

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 89 OF 2011

NALONGO BURASHE:.....

APPELLANT

VERSUS

KEKITIIBWA

MANGADALENA:.....RESPONDENT

CORAM: HON. MR. JUSTICE A.S NSHIMYE, JA

HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(Appeal from ruling of the High Court delivered by the Hon. Justice Kigundu Jane dated 15/06/2010 at Masaka in High Court Miscellaneous Application No. 8 of 2010(Arising from M.A. No. 167 of 2009, Masaka) Arising from Kalagala L.C.II Court C.S No. 12 of 2009)

JUDGMENT OF THE COURT

This appeal arises from a Ruling of the High Court of Uganda at Masaka in Misc Application No. 162 of 2009. The appellant was the applicant at the High Court.

That application was brought under **Sections 98** and **83** of the Civil Procedure Act, **Order 52, Rule 1** of the Civil Procedure Rules

and **Sections 30** and **32** of the Local Council Courts Act 13 of 2006.

The brief background to this appeal is as follows;-

5 Both the appellant and the respondent were parties to Kalagala Parish L.C II Court in Civil Suit No. 12 of 2009 in which the respondent was the plaintiff. The dispute was over the ownership of a *Kibanja* (customary land) in the same area. The suit was heard and judgment was given in favour of the respondent.

10 The respondent who was the successful party applied to the Chief Magistrate's court for execution of the judgment of the LCII parish executive committee Court. The Chief Magistrate dismissed the application contending that, the LCII Court had no jurisdiction to entertain a matter of a civil nature as a court of first instance.

15 The matter then went to the High Court, by way of notice of motion as already stated above.

The High Court held that the LCII court that tried the suit had original jurisdiction to do so.

The appellant being dissatisfied with the decision of the High Court then filed this appeal.

20 At the hearing of this appeal **Mr. Gibbs Baryajunwa** appeared for the appellant while **Mr. Alexander Tuhimbise** appeared for the respondent.

Both parties adopted their respective conferencing notes and also addressed court orally.

Mr. Tuhimbise raised a procedural issue to the effect that the appeal was incompetent as it contravened **Section 76 and**
5 **77(1)** of the Civil Procedure Act (Cap 71).

Section 77 (1) of the Civil Procedure Act stipulates as follows;-

“Except as otherwise provided no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction”

10 He contended that this application having been brought under **Section 98** of the Civil Procedure Act and **Order 52, Rule 1** of the Civil Procedure Rules an order arising therefrom is not appealable as of right. He submitted that this appeal was therefore incompetent.

15 Mr. Baryajunwa conceded that the appellant had not sought leave to appeal and that there was no right of appeal from the order being appealed from.

He however, sought to rely on the decision of the Supreme Court in **Re Christine Namatovu Tibaijjukira [1992-93] HCB**
20 **85**, that;-

“The administration of justice should normally require that substance of disputes should be investigated and decided on the merits and that error and lapses

should not necessarily debar a litigant from the pursuit of his right.”

With all due respect to learned counsel for the appellant we do not accept the argument that leave to appeal is a simple procedural matter.

It is long settled law that there is no such a thing as an inherent right of appeal. An appeal is a creation of statute. In ***Attorney General vs Shah No. 4 [1971] E.A P. 50 SPRY*** Ag President of the Defunct East African Court of Appeal, noted that ;-

10 ***“Appellate jurisdiction springs only from statute. There is no such a thing as inherent appellate jurisdiction.”***

In ***Baku Raphael Obudra and Obiga Kania vs Attorney General (Supreme Court Constitutional Appeal No.1 of 2005)***, It was held by Odoki CJ that;-

15 ***“Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied.”***

We find that this court lacks jurisdiction to entertain a matter in which leave to appeal is required but has not been sought or granted. The Supreme Court in ***Dr. Sheik Ahmed Mohamed Kisuule vs Greenland Bank (in liquidation) Civil Appeal No. 11 of 2010***, held as follows on this issue at page 10 of the Judgment of Kitumba JSC.

25 ***“Where leave is required to file an appeal and such leave is not obtained, the appeal filed is incompetent and cannot***

even be withdrawn as an appeal. See Makhangu vs Kibwana (1995-1998) 1 EA 175. It is not merely a procedural matter but an essential step envisaged by Rule 78 of the Rules of this Court”

5 We agree with the above proposition of the law and we find that this appeal is incompetent and therefore liable to be struck out on that account.

However, it appears to us that this appeal raises very serious issues of law which are of public importance that would require
10 this court to determine. For that reason alone we find that the peculiar facts of this appeal and the justice of the case require us to exercise the power granted to this court under **Rule 42** of the Rules of this court.

That Rule stipulates as follows;-

15 ***42 “Order of hearing applications.***

(1)Whenever an application may be made either in the court or in the High Court, it shall be made first in the High Court.

