**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA**

**AT KAMPALA**

**(Coram: Mwangusya; Mwondha; Buteera; JJ.S.C. Nshimye; Tumwesigye. A.G. JJ.S.C.)**

 **CIVIL APPEAL NO. 02 OF 2018.**

 **BETWEEN**

**HWAN SUNG LIMITED :::::::::::::::::::::::::::::::::::::::::APPELLANT**

 **AND**

**M. AND D. TIMBER MERCHANTS AND**

**TRANSPORTERS LIMITED :::::::::::::::::::: RESPONDENTS**

**(Appeal against the decision of the Court of Appeal at Kampala before Owiny-Dollo DCJ, Kavuma, Barishaki, JJ.A. in Civil Appeal No. 30 of 2016)**

**JUDGMENT OF BUTEERA, J.S.C.**

The appellant filed HCCS No. 409 of 2013 against the respondent and sought for a declaration that the company is the lawful owner of the suit land and the respondent has been and is still a trespasser on the land. The appellant also prayed for vacant possession, mesne profits, and damages.

The respondent filed a written statement of defense and a counter claim in which it claimed to be the rightful owner and to have been in exclusive possession of the suit property.

The respondent filed Misc. Application No. 796 of 2015 seeking for striking out the appellant’s suit with costs for being time-barred. The learned trial Judge allowed the application with costs.

The appellant appealed to the Court of Appeal against the dismissal. The Court of Appeal found no merit in the appeal and dismissed the same to the dissatisfaction of the appellant, hence this appeal.

The appeal is on the following three grounds according to the memorandum of Appeal;

1. **The learned Justices of the Court of Appeal erred in law in holding that the appellant had no right of appeal against the order of Justice Bashaija, J. without seeking leave of court.**
2. **The learned Justices of Appeal erred in law in not deciding ground one of the memorandum of appeal, which was that:**

**“The learned Judge erred in law and fact in holding that the respondent’s suit is barred by statute.”**

1. **The learned Justices of the Court of Appeal erred in law in dismissing the appeal.**

The appellant prayed to ask this court for the following orders:

1. **This appeal be allowed,**
2. **The decision of the Court of Appeal be set aside,**
3. **The High Court proceeds with the hearing of the plaintiff’s suit on its merits,**
4. **The costs of this appeal and in the courts below be awarded to the appellant.**

Representation

At the hearing of this appeal the appellant was represented by learned Senior Counsel, Dr. Joseph Byamugisha together with Mr. Brian Osenyu. The respondent was represented by learned Counsel, Mr. Kavuma Kabenge together with Mr. Golooba Muhammed.

Counsel for both parties filed written submissions which they adopted at the hearing and they only made a few oral highlights of their submissions.

**Submissions of Counsel for the Appellant:**

**Ground one.**

Counsel submitted that the Court of Appeal erred when it heard the preliminary objection and relied on **Order 7, rule 11(d)** of **the Civil Procedure Rules** to dismiss the appeal with costs on the ground that there was no appeal before it since the same was filed without leave from Court.

Counsel contended that when the learned trial Judge of the High Court allowed the preliminary objection and dismissed the suit with costs, that was a final decision which amounted to a decree under the provisions of **Section 2 (c ) of the Civil Procedure Act.** Counsel relied on the authority of this court in **Bank of Uganda versus Banco Arabe Espanol [1999] 2 EA 45** and that of the defunct **Court of Appeal for East Africa in South British Insce Co. LTD v Mohamedali Taibji LTD [1973] EA 210**

**Ground two.**

Counsel submitted that the court of appeal erred in law in not deciding ground one of the memorandum of appeal which was that **“The learned Judge erred in law and in fact in holding that the respondent’s suit is barred by statute.”**

According to counsel, the plaintiff’s suit was in respect of registered land. A copy of the Certificate of Title to the suit land was annexed to the plaint and it clearly indicated that the lease was for twenty years commencing on 1st August 2006. The twenty year lease had not expired.

Counsel submitted that the appellant had sued as a registered owner who had possession of the suit property and the suit was against the respondent who was a continuing trespasser. The suit could not have been time-barred when the trespass was subsisting.

