relating to events which occurred prior to 1941 before they were born. He also rejected the

evidence recorded at the locus in quo by elders who were not called as witnesses. In my view this process was an evaluation of evidence. Considering the judgment as a whole I am of the opinion that the learned judge adequately re-evaluated the evidence and therefore I find no merit in the third ground of appeal.

Mr. Owiny Dollo, for the appellant, abandoned, properly in my view, the second ground of appeal. He then went on to argue the first ground of appeal. He submitted that the learned judge misdirected himself on the burden and standard of proof when he said that **"it remains uncertain where the defendants' father was since 1941 until his death, the date of which is unknown."** Learned counsel contended that the learned judge was shifting the burden of proof on the defendant**s** whereas, the burden rested on the plaintiff to prove his case. I am unable to agree with learned counsel for the appellants. The learned judge was merely commenting on the state of evidence adduced in the case and he was entitled to do so while evaluating the evidence in order to come to his own conclusions. Therefore, there was no shifting of the burden of proof on to the appellants.

Counsel for the appellants also argued that the evidence adduced left many doubts which ought to have been resolved in favour of the appellants. Whether the respondent produced sufficient evidence to establish his case are questions of fact which this court has no jurisdiction to entertain. This being a second appeal, the appellant

can only complain against matters of law as specified in section 74 of the Civil Procedure Act which provides:-

> **"74 (1) Save where otherwise expressly provided in this Act, or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that;**
>
> **(a) the decision is contrary to law or to some usage having the force of law;**
>
> **(b) the decision has failed to determine some material issue of law or usage have the force of law;**
>
> **(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits."**

It is emphasized under section 75 of the same Act that no second appeal shall lie except on the grounds mentioned in section 74.

The learned judge found that the respondent had proved his case on a balance of probabilities and therefore, I find the contention that he misdirected himself on the burden of proof without merit. In the circumstances, the first ground of appeal must also fail.

I would, therefore, dismiss this appeal with costs.

Dated at Mengo this .....23rd ..... day of ...December..... 1988.

B. J. Odoki

JUSTICE OF THE SUPREME COURT.