20 ***(2)Notwithstanding subrule (1) of this rule, in any civil or criminal matter, the court may, on application or of its own motion, give leave to appeal and grant a consequential extension of time for doing any act as the justice of the case requires, or entertain an application under rule 6(2) (b) of these Rules, in***

order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High court.”

(Emphasis added)

- 5 On this court’s own motion, we hereby grant the appellant leave to appeal. The consequential effect of this, is to regularize this appeal which would have otherwise been struck out.

The learned Judge before arriving at the decision that is the subject of this appeal had observed and held as follows at Pages

10 3-4 of her ruling;-

“As far as this court is concerned, the main issue to be decided upon is the issue of jurisdiction of the LC 11 court.”

15 ***Learned counsel Baryajunwa argued that an LC 11 court has no original jurisdiction in Civil matters. He quoted S. 30 and S. 32(2) of the local council Courts Act. Act 13/2006. He submitted that S.32 (2) gives Lc courts powers to handle matters arising from cases and causes from LC1 courts. That this section only confers jurisdiction to LC 11 courts as appellate courts.***

25 ***Learned counsel Mr. Mulindwa Fredrick did not address this issue. Court has taken note and has this to say. The matter in this case arose on 21.12.2008. The applicable law therefore is the Land Act,***

(Cap227),and the Land (Amendment) Act, Act 1 of the 2004 and the Local Council courts Act, Act 13 of 2006. S. 50(1) of the local council Act, Act 13 of 2006 repealed the Executive Committees (Judicial Powers) Act (Cap 8).”

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S. 30 of the Land (Amendment) Act, 2004 introduced S. 76 A of the land Act which states that “.... The Parish or Ward Executive Committee courts shall be the courts of first instance in respect of Land disputes”. It therefore follows that these two pieces of legislation removed the legal jurisdiction from a village executive committee court to try and determine land disputes. My opinion is that the court of first instance in respect of Land disputes is the Parish or ward executive committee court and NOT the village executive Committee court.

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In dismissing the application for execution, this court is not sure which law the Chief Magistrate relied on. May be relied on the argument of counsel.

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The applicant brought this application to this court for orders nullifying the orders of the LC 11 court on the ground that the LC 11 court had no original jurisdiction to try a Civil matter. This court finds that in cases of Land, the LC 11 court has original jurisdiction to hear and determine Land matters.

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In conclusion, this court has no choice but to dismiss the application herein with costs and it is hereby so ordered.”

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We agree with the proposition of the law as set out by the learned Judge, that indeed in respect of land matters the parish or ward executive committee court and not the village executive committee court is the court of first instance.

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We also agree with position of the law as set out by Bashaija J in ***Busingye Jamiya versus Mwebaze Abdu and another*** High Court (***Civil Revision No.033 of 2011***) in which the learned Judge while determining a matter similar to the one at hand held as follows;-

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“It is my view that provisions of the Land Act were intended to modify the provisions of the Executive Committee (Judicial Powers) Act (supra) with regard to jurisdiction over land disputes and the forum of appeals from Division or Sub-County Executive Committee Courts.

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The Local Council Courts Act has by, it's Section 10 (1) (b) regarding "legal jurisdiction", and Section 32 (2) (c) regarding the right of appeal, re-enacted with slight modification the provisions which were contained in Section S (1) (b) on jurisdiction, and Section 28 (2) (c) on appeals, in the Executive Committees (Judicial Powers) Act (Cap 8), now repealed. Therefore, according to Section 13 (1) of the Interpretation Act (supra) on "effect of repeal", references by Land Act,

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Section 76 A (1) and (2) to the provisions so repealed have to be construed as references to the provisions so re-enacted, that is; Section 10 (1) (b) and Section 32 (2) (c) of Local Council Courts Act).

I am acutely aware of the principles of construction which require that an earlier Act stands impliedly repealed by a later Act. See Kariapper vs. Wijesinlta [1968] AC 716, which was the provisions, of Section 76 A (1) and (2) of the Land Act (Cap 277), because the provisions contained in Sections 10 and 32 (supra) are expressed to be subject to the provisions of any other written law. Accordingly, a Local Council Court established at the village level has no jurisdiction to try and determine land dispute or matters relating to land. Section 76 A (1) and (2) of the Land Act (Cap.227) have to be read with all the necessary modifications and/or adoptions in light of changes in names of courts established under the Local Council Courts Act, (2006) have followed by the Court of Appeal of Uganda in Civil Appeal No. 12 of 1985 between David Ssejaaka Nalima and Rebecca Musoke, per Odoki, JA. (as he then was). In that case, the Learned Justices of Appeal agreed with the forestated statement of the principles of construction of statutes. I am of the strong view, however, that situation in the instant case is properly covered by Section 13 (1) of the Interpretation Act (Cap 3). This is so because the general principles of construction of statutes would not apply where the local interpretation Act provides for a specific situation. I will conclude the above point by stating that Section 10 (1) (b) and (e) and Section 32 (2) (c) of the Local Council Courts' Act (2006) have to be construed subject to the