Counsel concluded that this court should take cognizance of the undue delay of the dispute in court for more than 18 years and invited the court to determine the dispute on merit rather than remit it to the High Court for trial since the evidence of both parties is on record.

Counsel prayed this court to allow the appeal.

**Submissions of counsel for the respondent.**

**Ground one**

Counsel submitted that the learned Justices of the Court of Appeal rightly held that the appellant’s appeal to the Court of Appeal was incompetent having been filed without seeking the leave of court.

According to counsel, his client’s appeal emanated from High Court Civil Suit No. 409 of 2013 which was struck out under Order 7 Rule 11(d) of the Civil Procedure Rules that resulted into an order of the High Court.

Order 44 Rule 1 of Civil Procedure Rules sets out orders which are appealable as of right to the Court of Appeal and an order made under Order 7. Rule 11(d) is not one of them. It therefore falls under Order 44 Rule 2 as one of the orders from which an appeal can only lie from the High Court to the Court of Appeal with the leave of Court.

Counsel contended that since the appellant had not applied for and had not obtained the leave of Court to appeal to the Court of Appeal from orders of the High Court in accordance with Order 44 Rule (2) of the Civil Procedure Rules, the appeal was incompetent.

He prayed that this Court finds no merit in the present appeal and strikes out the appeal with costs

**Ground two.**

Counsel submitted that the Court of Appeal did not decide the appeal on its merits. The Court of Appeal dismissed the appeal on a preliminary point of law and did not therefore consider and decide whether the trial Judge erred in law and fact when he held that the appellant’s suit was time barred because by doing that the court would have gone into the merits of the appeal. Counsel contended accordingly that the Court of Appeal adopted the right procedure and could not be faulted.

On the appellant’s prayer for this Court to determine the appeal and declare the ownership of the disputed land as well as grant damages, mesne profits and injunction, counsel submitted that it would be inappropriate for this Court to do so since the case had been dismissed by the High Court on a preliminary point of law and those issues were not canvassed or determined by the lower court.

**Consideration by Court.**

The critical issue for determination of this appeal is whether the appellant could appeal to the Court of Appeal against the order of Justice Bashaija of 2nd February 2016 in Miscellaneous Application No. 0796 of 2015 without the leave of court. The learned trial Judge decided the matter and issued the Order under **Order 7** Rule 11(d) of **the Civil Procedure Rules**.

The appellant maintains that they have a right of appeal against the decision of the trial Judge as it was a conclusive determination of the suit and the Judge’ s order was in effect a decree appealable as of right which the respondent contests.

It is true the trial Judge dismissed the appellant’s suit on a preliminary point of law under Order 7 Rule 11(d) which is not listed under Order 44 Rule 1 among the orders that are appealable as of right to the Court of Appeal. The appellant contends that the decision of the trial Judge determined the suit and therefore the order that the Judge issued was in effect a decree appealable as of right.

I find that the Court of Appeal for East Africa considered this issue on facts similar to those of the instant case in **South British Insce. Co. Ltd. Versus Mohamedali Taibji Ltd. [1973] E.A. 210.** The court was handling a case originating from Kenya but The Uganda Civil Procedure Act and Civil procedure Rules and those of Kenya that were considered by the court are in *pari materia.*

In that case the appellant filed an action against the respondents for recovery of 280,000/=. The trial Judge made an order striking out the plaint on the ground that it disclosed no reasonable cause of action. The appellant appealed against that decision. The respondent raised a preliminary objection that the appeal was incompetent as the Judge’s decision was drawn up and signed as a formal order and appealed from as an order and that therefore the appeal was wrongly brought and incompetent.

The Court of Appeal for East Africa had to consider the provisions equivalent to our section 2(c) of the Civil Procedure Act.

A decree is defined by the section as follows:

**“ ‘Decree’ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include----**

1. **Any adjudication from which an appeal lies as an appeal from an order, or**
2. **Any order of dismissal for default;**

***Explanation--*- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when the adjudication completely disposes of the suit. It may be partly preliminary and partly final.”**

The Court considered the definition above quoted and held that the Judge’s decision in the case was in fact a decree although the formal document was contained in a document headed “order”. The Court found that the decision was in substance and in fact a decree and therefore the appeal was competent and properly brought.

