THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 61 OF 2012

Coram: Egonda-Ntende, Muhanguzi, Tuhaise, JJA

1. Stephen Musuhukye
2. Benon Subujisho.....Appellants

Versus

Faustine Ntambara..... Respondent

(Appeal arising from the ruling and order of His Lordship Justice Joseph Murangira in High Court Civil Revision No.04 of 2007 delivered on 30th September 2010)

JUDGMENT OF HON. LADY JUSTICE PERCY NIGHT TUHAISE

Background to the Appeal

In 2003, the respondent filed Civil Suit No.47/2003 against 4 defendants in the Chief Magistrates Court of Mubende at Kiboga. The two appellants were the 3rd and 4th defendants in the said suit, which was for recovery of land comprised in LRV 1088 Folio 22 Singo Block 647 Plot 7, at Nkokonjeru Sesa and Kapeke in the present day Kiboga District. The respondent sought for, among other things, orders of vacant possession and/or forceful eviction of the defendants from the land. He also claimed for a declaration that the defendants were trespassers on the land.

The defendants denied the case. They pleaded, among other things, that they were customary tenants on public land whose occupation dated back to 1987 prior to the respondent's purchase of the said land in 2003. The suit was decided in the respondent's favour on 1st March 2006. The 3rd and 4th defendants (the appellants in this appeal) were dissatisfied with the trial court's judgment. They filed an appeal HCCA No. 14/2006 which was later withdrawn. They then applied for revision of the judgment to the High Court at Nakawa *vide* Miscellaneous Application No. 4/2007. The application was dismissed with costs on 30th

September 2010 on grounds that the matter could best be handled by appeal. The appellants were granted leave to appeal against the High Court Ruling.

The appeal was based on the following grounds:

1. That the learned Judge erred in law and fact while handling the revision cause by misdirecting himself when he revisited the issue as to whether the proceedings of the lower court under consideration could be subject of a revision a matter that had been disposed of in the affirmative by His Lordship Gideon Tinyinondi on the 2nd November, 2007.
2. That the learned Judge on revision was in error when he held that the applicants had failed to show that their grievances could not be resolved by revision.
3. That the learned Judge on revision failed to exercise his jurisdiction on revision when he failed and or declined to peruse and appraise the record of the lower court before him and in particular when he failed to find *inter alia*;
    a) That the trial magistrate in the lower court had not conducted a trial of the matter and issues before him before he reached the decision he reached.
    b) That the trial magistrate relied on evidence regarding a subject matter different from the subject matter of the suit when reaching judgment.
4. That the learned Judge on revision erred in law and fact when he failed to reach a finding that the case before him fell within the provisions of section 83 of the Civil Procedure Act.

Representation

Mr. Besigye Enock represented the appellants at the hearing of this appeal, while Mr. Osupelem Justin represented the respondent.

At the hearing of this appeal, Mr. Besigye Enock informed Court that the 1st appellant passed away in 2018, and that no legal representative had been appointed for him. He was proceeding with only the 2nd appellant.

The record shows that a scheduling conference *inter partes* was held before a Registrar of this Court on 30th March 2016 where Counsel for both parties were

present. The parties agreed on only one issue to be presented before this Court, that is:-

1. Whether the ruling of the Judge constituted an error in law and fact when he ruled that the matter was not reliable (sic) for revision but should have been an appeal.

Submissions for the second Appellant

Counsel argued grounds 1, 2 and 4 together and ground 3 separately.

Grounds 1, 2, and 4

The second appellant's counsel referred this Court to pages 67 to 69 of the record of appeal and submitted that it was erroneous for the learned Judge on revision to resolve the legal point of whether or not the appellant's' grievances were tenable for revision or not. Counsel contended that the issue as to whether the grievances could be resolved through revision had been resolved by Justice Gideon Tinyinondi (RIP) in the ruling delivered on 2nd November 2007, at pages 49 to 54 of the record of appeal. He argued that, having disposed of this legal point, the learned Judge on revision was, under section 7 of the Civil Procedure Act Cap 71, barred from revisiting it in the application. According to Counsel, the duty of the learned Judge on revision was to resolve whether the grievances raised in application No. 4/2007 passed the requirements under section 83(c) of the Civil Procedure Act cap 71.

