**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable
Civil Appeal No. 031 of 2019

In the matter between

**1. KILAMA TONNY**
**2. OLOYA JOHN BOSCO** **APPELLANTS**

**And**

**MRS. GRACE PERPETUA OTIM** **RESPONDENT**

**Heard: 15 October, 2019.**
**Delivered: 27 February, 2020.**

***Civil Procedure*** *—Appeals from interlocutory orders — The right of appeal is a creature of statute and must be given expressly by statute — appeals do not lie as of right from any other interlocutory orders — Save for interlocutory decisions specified under Order 44 of The Civil Procedure Rules, there is no right of appeal to this Court originating from interlocutory orders of a Magistrate's Court — The requirement of leave is intended as a check to unnecessary or frivolous appeals — In cases where the question relates only to exercise of discretion (not involving a point of law), leave should generally be refused — Representative suits — One consideration for granting leave is whether or not the issues sought to be raised on appeal are sufficiently important to be brought forward as they affect the competence or fairness of the trial or that the grounds on which leave is sought would be dispositive of the subject matter of the litigation* — an order of re-trial is not authorisation for filing a fresh suit

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**JUDGMENT**

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**STEPHEN MUBIRU, J.**

Introduction:

[1] The appellants are the administrators of the estate of the late Kerobino Oryang. The respondent sued a one Kerobino Oryang jointly and severally with four other defendants seeking recovery of land measuring comprised in LRV 747 Folio 19 situated at Kal Omoro County, Gulu District, measuring approximately 19.15 hectares, general damages for trespass to land, *mesne* profits, a permanent injunction restraining them from further acts of trespass to that land, interest and the costs of the suit. The respondent's case was that the land in dispute is registered in the name of Mzee Anania Akera who on 22nd June, 1988 sub-let to her for purposes of mixed farming. During or around that time henceforth, the appellants unlawfully took possession of the land and prevented the respondent from gaining access thereto, hence the suit.

[2] In his defence, Kerobino Oryang denied the respondent's claim. He averred that he is the administrator of the estate of the late Yovan Ojok who was party to a suit with the respondent's father in 1994. Kerobino Oryang contended that the respondent fraudulently acquired a title deed to land on which he and several other persons were customary tenants at the time. He therefore counterclaimed for cancellation of the title, general damages for trespass to land and dismissal of the suit.

Procedural history:

[3] The background was that Gulu Chief Magistrate's Court Civil Suit No. 29 of 1994 was between Ananiya Akera and his daughter the respondent herein versus Yovani Ojok and 8 others. Judgment was delivered on 21st March, 2000 dismissing the suit for being time barred. The plaintiffs appealed the decision by way of Civil Appeal No. 09 of 2000. Judgment on appeal was delivered on 19th February, 2009 ordering a re-trial. Instead, the appellant herein filed a new suit where she did not join her father as plaintiff, and only against five defendants out of the original nine.

When the suit came up for hearing on 27th March, 2019 counsel for the respondent applied to substitute three of the deceased defendants with their legal representatives. Hearing of the suit began on 9th April, 2019 when two witnesses testified the first one of whom was cross-examined on 17th July, 2019 whereupon counsel for the appellant raised a preliminary objection contending that the suit was incompetent since it contravened the order of the High Court for a re-trial.

Ruling of the court below:

[4] In its ruling, the court below stated that failure of the respondent to pursue a re-trial but instead file a fresh suit did not affect the cause of action. The questions for determination in the fresh suit and in the original suit are the same. The appellants filed a counterclaim to the fresh suit that requires the respondent's title to be cancelled. That prayer can only be granted by the High Court and for that reason the counterclaim is struck out. Substantive justice will be administered and it is not in the interests of justice that the suit be struck out. The counterclaim is this struck out, the objection was overruled and the court directed the respondent to proceed with the suit. The trial continued. The respondent closed her case.

The grounds of appeal:

[5] The appellants were dissatisfied with that riling and appealed to this court on the following grounds, namely;

1. The trial Magistrate erred in law and fact when he failed to find that the matter before him for re-trial should have been Civil Suit No. 29 of 1994 and not the fresh suit No. 018 of 2019.
2. The trial Magistrate erred in law and fact when he held that he had jurisdiction to entertain civil suit No. 018 0f 2019.
3. The trial Magistrate erred in law and fact when he dismissed the appellants' counterclaim.

