THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

MISCELLANEOUS CIVIL APPLICATION 40/91

BETWEEN

LIVINGSTONE M. SEWANYANA:::::::::::::::::::: APPLICANT

A N D

MARTIN ALIKER:: RESPONDENT

(Application for review of judgment in Civil Appeal No. 4 of 1990 dated 27/2/91 (Manyindo, D.C.J., Oder, J.S.C., & Platt, J.S.C.)

RULING OF THE COURT:

By a Motion on Notice, the applicant Livingstone Sewanyana moved the Court seeking orders calling for the admission of newly discovered evidence, and reviewing its decision in civil Appeal No. 4 of 1990, on the grounds that a witness called M.G.K. Mayiga gave evidence against Mr. Sewanyana which was false. When the witness Mayiga became involved in other alleged illegal transaction, and left her position as senior Registrar of Titles, Mr. Sewanyana alleged that Ms Mayiga had prevented him from discovering the fresh documents and information while she was in office, but that they became available after her removal. The crux of the matter at the trial, and on appeal to this court, had been whether or not Mr. Sewanyana had applied for a lease of the suit premises in Nansana, which had been approved by Minute No. 8/2/82 (a) 204 or 159 of August 1982. Mr. Sewanyana stated that he had not been notified of any approval in August 1986, which was the operative application.

Behind these facts are the finding of the trial Court, with which this court concurred, that if Mr. Sewanyana's application for a lease had been approved in August 1982, the Authority purporting to give approval had no authority to do so, until the determination of the existing lease in favour of Mr. Martin Aliker, as trustee for certain beneficiaries. The proper allocation took place in 1986, when both applicants had put forward their application and the present Applicant has lost. It remains, therefore, the vital task of Mr. Sewanyana to show that his alleged first application was not made in August 1982, and certainly that if it was, it was not approved in August 1982.

The Application has two aspects. The first is whether fraud, if established, would vitiate the judgment of the court? The second is that even assuming that the witness Mayiga hide the true facts, and manufacture the evidence relating to the approval of Mr. Sewanyana's application to set aside its judgment on the grounds of fraud?

Mr. Kateera, for the respondent, strongly submitted that the court had no jurisdiction to do so. Mr. Zaabwe supported this application from general principles relating to the vitiating effect of fraud, as expounded by the privy council in HIP FOONG HING VS NEOTIA and Co (1918) A.C 888, At p. 894, Lord Buchmaster sitting with the Lord Chancellor, Earl Loreburn, and Lord Dunedin (a very persuasive court) made the following remarks:-

> "In all applications for a new trial, the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; but in the present case their Lordships are unable to say that such a case has been established. They think the judgment of the Supreme Court was in its conclusion correct. They have only to add that, where a new trial is sought upon the ground of fraud, procedure my motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, where the whole issue can be property defined, fought out, and determine; though a motion for a new trial is also an available weapon and in some cases may be more convenient."

In that appeal, there had been a judgment at first instance by the High Court at Shanghai. There was to have been an appeal on the merits, but this was abandoned in favour of an attempt to obtain a new trial, upon the ground that further matter had been disclosed which showed that the defendants' case was so tainted with fraud and dishonesty that, in the interests or justice, the appellants were entitled to have the matter reheard. The decision is therefore very pertinent to the first issue before the Court. It is fair to Mr. Kateera to note, however, that judgment in the Privy Council had not been given before the motion was moved. That is an important difference in view of the arguments addressed to this court. We think that Mr. Kateera did not express any objection to the opinion of the Privy Council within the confines of those circumstances. There was no dissent to the general principle that fraud vitiates a judgment as much as

a contract based upon dishonest and unjust dealing. Certainly, there was no dissent from the principle, set out by their Lordship, that a judgment which is tainted and affected by fraudulent conduct throughout, and the whole must fail. We think that the views expressed on this point should be followed.