Counsel submitted that the learned Judge on revision refused to revise the record on ground that the appellants should have appealed but not sought revision. Counsel contended that section 83(c) of the Civil Procedure Act empowers the High court in revision proceedings, to determine whether there was "material irregularity" or "injustice" caused by the decision of the trial court. One of the irregularities and injustices raised by the appellants was that the judgment amounted to a mistrial. According to Counsel, the learned Judge on revision should have perused the record of proceedings to establish whether in law, there was a mistrial before delivery of the trial magistrate's judgment dated 1st March 2006.

Counsel submitted that if the learned Judge on revision had perused the judgment and decree of the trial court, he would have discovered that the

judgment resulted into, *inter alia,* eviction of the appellants, and that none of the parties adduced evidence. According to Counsel, the mistrial allegation placed the matter within the ambit of section 83 of the Civil Procedure Act.

The second appellant's counsel submitted that even if it is to be assumed that the procedure adopted by the applicants in Miscellaneous Application No. 04/2007 was wrong, still the learned trial Judge had powers under section 98 of the Civil Procedure Act to rectify the glaring and fundamental errors in the trial court proceedings. According to Counsel, the trial Judge could not close his eyes and ignore such defective and prejudicial proceedings, merely on procedural grounds, as set out in Article 126(2) (e) of the Constitution. Counsel cited Articles 28(1) and 44(c) of the Constitution which provide for the non-inviolable right to a fair hearing.

Counsel submitted that mistrial or delivery of judgment without evidence was a material irregularity which could be investigated under section 83 of the CPA and not only an appeal. He contended that the appellants were at liberty to choose whether to appeal or to apply for revision to resolve their issue. He cited **Kampala District Land Board & Another V Venansio Babweyaka & Another, Supreme Court Civil Appeal No. 16/2002** to support his submissions.

Counsel prayed to this Court that, for the reasons given above, grounds 1, 2 and 4 should be allowed.

Ground 3

The second appellant's counsel referred this Court to pages 1 to 23 of the record of proceedings in the trial court, and to the judgment from pages 24 to 27. He submitted that, as stated in paragraph 1 of the applicant's affidavit in support of the application, no evidence was adduced by any of the parties before the judgment was prepared.

Counsel submitted that the defendants (appellants in this case) were absent on 16th and 28th November 2005, and on other dates, due to non-service. He submitted that the record of proceedings also shows that none of the parties had testified; and that there is no evidence that the parties waived off the option of testifying in court. He submitted that a perusal of the judgment indicates that the trial magistrate evaluated statements in the pleadings but not parties' evidence;

that he only kept referring to paragraphs in the various written statements of defense but not testimonies. Counsel submitted that it was erroneous for the learned trial magistrate to write the judgment without summoning both parties to appear on 28th November 2005 and testify. According to Counsel, had the learned Judge on revision perused the judgment and record, he could have reached a finding that there was no trial at all.

Counsel also submitted that the learned Judge on revision ignored to peruse the record and, as a result, failed to reach a finding that the learned trial magistrate relied on evidence regarding a subject matter which was different from the one in court. Counsel referred this Court to pages 113 & 114 of the record of appeal which show that the instruction from the trial court was to survey/open boundaries of block 647 plot 7, yet the survey report was on block 647 plot 19 Singo, which is a different piece of land.

Counsel contended that according to the record of proceedings, the learned trial magistrate had rightly noted in his ruling at page 21 in the second paragraph that the subject matter was not clearly described. According to Counsel, it is apparent from the entire proceedings that no amendment was ever made until later when the trial court delivered judgment.

The second appellant's counsel further alluded to what he called fundamental and glaring prejudicial errors made in the trial magistrate's court's judgment regarding the survey. According to Counsel, the magistrate's statements on page 26, second paragraph reveal that the court's reference that surveyors were commissioned to open boundaries on block 647 plot 19 is false since the instructions to survey were in relation to block 647 plot 7, not plot 19.