The appellants' submissions;

[6] In their submissions, counsel for the appellants argued that instead of initiating a re-trial as ordered by the High Court on appeal, the respondent filed a fresh suit against some of the defendants in the previous suit. A fresh suit is not a re-trial. The court below does not have jurisdiction over the appellant's counterclaim in the suit since it seeks cancellation of the respondent's title. Instead of striking out the counterclaim, the court below should have caused a transfer of the suit to the High Court. They prayed that the appeal should be allowed. The respondent did not file submissions in reply.

The duties of a first appellate court;

[7] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[8] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she 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 demeanour of a witness is inconsistent with the evidence in the case generally. It is not every slip of a lower court that will result in an appeal being allowed: it is only

those mistakes that have been shown to have affected or influenced the decision appealed against that will result in the appeal being allowed.

Decision on appeal;

[9] Although not raised by the respondents, the court observes that the right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17*; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah (No. 4) [1971] EA 50*). It must be said, and cannot be ignored, that the already overloaded system of justice simply cannot cope with, and should not have to tolerate, interlocutory appeals directed to issues of little moment. The High Court has jurisdiction to hear and determine appeals which lie to it by virtue of any enactment from decisions of magistrates' courts in the exercise of their original or appellate jurisdiction (see section 16 (1) of *The Judicature Act*).

[10] Except as otherwise expressly provided, no appeal lies from any order made by a court in the exercise of its original or appellate jurisdiction (see sections 76 (1) and 77 (1) of *The Civil Procedure Act*). Save for interlocutory decisions specified under Order 44 of *The Civil Procedure Rules* and from no other orders, there is no right of appeal to this Court originating from interlocutory orders of a Magistrate's Court which orders are incidental to the suit but not resulting from the final determination of the suit itself.

[11] The regime for interlocutory appeals was not designed to cater for appeals against routine procedural and evidentiary rulings, not determinant of the rights of the parties, made in the ordinary course of a trial. Therefore, there is no right of appeal from an order overruling a preliminary objection, or an objection raised during the course of the trial, based on point of law. According to Order 44 rule 1 (2) of *The Civil Procedure Rules*, an appeal under *The Civil Procedure Rules* does not lie from any other order except with leave of the court making the order or of the court

to which an appeal would lie if leave were given. Applications for leave to appeal should in the first instance be made to the court making the order sought to be appealed from. The requirement of leave is intended as a check to unnecessary or frivolous appeals (see *Lane v. Esdaile (1891) A.C. 210 at 212* and *Ex parte Stevenson (1892) 1 Q.B. 609*).

[12] The scheme of appellate review distinguishes between cases where the appeal is as of right and cases where the appeal cannot be preferred without leave previously obtained. In the former set of cases the High court cannot refuse to hear the appeals but, in the latter, it has the power to screen. The differentiation is intended to leave it to the High court to decide, where leave to appeal is a precondition of an appeal, whether it will entertain it.

[13] However, the interlocutory appeals provisions under Order 44 of *The Civil Procedure Rules,* in both automatic right and with leave perspectives, were enacted precisely so that difficult legal issues of significant importance could receive appellate consideration before the conclusion of the trial. There are so many considerations that enter into a refusal to give leave as to make the matter one peculiarly for the experienced judgment of the Court from which leave is sought. One such consideration is whether or not the issues sought to be raised on appeal are sufficiently important to be brought forward as they affect the competence or fairness of the trial or that the grounds on which leave is sought would be dispositive of the subject matter of the litigation. The test to be applied before leave to appeal is granted is whether the question of law or equity before the Court is of sufficient difficulty or importance to warrant or require the decision of or consideration by the High Court.

[14] Leave to appeal should not be refused simply because the trial Magistrate or the appellate Judge is of opinion that the decision was correct. If the question is one of principle and a novel one, ordinarily leave to appeal should be granted. Substantial justice should not altogether be lost sight of in considering finality of

decision, in cases where the Legislature has thrown the duty of deciding whether the litigation should be continued further, on the trial court or alternatively the appellate Judge who considers an application for leave to appeal. It would be obviously absurd to allow an appeal against a decision under a provision designed to limit the right of appeal. However, if the question raised be one in respect of which there is no authoritative decision that would be a guide to the parties, then the circumstances favour granting of leave. It is for that reason that leave is hereby granted by ratification.