Justice Mustafa with whom all the other justices agreed held:

**“If the decision conclusively determines the rights of the parties, then it would be a decree, otherwise it would be an order. If for instance portions of a plaint are struck out as being frivolous or vexatious, or if a suit is stayed, such a decision would be an order, whereas if a suit is dismissed with costs, that would be a decree. A decree is appealable, and an order made in terms of O.6, r. 29 is made appealable as of right also.”**

The interpretation of provisions of **Section 2(c) of the Civil Procedure Act** is interpretation of the principal legislation. The provisions of **Order 44 Rule 2 of the Civil Procedure Rules** are insubsidiary legislation. The former takes precedence over the latter. The decision in **South British Insce. Co. Ltd (supra)** therefore clarifies the legal position. We have to follow the Court’s decision and act in accordance with the principal legislation.

I will now proceed to apply the principles set out by the East African Court of Appeal in **South British Insce. Co. LMD** (supra) to the facts of this case. The trial Judge in the instant case dismissed the suit on a preliminary point of law with costs. The Judge’s decision wholly determined the controversy between the parties since nothing remained to be heard by the Court. I find that the High Court decision disposed of the suit conclusively and the decision was therefore a decree within the meaning of **Section 2 (c) of the Civil Procedure Act** though it was worded as an order**.** I would hold that the appellant therefore had a right of appeal as against the decision and did not need to apply for leave to appeal to the Court of Appeal. In my view, Ground one of this appeal therefore succeeds.

**Ground two.**

At the hearing before Court of Appeal the respondent raised a preliminary objection on the ground that there was no appeal before the Court since the appeal was filed without seeking leave of court. The Court heard the preliminary objection and ruled that the appellant had no right of appeal against the order of the High Court without seeking leave of court. The Appeal was dismissed with costs.

The issue as to whether or not the original suit before the High Court was time barred was never considered by the Court of Appeal when it was ground one of the appeal.

Counsel for the appellant contends that this was in error and the Court of Appeal should have considered this ground and should have decided whether or not the High Court was correct when it ruled that the case was time-barred.

The question in ground two of this appeal is whether the Justices of Appeal were right not to have gone ahead to determine ground one of the Memorandum of appeal before them.

The East African Court of Appeal considered and explained what a preliminary objection is in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** where the Judges stated:-

**“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

This Court had occasion to consider and state how a preliminary point of objection should be handled once raised **in The Attorney General vs. Major General David Tinyefunza Supreme Court Constitutional Appeal No.1 of 1997.** The Court was of the view that the Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case. Justice Oder in that case held:-

**“The effect of the rules under Order 6 referred to appears to be this: the defendant in a suit or the respondent in a petition may raise a preliminary objection at the commencement of the hearing of the suit or petition that the plaint or petition discloses no reasonable cause of action. After hearing arguments (if any) from both parties the Court may make a ruling at that stage, upholding or rejecting the preliminary objection. The Court may also defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether a cause of action is disclosed or not. I think that it is a matter of discretion of the Court as regards when to make a ruling on the objection. No hard and fast rule can and should be laid to fetter the Court’s discretion. The exercise of the discretion must, in my view, depend on the facts and circumstances of each case.”**

Justice Mulenga (JSC) in the same case stated**:**

**“The court has option. It may or may not hear the point of law before the hearing. It may dispose of the point before, at or after hearing and it may or may not dismiss the suit or make any order it deems just. I would therefore not hold a court to be in error, which opts to hear a preliminary objection but postpones its decision to be incorporated in its final judgment, unless it is shown that material prejudice was thereby caused to either party; or that the decision was reached at un judicially.”**

The preliminary objection before the Court of Appeal in the instant case was for the appeal to be struck out on the ground that the appeal was incompetently before the Court. The Court found that the appeal before the Court was incompetently filed for lack of leave and dismissed it.

In my view, the Court would not have gone ahead to determine any issues that go to the merits of the appeal after holding that the appeal itself was incompetently before the Court. The Court of Appeal, therefore, did not err in law in not deciding ground two of the Memorandum of Appeal since that would entail determining on merit a ground of an appeal they had found they had no Jurisdiction to handle.

I have, however, found in ground one that the Court of Appeal was not correct in holding that the appellant did not have a right of appeal.

