

UGANDA / JUDGMENT

Sewanyanya v Alier (Civil Application 4 of 1991) [1992] UGSC 25 (3 February 1992)

[1992] UGSC 25

COURT

Supreme Court of Uganda

BEFORE

Manyindo, DCJ, Oder, JSC, Platt, JSC

CASE / FILE NUMBER

Civil Application 4 of 1991

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IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: MANYINDO, D. C. J., ODER, J. S. C., 8c PLATT, J. S. C.

CIVIL application NO. 4 OF 1991

BETWEEN

LIVINGSTONE M. SEWANYANA APPLICANT

AND

MARTIN alier <sup>i</sup> 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. 8c Platt, J. S. C.)

IN

CIVIL APPEAL NO. *k* OF 1990

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moved the Court seeking orders calling for the admission of newly discovered evidence, and reviewing its decision in Civil Appeal No.4 witness called M. G. K. Kayiga gave evidence against Mr. Sewanyana which was false. When the witness Mayiga became involved in other alleged illegal transactions, 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, after her removal. The crux of the matter at the trial, and on appeal to this Court, had been whether or not Hr. Sewanyana had applied for a lease of the suit premises in Nansana, which had been approved by 159 of August 1982. Mr. Sewanyana stated application. that he had not been notified of any approval in August 1982. Consequently he had applied again in 1986, which was the operative Minute No.8/2/82 (a) 204 or but that they became available of 1990, on the grounds that a By a Station on jiotice, the Applicant Livingstone Sewanyana

Behind these facts are the findings 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 Alier, as trustee for certain. beneficiaries. The proper allocation took place in 1986, when both applicants had put forward their applications and the present Applicant had 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 manufactured the evidence relating to the approval of Er. Sewanyana's application in August 1982, would this Court have jurisdiction to set aside its judgment on the grounds of fraud?

Mr. Katera, for the respondent, strongly submitted that the Court had no jurisdiction to do so. Mr. Zaabwe supported his application from general principles relating to the vitiating effect of fraud, as expounded by the Privy Council in *HIP FOONG HING VS NECTIA and CO* (1918) A. C.888, At p. 894, Lord Buckmaster 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

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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 by 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 properly defined, fought out, and determined,' though a motion for a new trial is also an available weapon and in some cases may be more convenient."

judgment at first instance by the High Court the merits, but this was abandoned in favour of an attempt to obtain a which showed that the defendants' dishonesty that, in the interests of justice, the appellants were entitled to have the matter reheard - The decision is therefore very pertinent to the first issue before this Court. It is fair to say 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. Kateradi 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 it vitiates any other conduct, contract, based at Shanghai. such as a There was to have been an appeal on Katera to note, however, new trial, upon the ground that further matter had been disclosed case was so tainted with fraud and In that appeal, there had been a

dis. \$\$\$\$ upon honest and just dealing. Certainly, there was no dissent from the principle, set out by their Lordships, that a judgment which is tainted and affected by fraudulent conduct is tainted 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 for 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 a judgment tainted by fraud must fail, and the question is, simply, how that is to be achieved. On the one hand, Mr. Katera argued that judgment 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. Zambwe contended that by virtue of Rule 1(3) of the Scales of Appeal Rules, this Court has jurisdiction to control its proceedings to prevent abuse and injustice. Moreover Mr. Zambwe submitted that the application must be made in this Court, because judgment 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 be implied from his argument that it was more convenient all-round to bring the

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

> "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."

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Much has been said in the decisions of the Court of Appeal for East Africa concerning the jurisdiction of the Court of Appeal being cation; Somani's That rule it does in Uganda's argument, based on Section 3(2) of the Appellate Jurisdiction Act same powers as that of the 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 judgment. 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 decision of that Court. It was conferred upon the High Court alone and not this Court. powers of the High Court to review a applies equally in Kenya as Thus, as far circumscribed by statute and that it has no power to review its completed judgments. It is often said that it has no inherent jurisdiction the concept of review is concerned, as explained in the Civil of Kenya, was to the effect that the Court of Appeal would have the v Shirinkhqnifo (No.2) 1971 E. A. 79. Yet Rule 1(5) of the Court of Appeal Rules, has preserved its inherent powers. It is to be noticed that Rule 1(3) was not cited to the Court of Appeal. Counsel's first pointed out, of course, that the powers of the High Court were specially

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would agree with the Court of Appeal for East Africa, that those powers are. not available to this Court. But that Mr. autama clearly referred to the inherent power of the Court, and herent powers having been taken away from the Court of Appeal, some such powers were preserved in Rule 1(5) was not the argument put to the Court of Appeal. so far from all in-Procedure Act, we

The question then is what is the nature of this power which was preserved by Rule 1(5)? We may compare the statement of the Court set out in Halsbury's Laws of England of Appeal's powers in England as 4th Ed. Vol 57 para. 695 at page 53 where it is said:-

"In relation to an appeal, in addition to the powers conferred on it 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. 4fee AVIAGENTS, LTD vs BALSTRAVEST niVF^TiCiriTS, LTD (1956) 1 All E. R.

in Lnkamanshi Brothers Ltd v • that:- The Court of Appeal for East Africa R. Raja and Sons Ltd (1966) 6 E. A. / held

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jurisdiction to "(i) The court had an inherent recall its judgments 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 its own judgment in the same proceedings."

Appeal Rules which is as follows:- This judgment seems to be consistent with Rule ⁵⁵ of the Court of

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"1• A Clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment 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 judgment was given.

2)* 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 judgment it purports to embody or where the judgment has been corrected under sub-rule (1) with the judgment 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 15 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 judgment may be recalled, Although a great deal of ..emphasis was placed upon the fact that judgment had been given, if the case falls within the scope of the inherent jurisdiction, the fact that judgment has been given, will not debar the Court from recalling its judgment. even after it has been perfected. a proper case a

Returning then! to Somani's^s case, it is useful to consider the the Court may interfere. Both Justices Spry it. Party had been deprived of the opportunity nullity and the 8/... argument that when the proceedings are null and void, and Lawrie[^]rrd the situation and distinguished the proposition that where a of being heard, then proceedings to that extent were a Law Ag« V. P. observed that the cases cited by Counsel, illustrated

Such rectification could only omission would be rectified (See p.8fl). amount to setting aside the proceedings, and judgment, if any.

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

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

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

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It was then for Mr fraud had taken. place. We were unable to agree with him that he had found any new evidence upon which an allegation of fraud could be based. Mr. Zaabwe 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 So the document so much relied upon, to show that the 1986 allocation was correct, itself referred back to the 1982 minutes, and net to the allocation in 1986. matter, to bring a fresh suit, the judgment of the high Court as confirmed by this Court, on the basis of fraud. They may allege and prove fraud as the Privy Council said. The shorter way of proceeding, is not a document to be prepared for the applicant, because the allocation of land was under Min.8/2/82 (a) (159) of August 1982. It follows therefore that if this Court would not be able to exercise any inherent powers in this has not conducted a Zaabwe to establish that a and we must leave Mr. Zaabwe and the Applicant to their rights to implead which is sometimes convenient, namely by way of a motion in this Court, proceeding which is open to the Applicant in this case. Until the position in 1982 is clarified the decision of the High Court and Co-f—A-PPE-a-1 must stand.

Delivered at Ngero this In conclusion the application is dismissed with costs. day of

OUT S. T. MANYINDO DEPUTY CHIEF JUSTICE. ORDER " SUPREME ATTORNEY TO JUSTICE OF THE SUPREME COURT H. G. PLATT JUSTICE OF THE SUPREME COURT

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