

UGANDA / JUDGMENT

Ssekabe v Zirabamuzzaale and Another (Civil Appeal No. 9 of 2000) [2001] UGCA 61 (2 July 2001)

[2001] UGCA 61

COURT

Court of Appeal of Uganda

BEFORE

Mukasa-Kikonyogo, DCJ, Mpagi-Bahigeine, JA,
Berko, JA

CASE / FILE NUMBER

Civil Appeal No. 9 of 2000

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Before HON. HON. HON. JUDGES L. E. M. JUDGES A. E. N. JUDGE J. P. BERKOWSKI /
MUKASA-KIKONYOGO, DCJ WAGI-BAHIGEINE, JA JA

CIVIL APPEAL NO. 9 OF 2000

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BETWEEN

ISMAEL SSEKABE and as legal representative) of ROBERT KIZITO (deceased)).... APPELLANTS

li AND

1 2 YAHAYA ZIRABAMUZZAAL MUTWALIB SAJJABI TEZIKUBA RESPONDENTS I

10 (Appeal from a Judgment / Decision of High Court of Uganda at Kampala [Lady Justice
Byamugisha Constance] dated 30th day of September, 1999 in Civil Suit No. 473 of 1992)

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15 JUDGMENT OF L. E. M MUKASA-KTKONYOGO DCJ

I have had the benefit of reading Judgment of Berko, J. A. I agree with conclusions for allowing the appeal and he proposed. in draft, the the reasons and for the o rde rs

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I do not have much to add, except to briefly comment on the Judgment of the High Court which is the subject of the complaint in ground 4 of the appeal and which reads as follows:-

"The learned trial judge erred $\$_{\text{tt in}}$ law in concluding a defended trial by simply making a summary order instead of a reasoned Judgment."

During the cross-examination of the $\$1^{\text{st}}$ Appellant in the $\$10$ High Court he stated, inter alia, that

"I admitted receiving the sum of Shs. 28,183,255/= from the plaintiff in 1992. The last payment was made on $\$6/01/92$. I did not refund the money $\$15$ because the amount is equivalent to the rent they would have paid for the building. The agreement was for the sale of the building. They failed to fulfil the agreement."

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Whereupon, Mr. Karugaba, learned counsel for the Respondent prayed for Judgment and his prayer was granted.

For clarity, I will reproduce the relevant portion of $\$25$ the record. It reads as follows:-

> "Mr. Karugaba: will pray for Judgment $\boldsymbol{\mathcal{I}}$ on admissions that the defendants refund to the plaintiffs the sum of Shs. 28,183,255/=, interest

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the rate of 23% p.a. from July 1992 until at payment in full. Further that the defendants return the plaintiffs' property exhibited in the list supplied by the defendant (DW1). The defendants pay the costs of this suit.

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Tuyiringire: - I disagree with my learned friend on The defendants refund the sum of particulars. Shs. 28, 183, 255/ $\$=\$$. I submit that interest at Court rate today. It is unfair to penalise the defendant on commercial rate.

Order: - Judgment will be entered in favour of the plaintiffs against the defendants for the sum of 28,183,255/- being the admitted amount Shs. received by the defendants. This sum will carry interest at the rate of 15% p.a from the date of filing the suit on 29/07/92 till payment in full. They will also have costs of the suit. The defendants to return the list of grounds in their possession."

I agree with the learned counsel for the Respondent that to treat the deposits totalling to Shs. \$28,183,255/=\$ paid by the Respondents to the 25 appellants not as part payment of the purchase price but for rent would be raising a new argument. The evidence on record clearly shows that those deposits were paid as part-payment of the agreed purchase price of Shs. 120,000,000/ \$=\$. 30

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In my view any indebtedness or any other claim against the Respondents can be taken care of by a counterclaim.