Ordinarily this Court would after that holding remit the case to the Court of Appeal to dispose of the appeal on its merits.

I am constrained from doing that for mainly two reasons:-

One, the dispute in this case has been protracted. The case has been in the Courts for over 18 years. All should be done to give the parties in such a case an expeditious disposal of the dispute to the extent possible.

Article 126(1)(b) of the Constitution provides:-

 **“126. Exercise of Judicial power**

1. **…………………………..**
2. **In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles-**
3. **…………………………**
4. **Justice shall not be delayed**
5. **……………………….**
6. **……………………….**
7. **……………………….**

Two, the High Court decision was based on a preliminary point of law and no evidence was taken by the Court.

The Court of Appeal also disposed of the matter, on technical grounds without taking evidence.

In the circumstances of this case, I find that this is a proper case in which to invoke the provisions of **Section 7 of the Judicature Act** which provides:-

 **“Supreme Court to have powers of the court of original jurisdiction.**

**For the purposes of hearing and determining an appeal, the Supreme Court shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.”**

This Court has the power under **Section 7 of the Judicature Act** to dispose of the issue of whether or not the case before the High Court was time-barred since the matter was determine on examination of the plaint without reference to any evidence.

I have studied the plaint and do find that if the trial Judge had studied the plaint carefully he would have found differently from what he held in his judgment. I will reproduce the relevant paragraphs of the plaint to illustrate the point:-

**“9. The defendant has remained a trespasser on the said land and, when the plaintiff applied for the lease extension in 2011, it received a letter stating that the application had been deferred until Court pronounces itself on the case. A photocopy of the said letter is annexed hereto and marked PE8.**

**10. In the meantime, HCCS of 2000 had been consolidated with HCCS of 2003 and, by HCMA No.431 of 2013 the defendant applied and was permitted to withdraw the two cases. A copy of the ruling of the Court is annexed hereto and marked PE9.**

**10A. After the above suit had been withdrawn, the plaintiff brought the above mentioned ruling to the attention of the Board and requested that its application which had previously been deferred by the Board, be granted.**

**10B. The Board then granted the plaintiff a lease on the suit property for 20 years with effect from 1/08/2006. The plaintiff has processed a Certificate of Title for the suit properly and a copy thereof is already referred to in paragraph 7 above.**

**11. By filing and presenting the suits, the defendant intended to and did in fact deprive the plaintiff of the occupation and use of its land and even prevented the extension of the lease when it expired.”**

The plaintiff prayed for:-

1. **A declaration that the plaintiff is the lawful owner of the suit land;**
2. **A declaration that the defendant has been and is a trespasser on the land.**

According to paragraph 10B of the plaint, the plaintiff was suing as a leaseholder. A registered owner with a lease for 20 years with effect from 01/08/2006. A copy of the Certificate of Title is attached to the plaint as annexture on page 142 of the record of appeal.

The plaintiff’s claim is also based on trespass as stated in paragraphs 9 and 11 of the plaint.

The plaintiffs prayers in (a) and (b) of the plaint are for declaration based on the two claims based in ownership and trespass.

The suit was filed in 2013. **Section 5 of the Limitation Act** provides:

**“No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom him or she claims, to that person**

I would agree with counsel for the appellant that the appellant’s claim was based on a Certificate of Title issued on 1st August 2006 and he filed his suit in 2013 which is before the expiry of 12 years to be barred by limitation as a claim of ownership of land.

The second claim was in trespass.

In **Justine E.M.N. Lutaya and Stirling Civil Engineering Company Ltd Civil Appeal No.11 of 2002** Justice Mulenga, whose decision was approved by all the other Justices held:-

**“In a suit for tort, the date when the cause of action arose is particularly material in determining if the suit was instituted in time. The commencement date is also material where, in a continuing tort such as unlawful detention, the duration of the tort is a factor in the assessment of damages. In other continuing torts, that date is of little significance. If it is outside the time limit, such part of the continuing tort as is within the time limit, is severed and actionable alone. Trespass to land is a continuing tort, when an unlawful entry on the land is followed by its continuous occupation or exploitation.”** The underlining is mine for emphasis.