That being so, the closely fought second issue, is whether this court still has jurisdiction to proceed by motion of a new trial, or whether it should direct that if the Applicant chooses, he may bring a suit to set aside the judgment. It seems that in the event the Privy Council thought it the wiser course, in the case before it, to have sought a

new trial, because an appeal on the merits would have been unlikely to succeed. In general, fresh proceedings were thought advisable, but not always convenient. We would say that the time factor is at least one consideration favouring a motion. However, this court must deal with the case where an appeal on the merits has failed, and later an alleged fraud is discovered, giving rise to a motion for a new trial. That point was not before the Privy Council. The importance of the opinion of the Privy Council is that judgement by this Court having been given, the only course open to the Applicant, was to bring a fresh suit in the High Court. On the other hand, Mr. Zaabwe contended that by virtue of Rule 1(3) of the Supreme Court, as they are now called, this Court had jurisdiction to control its proceedings to prevent abuse and injustice. Moreover Mr. Zaabwe submitted that the application must be made in this Court, because judgement had been given in this Court, and was binding upon the High Court. Therefore, he could not ask for a new trial in the High Court. It appears to have implied from his argument that it was more convenient all-around to bring the application in this Court.

We must first consider the jurisdiction of this Court which is to be followed in Rule 1(3) of the Supreme Court Rules which reads as follows:-

> "Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court."

Much has been said in the decisions of the Court of Appeal for East Africa concerning the jurisdiction of the Court of Appeal being circumscribed by statute, and that it has no power to review its completed judgements even if clearly wrong. It is often said that it has no inherent jurisdiction; Somani's v. Shirinhanu (No.2) 1971 E.A. 79. Yet Rule

1(3) of the Court of Appeal Rules, now the Supreme Court Rules has preserved its inherent powers.

It is to be noticed that Rule 1(3) was not cited to the Court of Appeal in Somani's case. That rule applies equally in Kenya as it does in Uganda. Counsel's first argument, based on Section 3(2) of the Appellate Jurisdiction Act of Kenya, was to the effect that the Court of Appeal would have the same powers as that of High Court, in determining an appeal. We would agree that that argument had to be rejected for the reasons given by the Court of Appeal; namely, that the Court of Appeal could employ those powers up to the time of judgement. Counsel's second argument was that every Court from the highest to the lowest had power, and indeed the duty, to put right something done by it which was manifestly wrong. The Court decided that it had no such powers of review as the High Court enjoyed by Statute. Indeed we may say here in passing, that Mr. Zaabwe had proposed that this Court reviewed the case before it now under the powers of the High Court to review a decision of the Court. It was pointed out, of course, that the powers of the High Court were specially conferred upon the High Court alone and not this court. Thus, as far as the concept of review is concerned, as explained in the Civil Procedure Act, we would agree with the Court of Appeal for East Africa, that those powers are not available to this Court. But that was not the argument put to the Court of Appeal. Mr. Gautama clearly referred to the inherent power of the Court, and so far from all inherent powers having been taken away from the Court of Appeal; some such powers were preserved in Rule 1(3).

The question then is what is the nature of this power which was preserved by Rule 1(3)? We may compare the statement of the Court of Appeal's powers in England as set out in Halsbury's Laws of England 4th Ed. Vol. 37 Para 693 at page 531 where it is said:-

> "In relation to the appeal, in addition to the powers conferred on nit by Statute, or the rules of Court, the Court of Appeal has its own inherent jurisdiction to prevent the abuse of its process, to do justice between the parties and to secure a fair and just determination of the real matter in controversy in the appeal."

It may be useful to observe that the English Court of Appeal exercises its inherent jurisdiction to strike out an appeal which is incompetent, although there are no specific rules to empower it to do so; see AVIAGENTS, LTD vs. BALSTRAVEST INVESTMENTS, LTD (1966) 1 All E.R. 450.

The Court of Appeal for East Africa in Lakamanshi Brothers Ltd v. Raja and Sons Ltd (1966) E.A. 313 held that:-

> "(i) The court had an inherent jurisdiction to recall its judgement in order to give effect to its manifest intention or what clearly would then be the intention of the Court had some matters not been inadvertently omitted, but it would not sit on appeal against it own judgement in the same proceedings."