It is correct, as rightly submitted by Mr. Karugaba, that a party may move the Court for judgment upon admission as he did under Order 11 rule 6 of the Civil **Procedure Rules** which provides:

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> "Any party may at any stage of suit, where an admission of facts has been made, either \$on\$ pleadings or otherwise apply to the Court for such judgment or orders as upon such admission he may to, without waiting be entitled for the of other questions between determination the parties; and the Court may upon such application, make such order or give judgment, as the Court may think fit"

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I also agree with counsel that in such cases the Court need not give a reasoned judgment envisaged under 0.18 rule 4 of the Civil Procedure Act unless circumstances warranted so.

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Order 18 rule 4 reads that:-

in defended suits shall contain "Judgments $\overline{\$a}$ concise statement of the case, the points for

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de:rrination, the decision thereon and the reason for such decision"

In the instant case it is true the appellant made some admissions but as his counsel submitted, they were qualified. He did not think it necessary to refund Shs . 2 B , 183 , 255 / = because he thought that it could be converted into payment of rent. I agree that he could have been wrong but as the record stands, the first appeal, Iant did not seem to admit liability. In any case the particulars were not agreed upon by the parties. In agreement with Mr. Zagyenda, the judgement entered for the Respondent cannot be said to be by consent or on admission. a l()

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Secondly, as it was argued by counsel for the appellant, Mr. Tuyingirire, counsel for late Robert Kizito had no instructions to represent him (Kizito) in the absence of a legal representative. This issue has been already dealt with in Lead judgment of my brother Berko, J. A. So I will rest it at that.

In the circumstances of this should not have been entered on I think judgment terms. CASC, those

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In my view this appeal could also have succeeded on this ground alone. Since Mpagi-Bahigeine, J. A and Berko, J. A agree that the appeal should succeed, it is as I found .

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The judgment and orders of the High Court are hereby set aside. They are substituted by an order for a retrial before another High Court judge. Costs here and in the High Court are awarded to the appellants.

Dated at Kampala this 2nd July 2001.

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L. E. M. MUKASA-KIKONYOGO DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ HON. LADY JUSTICE A. E. MPAGI-BAHIGEINE, JA. HON. JUSTICE J. P. BERKO, JA.

CIVIL APPEAL NO.9 OF 2000

BETWEEN

ISMAEL SSEKABE and as legal representative of ROBERT KIZITO
(deceased) ::::::::::: APPELLANTS

AND

1. YAHAYA ZIRABAMUZAAL

2. MUTWALIB SAJJABI TEZIKUBA::::::::: RESPONDENTS

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[Appeal from a Judgement/Decree of High Court of Uganda at Kampala [Lady Justice Byamugisha Constancl dated the 30th day of September, 1999 in Civil Suit No.473 of 1992]

JUDGEMENT OF A. E. MPAGI-BAHIGEINE, JA

I have read in draft the Judgement of Berko, JA and I entirely agree with it
and the orders therein as proposed by him.

I have nothing useful to add.

I have nothing used.
Dated at Kampala this 2nd day of July 2001.

A. E. MPAGI-BAHIGEINE JUSTICE OF APPEAL.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L. E. M. MUKASA-KONYOCO, DCI. HON. LADY JUSTICE A. E. N. MPAKABE, BAHTEKE, IA. HON. MR. JUSTICE I. P. BERKO, IA.

CIVIL APPEAL NO. 9 OF 2000

BETWEEN

|| ISMAEL SSEKABE) and as | |-----| | Legal Representation of | | 2 |
ROBERT KIZITO XDECEASED).
APPELLANTS |

AND

YAHAYA ZIRABAMUZAALE } MUTWALIB SAIABI TEZIKUBA).... ..
RESPONDENTS I 2() 2

(Appeal from a judgment/Decree of High Court of Uganda at Kampala by Lady Justice Byamugisha Consensel dated the 30th day of September, 1999 in civil suit No. 473 of 1992)

JUDGMENT OF HON. I. P. BERKO, IA.:

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1) Ismail Ssekabe, the appellant and his son, Kizito Roben, agreed on 14/3/91 to sell the property on Plot No. 4 Kutch Road, West line to Yahaya Zirabamuzaale and Mutwalib Saiabi Tezikuba, the respondents. The property on the Plot was a hotel. It is clear from the evidence of the first respondent that Ismail Ssekabe was the owner of the suit property, though registered in the names of his son Kizito Roben. The agreed price was Shs. 120 million. The sale Agreement was in writing and signed by both parties.