Secondly, Counsel referred this Court to the record of 6th July 2005 which indicated that the surveyor was to be appointed by court. The plaintiff was only supposed to pay one million shillings to the surveyor appointed by court. However, the learned trial magistrate, in his judgment, indicated that surveyors were introduced by the plaintiff. He submitted that this was contrary to the court orders. Counsel also submitted that although the court states that both parties' counsel agreed on the surveyors, this is not reflected anywhere in the record of proceedings.

Thirdly, Counsel submitted that on the record of proceedings of 6th July 2005, 2nd November 2005 and 27th December 2005, no survey report is talked about. According to Counsel, the purported survey report at pages 114 to 119 was a nullity, irrelevant and useless regarding the dispute in court, and it was in respect of a different property. Counsel submitted that it was erroneous for the learned trial magistrate to rely on such report. He argued that if the learned Judge on revision had perused the record of the proceedings, he would have found that there was no trial at all, and that the learned trial magistrate instead relied on a purported survey report referring to a different subject matter.

Counsel further submitted that in the instant case, there was no investigation of the dispute between the parties. He contended that the administration of justice usually requires that the substance of a dispute should be investigated and decided on the merits, as was stated in the case of **The Executrix of late Christine Mary Namatovu Tebajukira & Another V Noel Grace Shallitastananzi [1992-1993] HCB 87**.

Counsel prayed to this Court that this appeal be allowed with costs here and in the High Court. He also prayed that an order for re-trial be ordered in the chief magistrate's court of Kiboga before a competent court.

Submissions for the Respondent

The respondent's counsel submitted in reply that the learned judge on revision was right in finding that the issues in the application could not have been handled by revision but rather could best be handled by appeal. He contended that this was so because the decision of the learned trial magistrate dealt with matters of fact, and that such a decision is best appealed against. Counsel submitted that revision is a remedy provided for under section 83 of the Civil Procedure Act which sets out the grounds under which an application for revision of orders of any magistrate's court can be granted by the High Court.

Counsel referred this Court to page 13 paragraph 3 of the ruling by the Judge on revision, where he found that the learned trial magistrate acted within the jurisdiction of his court in determining Civil Suit No. 47/2003. He submitted that section 83 of the Civil Procedure Act, which the appellants seem to have taken as the mainstay of their appeal, emphasizes on revision being tenable where a magistrate's court acted outside its jurisdiction, or with material irregularity or

injustice. According to Counsel, the appellants have not, nor indeed did they, at the lower court, raise their objection that the lower court was acting outside its jurisdiction, yet they had all the opportunity to do so.

Counsel submitted that the only question for determination before the trial court involved ownership of land, which required adducing of evidence, and that the appellants were present at the conferencing *inter partes* where one agreed issue to be presented to this Court was framed. He submitted that the appellant's counsel has surprisingly avoided addressing this Court on the issue before it, and is treating the matter as if it were a first appeal before the High Court. According to Counsel, revision only has to do with acting irregularly outside the provisions of the law, which in this case is section 83 (c) of the Civil Procedure Act. He submitted that the authority **Kampala District Land Board & Another V Venansio Babweyaka** cited by the appellant deals with appeals and matters of evidence, not revision; that it does not throw any light on whether the judgment of the trial magistrate contravened the provisions of section 83(c) of the Civil Procedure Act, or whether the ruling of the Judge of the High Court in dismissing their application for revision for want of procedure constituted an error in law and fact.

Counsel further submitted that the appellants have not cited any instances where the learned trial magistrate acted contrary to section 83(c) of the CPA, which anomalies can only be corrected by an appeal. He cited the case of **Matemba V Yamulinga [1968] EA 643**, where an application for revision was denied on the basis that the applicant had recourse to appeal. He also cited **Muhinga Mukono V Rushwa Native Farmers' Co-operative Society Ltd [1959] EA 595**, where it was held that the right to revise a decision of a lower court by a High Court was discretionary, and that the irregularities in granting an order on the basis of information received had not occasioned grave injustice to justify court interference.

Counsel contended that this is an appeal against the ruling of the High Court on procedure where, instead of lodging a first appeal against the decision of a magistrate's court, the appellants filed for, and/or preferred revision, and neglected to file for an appeal as required by the law.