This judgement seems to be consistent with Rule 35 of the Court of Appeal Rules which is as follows:-

> "1. A clerical or arithmetical mistake in any judgement of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgement has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the Court when judgement was given.
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> 2. An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgement it purports to embody or where the judgement has been corrected under sub-rule (1) with the judgement as so corrected."

It seems that what was taken as the inherent jurisdiction in 1966 has been reflected in the Court of Appeal Rules of 1972. But rule 35 will not exhaust the inherent jurisdiction of the Supreme Court; otherwise Rule 1(3) would not have been necessary. The latter rule is there to provide for the many types of cases when the inherent jurisdiction will be necessary to prevent abuse of the Court's process as may be necessary for the ends of justice. One aspect of the inherent jurisdiction as spelt out in rule 35, however, is that in a proper case a judgement may be recalled, even after it has been perfected. Although a great deal of emphasis was placed upon the fact that judgement had been given, if the falls within the scope of the inherent jurisdiction, the fact that judgement has been given, will not debar the Court from recalling its judgement.

Returning then to Somani's case, it is useful to consider the argument that when the proceedings are null and void, the Court may interfere. Both Justice Spry and Law noticed the situation and distinguished it. Law Ag. V.P. observed that the cases cited by Counsel, illustrated the proposition that where a party had been deprived of the

opportunity of being heard, then proceedings to that extent were a nullity and the omissions would be rectified (see p.81). Such rectifications could only amount to setting aside the proceedings and judgement, if any.

We would not in passing that Somani's case judgement was given ex tempore. A more careful analysis might well have revealed that as the Court followed an obsolete law, it had acted pro tanto without jurisdiction. The constitutional scope of the Court is to declare the law as Parliament has directed by Statute at that time. It would be dangerous for the court to allow a judgement to stand upon laws which parliament has directed shall not be followed; and certainly the issues between the parties could not have been fairly and properly tried between them. It may be that Somani's case should be reviewed at an appropriate time.

Applying the principle or rectifying a nullity to the case of fraud, and having in mind the Privy Council's opinion that a judgement based on fraud must fail; it seems to us that our duty is clearly, on this first occasion, when fraud is alleged. We would not hesitate to set aside a judgement based on fraud under our inherent powers in Rule 1(3), and substitute therefore an order setting aside the judgement of the High Court, with a further order for a new trial, so long as that was the most appropriate action to take. Alternatively, we could order the applicant to take fresh proceedings in the High Court to prove the fraud.

Consequently we did not allow Mr. Kateera to prevail upon a preliminary point, that this court had no jurisdiction to entertain the application, on the ground that even if fraud were established we would have no inherent powers to intervene.

It was then for Mr. Zaabwe to establish that a fraud had taken place, we were unable to agree with him that he had found any new evidence upon which allegation of fraud could be based. Mr. Zaabwe has not conducted a search of the 1982 minutes of the Authority, which is alleged to have given approval to the lease applied for by the applicant. His own witness Mr. Fred Lwasampijja swore an affidavit signed on the 25th August, 1986, in which he asked for the lease document to be prepared for the applicant, because the allocation of land was made under Min. 8/2/82 (a) (159) of August 1982. So the document so much relied upon, to show that the 1986 allocation was correct, itself referred back to the 1982 is clarified the decision of the High Court and the Supreme Court must stand. It follows therefore that this court would not be able to exercise any inherent powers in this matter, and we must leave Mr. Zaabwe and the applicant to their rights to bring a fresh suit, to challenge the judgement of the High Court as confirmed by this Court, on the basis fraud. They may allege and prove fraud

as the Privy Council said. The shorter way of proceeding, which is sometimes convenient, namely by way of a motion in this Court, is not a proceeding which is open to the applicant in this case.

In conclusion the application is dismissed with costs.

Delivered at Mengo this 3rd say of February 1992.

S.T. MANYINDO
DEPUTY CHIEF JUSTICE.

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

H.G. PLATT
JUSTICE OF THE SUPREME COURT