On the execution of the Sale Agreement on 14/3/91, a deposit of Shs. 1 million was paid. The mode of payment of the balance was to be agreed

1) upon later. It was, however, agreed that the balance should be paid within a period not exceeding 12 months. The hotel was handed over to the respondents after the execution of the Sale Agreement. On 24/4/91 the respondents Shs. 8,000,000/- to the Sellers. In July 1991 another Shs. 2,000,000/= was paid. This payment is disputed by the first appellant. Again, on 6/1/92 another Shs. 4,600,000/= was paid by Banker's Draft. On the same 6th January, 1992 the respondents paid a further sum of Shs. 4,000,000/= by cheque. Again on the same 6/1/92 the

respondents paid a further sum of Shs. 83,255/= by cash. According to the respondents, the total part payment towards the purchase of the suit property came to Shs. 30,183,255/=. It is

> The respondents have averred that they were ready and willing to pay the balance of the purchase price but the first appellant and his son Kizito Roben refused to execute a transfer of the property to them. They, as a result, instituted an action against them, claiming: -

- (a) a declaration that they lawfully purchased the suit property,
- (b) an order that the defendants execute a transfer of the suit property in their favour and
- (c) costs of the suit.

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Separate written statements of defence were filed on behalf of the first appellant and Kizito Roben by the same firm of advocates. The first appellant admitted the sale of the suit property to the respondents. He admitted, however, the receipt of only Shs. 28,183,255/= and not Shs. 30,183,255/- alleged by the respondents. He averred that the respondents breached the terms of the sale agreement and as a result he evicted them from the suit property and re-entered it. Consequently he denied that the respondents were entitled to the reliefs claimed. The first appellant counter-claimed for: -

(a) loss of use of the suit property,

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- o (b) loss of income,
- (c) interest and
- (d) Costs of the suit.

Kizito Roben, in his written statement of defence, averred that he was the sole registered proprietor of the suit property and denied having executed a sale contract in favour of the respondents in respect of the suit property. He therefore contended that the suit against him was misconceived, as the respondents had no cause of action against him. He did not counter-claim.

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The issues agreed upon for determination were: -

- (i) Who of the parties was in breach of the sale agreement?
- (ii) Whether the defendants lawfully entered the suit premises;
- (iii) Whether the plaintiffs were entitled to the remedies prayed for and
- (iv) Whether the first appellant's counter claim should be allowed.

After the evidence of the first respondent, Yahaya Zirabamuzaale, Mr. Buyondo, 20 who appeared for the respondents, applied to amend plaintiff by adding an alternative prayer in the event of all the other remedies failing. The alternative prayer was to the effect that the first appellant should refund Shs. 30, 183,255/- with interest of 25% from 1992. Mr. Masiga, who appeared for the first appellant, did not object. The amendment was accordingly allowed. Thereafter, Mr. Andrew Avula, who was the Manager employed by the respondent to manage the suit property, gave evidence. That was on 19/2/1996. The case was adjourned.

The case came up for further hearing on 10/3/96. On that day, Mr. Karugaba, respondents' counsel in this appeal, appeared for the respondents. Mr. O. Tuyiringire appeared for the first appellant and Roben Kizito. Mr. Karugaba informed the court that he had just taken instructions from the respondents and that he would like to amend the plaintiff to include other prayers. He also informed the court that the second defendant, Kizito Roben, had died and that he intended to bring in his legal personal representative. This was confirmed by Mr. Tuyiringire who informed the court that no one had taken out Letters of Administration yet. The case was then adjourned to enable the respondents to amend the plaintiff, if they considered it was necessary.