5 provisions **of Section 76 A (1) and (2) of the Land Act (Cap 277), because the provisions contained in Sections 10 and 32 (supra) are expressed to be subject to the provisions of any other written law. Accordingly, a Local Council Court established at the village level has no jurisdiction to try and determine land dispute matters relating to land. Section 76 A (1) and (2) of the Land Act (Cap.227) have to be read with all the necessary modifications and/or adoptions in light of changes in names of courts established under the Local Council Courts Act, 2006.**

15 We agree entirely with the above decision of the High Court and we adopt it.

In conclusion, we uphold the decision of the High Court that the Parish or Ward Executive Committee court has original Jurisdiction in land matters.

This appeal therefore substantively fails.

20 However, there are other issues which the High Court failed to take into account while disposing of this matter.

The Judgment of the L.CII Court from which this appeal emanates was delivered on 25th April 2009.

25 By that time in **Ruranga vs Electoral Commission and the Attorney General [2008] 1EA P. 387** the Constitutional Court had already made a decision that had far reaching implications on the nature and legality of Village, Parish or Ward Local Council Committees.

That petition was challenging the Constitutionality of a number of laws, regulations and policies in respect of local council committees and local council elections. The constitution Court made the following orders and declarations.

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1. Section 160 of the Local Governments' Act, regulation 12(1) of the National Women's Council (Council and Committee) Elections Regulations are inconsistent with article 61 (1)(g) of the Constitution.

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2. Section 161 (4) of the Local Governments' Act regulation 14(3) of both SI 318-1 and SI 319-1 are inconsistent with article 1 (4) of the Constitution.

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3. Section 161(2) of the Local Governments' Act, regulation 14(1) of both SI 318-1 of S1319-1 are inconsistent with article 1(4) of the Constitution.

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4. Sections 46(1)(c) and 160 of the Local Governments' Act, section 6(1) the National Youth Council Act, regulation 12(1) of SI 318-1 and regulation 12(1) of SI 319-1 are inconsistent with articles 61(1)(a) and (e) and 1(4) of the Constitution.

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5. Regulations 3, 6(1)(a), 7, 8, 9, and 11(3) of the National Youth Council (Councils and Committee) Elections Regulations are inconsistent with articles 1 (4) and 62 of the Constitution.

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6. Regulation 22(4) of SI 318-1 is neither inconsistent with nor contravenes articles 1(4) and 61(1)(a) and 68(1) of the Constitution.

7. Regulation 25 of SI 319-1 is neither inconsistent with nor contravenes articles 1(4).61(1)(0) and 68(1) of the Constitution.

8. Section 46(1)(c) of the Local Governments' Act, sections 6(1), 2(2), 5(2), of the National Women's Council Act and sections 6(1), 2(2).

5 **9. The guidelines issued by the Electoral Commission are inconsistent with articles 1(4) and 180(3) of the Constitution.**

10 **10. The impugned provisions of the Local Government's Act, the National Youth Council Act, the National Women's Council Act, and certain regulations of S [318-1 and 319-1 as existing laws, are subject to Article 273.**

15 As a result of the above decision the elections of village, parish and ward councils which were under way at the time could not take place. The village, parish and ward councils which were in place at the time and which remain in place were not and are not validity constituted, their members having been elected under the Movement Political System that ceased to exist after
20 the amendment of the Constitution in 2005 and the general elections that followed under a multi-party system in 2006.

25 The executive arm of Government was required by the Constitutional Court to initiate an amendment in Parliament of the impugned provisions of the laws set out in that decision, to reflect and embrace multiparty system. This has not been done. At least it had not been done by the time the decision the subject of this appeal was made in 2009. It means therefore that the decision from which this appeal emanates was made by a court that was not legally constituted at the

time. That decision is no decision at all and is devoid of any force of law.

The decision and orders L.C II executive committee court at Malongo, Masaka District dated 24 April 2009 are accordingly
5 set aside on account that, the court was not legally in office as the elective term of all its members had expired.

This appeal therefore succeeds in part.

The parties to this appeal are at liberty to institute fresh proceedings in a court of competent jurisdiction should they
10 wish to do so.

Since the appeal has been determined on a question of law that had not been raised by either party, we make no order as to costs.

15 **Dated** at Kampala this **10th** day of **November** 2014.

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HON. MR. JUSTICE A.S NSHIMYE
JUSTICE OF APPEAL

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HON. MR. JUSTICE RUBBY AWERI OPIO
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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