I would be bound to follow the principle stated on trespass in **Justine Lutaaya (supra).**

Under **Order VII, rule 11(d) of the Civil Procedure Rules** a plaint shall be rejected,

**“Where the suit appears from the statement in the plaint to be barred by limitation.”**

A copy of the Certificate of the land title on which the plaintiff based his claim for ownership was attached to the pleadings and appears on page 142 of the record of the appeal.

According to the land title the grant of the lease to the plaintiff was for 20 years commencing on 1st August 2006.

On the face of the plaint, I would find that the plaint was not time-barred since both the claim of ownership and the one based on trespass would on the face of the plaint not be time-barred.

Counsel for the appellant submitted that this Court should in exercise of its inherent powers to do justice and prevent abuse of court process take note of the inordinate delay of the instant case in the courts. That the Court should take judicial notice of the record of proceedings in the High Court and in the Court of Appeal and determine the question of ownership of the suit property in light of the evidence on record and finally conclude the case. That the Court should allow the appeal with costs. Counsel for the appellant sought to rely on the decision of this Court in (**Capt. Philip Ongom versus Catherine Nyeko Owata S.C.C.A. No. 14 of 2001.)**. This proposition was opposed by the respondent on the ground that the case had not been heard on its merits and there was no way this court would determine the ownership of the property and grant all the other remedies the appellant was seeking.

 The facts of this case are that the High Court dismissed the appellant’s civil suit on a preliminary point of law on the ground that the suit was time-barred. No evidence was adduced by either party at the High Court hearing. The appeal to the Court of Appeal was also dismissed on a preliminary point of law on the ground that the appellant had no right of appeal without the leave of court. Both the High Court and the Court of Appeal did not receive any evidence. No evidence was admitted at any hearing by both lower courts.

The facts and the situation in **Capt. Philip Ongom versus Catherine Nyeko Owata** (supra) are distinguishable from those in the instant case. In **Capt. Philip Ongom** (supra) the suit was for breach of contract and for recovery of a sum of $ 13,000. The defendant did not deny liability. Four months prior to the hearing date, through his advocates the appellant had paid 19,000,000/= into court and admitted the contract between the two parties but contended that what he deposited in court was the amount he was owing to the respondent. The appellant thereafter did not enter appearance and the court proceeded *ex parte*. The plaintiff adduced evidence *ex-parte* in court. **Judgment was entered on the basis of the *ex-parte* evidence and the admission by the respondent**. His appeal was dismissed at the Court of Appeal. He appealed to the Supreme Court and was partially successful. The Supreme Court in its decision to dispose of the appeal on its merits was influenced by the fact that there was evidence on court record and there was an admission by the respondent. It was on that basis that the Court found that **“the appellant would have very little to defend in the suit ----.”**

In the instant case, there was no evidence on the records of the lower courts. This court would therefore have no basis upon which to make findings of fact and determine the rights and remedies of the parties. I would therefore not grant the prayer of counsel for the appellant to go ahead and determine the appeal on its merits.

**Ground Three**

This ground is framed as follows:-

 **“The learned Justices of Appeal erred in law in dismissing the appeal.”**

This ground offends Rule 82(1) of the Rules of this Court, which provides that

**82(1) “A Memorandum of Appeal shall set forth concisely under distinct heads without argument or narrative, the grounds of objection to the decision appealed against specifying the points which are alleged to have been wrongly decided and the nature of the order which it proposes to Court to make.”**

Ground three of this Memorandum of Appeal does not say in which way the Court of Appeal decision was wrong. In my view, it is not enough for counsel to simply complain and state that the Justices erred in law. He has to specify the err they committed.

In addition to that neither counsel for the parties submitted on this ground.

I would regard this ground as abandoned and dismiss it.

Having found that the case before the High Court was not time-barred, I would set aside the High Court decision.

Having found that the Court of Appeal was not right when they held that the appellant had no right of appeal before that Court, I would also set aside the decision of the Court of Appeal.

I would allow this appeal and award costs in this Court and the Courts below to the appellant.

I would remit the case to the High Court to be heard on its merits.

Dated at Kampala this 11th day of July 2018.

…………………………………………

Hon. Justice Richard Buteera

JUSTICE OF THE SUPREME COURT