> When the case came up for continuation on 11/5/98, Mr. Sekatawa Mathias held brief for Mr. Karugaba. Mr. Sekatawa informed the court that he had agreed with Mr. Tuyiringire that the case should be adjourned to enable Letters of Administration to be obtained in respect of the estate of Kizito Roben who had passed away since the institution of the suit. He added that notices had already been published and that he was waiting for the grant of the Letters of Administration. The matter was, as a result, adjourned to 15/9/98.

Mr. Karugaba appeared in person on 15/9/98. The following appeared in the court's record:

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Karugaba: - "I have one witness and ready to proceed. After that I shall assist my learned friend to bring the legal representative. "

Thereafter one Buyinza Abdalla Laffer, (PW3), who used to manage the suit property as the Hotel Manager of the appellant, testified. His evidence showed that he was the intermediary who brought the appellant and the respondents together that resulted in the purchase of the suit property by the respondents. He witnessed the first payment of Shs. 15,000,000/= to the first appellant. He also

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O said that respondent took possession but they were chased away by the first appellant in 1992.

> After the evidence of PW3, Mr. Karugaba did not formally cross the respondents' case and reserved the right to adduce further evidence. He, however, allowed the defence to proceed thereupon, the first appellant gave evidence reiterating the averments in his written statement of defence. He admitted that the respondents paid a total of shs. 28, 181,255/= towards the purchase of the suit property. In cross-examination he admitted that he received that sum.

> After the evidence of the first appellant and without any indication as to whether the defence had closed their case or not, Mr. Karugaba applied for judgment on the alleged admission to be entered against the defendants with interest at rate of 23% per annum from July 1992 until payment in full. Whether counsel for the defendants contested the application or not is in dispute. The learned trial judge, thereupon, entered judgment against the defendants for the sum of Shs. 28, 183,255/= being the admitted amount received by the defendants with interest at the rate of 15% per annum from date of filing suit, that is, 29/7/92, till payment in full and costs of the suit.

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This judgment is being challenged in the instant proceedings. Though there are eight grounds of appeal, in my view, the determination of the appeal rested on one ground only, namely, the propriety of the further proceedings in the suit after the death of Kizito Robert, the second defendant, when his legal representative had not been joined.

There is no dispute that during the pendency of the suit brought against the first appellant and Kizito Robert, the said Kizito Robert died. This was brought to the notice of the court and the court was apprised of the fact that steps were being

taken to get Letters of Administration for his legal representative. Instead of the respondents following the procedure to have the legal representative of the deceased made a party, proceeded with the trial and heard the evidence of PW3 and the first appellant and obtained judgment against the original defendant, as if Robert Kizito was alive. According to Mr. Zagyenda, learned counsel for the first appellant, the court was wrong to have proceeded with the hearing of the suit when the legal representative of Robert Kizito had not been made a party. In support of his argument Mr. Zagyenda referred to Order 21 r 4 of the Civil Procedure Rules and the case of *Samson Mayanja v Arisa Musoke and Another*, HCC No. 8 of 1986.

> Mr. Karugaba did not have a ready answer to Zagyenda's argument. He prayed for 7 days to put in a written submission, but we declined as we were of the view that the law governing the issue is beyond dispute. He, however, thought that the alternative relief survived against the first appellant alone.

> The procedure where one of several defendants dies is governed by Order 21 r 2 and 4. of the CPR. The relevant parts of Order 21 r 2 are: -

"Where there are more.....defendants thdn one and any one of them dies, and where the cause of action suruives or continues.....against the suruiving defendant or defendanB alone, the court dtall cause an entty to thdt effect to be made on the recor4 and the suit drall against the surviving defendant or defendants".