[15] In grounds one and two, the appellants argue that an order of re-trial is not authorisation for filing afresh suit. Indeed, a retrial is a trial *de novo* in which the whole case is tried as if no trial whatsoever had been held in the first instance. Therefore, when a case is remanded for a retrial, the parties generally are not permitted to amend their pleadings, but instead must proceed on the pleadings as they were at the time of the first trial. When a retrial has been declared by a superior court, the judgment has a binding and not a persuasive effect on the court below as a judicial opinion.

[16] The order for a retrial should not be seen as an open invitation to simply embark upon a new round of the litigation, remedying lacunae in pleadings, evidence and raising further or new arguments. A retrial is not intended to provide either party with an opportunity for another bite at the cherry. If either party wishes to reframe and restructure its case as it may deem it appropriate, such party may only do so with the leave of court.

[17] If as a result of that order there is need to amend any of the parties' pleadings, under Order 6 rule 20 of *The Civil Procedure Rules*, permits a party to amend his or her pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, any time within 21 days after it is filed. Otherwise, a party may amend his or her pleading

only by leave of court or by written consent of the adverse party; and leave is ordinarily freely given when justice so requires. Consequently, amendment necessitated by the need to adduce further evidence on matters which occurred after the date of the order of re-trial, such amendments may be undertaken only with the leave of the court undertaking the retrial. Amendments may be allowed in exceptional cases where it would affront common sense or a sense of justice to deny them. A partial compliance with the order of re-trial, by way of irregular elimination of some of the parties to the original suit would impede or prejudice the case for either party, especially in their claim for costs incurred.

[18] On the other hand, a Court is one of competent jurisdiction when: (i) it is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; (ii) the subject matter of the case is within its jurisdiction, and there is no feature in the case, which prevents the court from exercising its jurisdiction; and (iii) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication. Upon order of a re-trial, the court below derives the authority to override the *functus officio* principle that would otherwise have deprived it of jurisdiction over the same matter.

[19] It is trite that any purported exercise of any function by a court without legal or Constitutional authority is null and void and of no effect. If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse since it has no legal foundation upon which any lawful right could be hoisted (see *Macfoy v. United African Co. Ltd. [1961] 3 W.L.R. 1405 at 1409*). Whereas a valid judgment remains

enforceable at the instance of the party in whose favour it is given, a nullified judgment loses all its legal character and remains a judgment merely in name. It is not recognised as a determination of the issue before the court and cannot be enforced since it does not exist as a determination of the court. It ceases in the eyes of the law to be an effective adjudication on the rights of the parties. Therefore, the Court below in purporting to exercise jurisdiction over a fresh suit yet the mandate given to it was for conduct of a re-trial, the court misdirected itself. The two grounds of appeal therefore succeed.

[20] In the third ground of appeal, the appellants criticise the decision to strike out their counterclaim. Section 177 of *The Registration of Titles Act* provides that upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the High Court may direct the registrar to cancel any certificate of title or instrument, or any entry or memorial in the Register Book relating to that land, estate or interest. An applicant invoking this provision must prove to the High court that he or she has recovered the land by court order against the registered proprietor thereof and that such proceedings are not expressly barred by statute.

[21] Although jurisdiction to order cancellation is vested in the High Court, this does not deprive a Magistrate's Court of jurisdiction to make findings of fraud. Consequential orders for cancellation of title may be made by the High Court following a finding by a Magistrate's Court of forgery of a title deed (see *Nandyose Elizabeth v. R. Kyogaba [1971] HCB 13*; *Andrea Lwanga v. Registrar of Titles [1980] HCB 24* and *Re Ivan Mutaka [1980] HCB 27*).

Order:

[22] In the final result, the appeal succeeds. It is accordingly ordered that trial of the suit be conducted de-novo before another Chief Magistrate. The costs of the appeal shall abide the results of the suit.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Ayigihugu and Co. Advocates

For the respondent :