This rule deals with the situation where the suit survives or continues against the surviving defendant alone. In other words, where the plaintiff can pursue his relief or reliefs against the surviving defendant and get full satisfaction for whatever relief the coun might grant without looking to the estate of the deceased defendant. In

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such a situation, all that the coun is required to do is to record the fact that one defendant had died and proceed with the case.

As we have said earlier on the suit in this case was again\ the first appellant and late Kizito Roben. The reliefs claimed against the first appellant and the late Kizito Roben were: -

- (i) a declaration that the plaintiffs are the lawful purchasers of the propefty comprised in Plot No. 4 Kutch Road, West linia, Uganda.

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- (ii) an Order that the defendans execute a transfer in respect of the above property in favou r of the Plaintiffs and

- (iii) Costs of the suit.

There is evidence on record that Kizito Roben, deceased, was the registered proprietor of the suit property. There was, therefore, no way in which an order could be made in respect of the reliefs claimed without the interest of Kizito Robert being affected. The suit, as a result, did not survive against the first appellant alone. Even the alternative prayer did not survive or continue against the first appellant alone. The payments of the monies were inseparably linked with the contract of sale of the suit property. Accordingly, Order 2l r 2 did not apply.

The next is Order 2l r 4, which provides: -

'4(l) Where one of two defendants dies and the cause of action does not suruive or continue against the suruiving defendant or defendans the couett, an application made in that behafi, shall cause the legal representative of the deceaed defendant to be made a party and shall proceed with the suit".

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This rule deals with a situation where action does not survive against the surviving defendants alone and that whatever order or orders the court might make in the suit would affect the estate of the deceased defendant. In such a situation the legal representative of the deceased defendant is a necessary party to the suit. The suit cannot proceed further if he is not made a party. That is the reason why the rule requires that the legal representative of the deceased defendant to be made a party before the suit can proceed.

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As the late Roben Kizito was the registered proprietor of the suit property, the cause of action here could not have survived or continued against the first appellant alone. The alternative relief did not change the character of the suit. It was pure and simple action for specific performance of a contract of sale of the suit property and it remained so in spite of the alternative claim. The monies paid were part-payments towards the purchase of the suit property. Consequently, the payment of the monies cannot be separated from the agreement to sell the suit property. The cause of action arose from that agreement. Possession of the suit property was given to the respondents pursuant to the sale agreement and they ran the Hotel for profit. The respondents therefore cannot claim a refund of their monies without regard to the legitimate claims of the defendants under the sale agreement. Those legitimate claims accrued to the benefit of the estate of the deceased defendant. The court therefore ought to have caused the legal representative of the late Kizito to be made a party before proceeding further with the suit.

What then is the legal effect if the court proceeds without making the legal representative of the deceased defendant a party to the suit? The A.I. R. Commentaries on the Indian Code of Civil Procedure, 7 Ed. Vol. III on their

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Order 22 rule 4(S. 168) which is the same as our Order 21 r 4 is very instructive and can, with profits, be relied upon: It says, at page 3372: -

8 'Shall cause the legal representative of the deceased defendant to be made a - On the death of a defendant in a suit the court should bring the legal representative on the record before proceeding further with it. The suit may be described to be in a state of suspension till then, and no order excepting formal or processual can be passed. If the suit is disposed of without impleading the legal representative of the deceased party, retrial will be ordered. "

The suit in this case was disposed of "without impleading" the legal representative of the late Kizito Robert. In other-words, the court allowed the suit to proceed without complying with the mandatory provisions of Order 21 r 4, of the CPR. In my view, all the subsequent proceedings after the death of Kizito Roben, in contravention of Order 21 r 4 were, incurably defective and most irregular. I, as a result, have no alternative but to order a retrial. This is enough to dispose of the appeal.

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I would allow the appeal. The iudgment and orders made by the trial court are hereby set aside. I would substitute therefor an order for a retrial before another Higlr Coun ludge. I would order the Costs here and the court below to be in favour of the appellants.

Dated at Kampala this 2day of 2001. J ,t

l lustice of Appeal.

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