Counsel also argued that the instant appeal is not grounded on a decree, but on a ruling of the High Court dismissing an application for revision on grounds of

wrong procedure. He cited section 77(1) of the Civil Procedure Act, which provides that no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction, unless the appeal is grounded on a decree and such grounds should be set out as grounds of objection/appeal in a memorandum of appeal.

Counsel further argued that under section 77(2) of the CPA, a party who does not appeal a matter where an appeal lies is precluded from disputing its correctness. He concluded that the appellants are precluded from appealing against the judgment of the magistrate's court. According to Counsel, given the nature of the appellants' submissions, the appeal is a thinly veiled attempt to institute, albeit retrospectively, an appeal in the High Court where they are already precluded under sections 76 and 77(2) of the Civil Procedure Act.

Counsel submitted that the appellants ought to be addressing this Court on how the Judge of the High Court erred in law and fact when he dismissed their application for revision, which has not been done. He submitted that the appellants have not satisfied the provisions of section 83(c) of the CPA, let alone shown any procedural irregularities of a grave nature on the part of the learned trial magistrate to render the order of the learned Judge an error in law and fact.

Counsel submitted in conclusion that the learned Judge's ruling does not constitute an error in law and fact; and that it is also not appealable to the Court of Appeal since it is not captured under section 76 of the Civil Procedure Act.

Resolution of the Appeal by Court

It is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues, as required under rule 30 of the Judicature (Court of Appeal Rules) Directions 2005. In doing this however, this Court should give allowance for the fact that, unlike the trial court, it did not see the witnesses as they testified. The duty of a first appellate court was also reiterated in **Fr. Narsensio Begumisa & 3 Others V Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002**, where the Supreme Court held as follows:-

> *"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although 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."

The sole issue agreed on by the parties in this appeal is whether the learned Judge erred in law and fact when he ruled that the matter was not tenable for revision but should have been an appeal. The issue can only be addressed by analyzing the four grounds of appeal following the order in which counsel submitted on them.

Grounds 1, 2 & 3

The second appellant argues in this appeal that the issue as to whether the proceedings of the lower court could be subject of a revision was disposed of in the affirmative by Justice Gideon Tinyinondi on 2nd November, 2007, and that Justice Joseph Murangira misdirected himself when he revisited it in his ruling of 30th September 2010 while handling Civil Revision No. 004/2007.

I have carefully perused the record of appeal on this matter. It shows on pages 49 to 69 that Civil Revision No. 004/2007, which was an application for revision against a judgment of the trial magistrate grade 1 of Kiboga Court Mubende, in Civil Suit No. 47/2003, was first adjudicated on by Justice Gideon Tinyinondi on a preliminary point of law (PO). The PO was raised by the respondents' counsel who argued that since the applicants (who included the two appellants in this appeal) had elected to appeal in HCCA No.14/2006, they could not now apply for a revision. The application was opposed by the applicants' counsel. The Judge dismissed the PO. He ruled that the applicants were not barred from pursuing the application for revision since HCCA No.14/2006 from which their application arose had been withdrawn and not heard or decided on either way.

The same application was indeed eventually heard and determined by Justice Joseph Murangira at the same High Court at Nakawa. He dismissed it with costs on 30th September 2010, on grounds that the matter could best be handled by appeal. The 3rd and 4th applicants in that application were dissatisfied with the ruling and they were granted leave to appeal against it in this Court, hence the instant appeal.

Accordingly, contrary to the second appellant's argument, it cannot be true that the issue as to whether the proceedings of the lower court could be subject of a revision had been handled and disposed of in the affirmative by Justice Gideon Tinyinondi on 2nd November, 2007. It is also not true that Justice Murangira's ruling of 30th September 2010 in the same matter deliberated on an issue which Justice Tinyinondi had already deliberated on in his ruling.

The correct position, as borne out by the record, is that Justice Tinyinondi merely dismissed a PO in Miscellaneous Application No. 004/2007 and ruled that the applicants could proceed to pursue the application. The application was indeed eventually pursued, heard and disposed of by Justice Joseph Murangira who dismissed it. The appellants' argument suggests that Justice Tinyinondi heard and disposed the matter on the merits, which was not the case at all since he only handled a PO on the matter.

The second appellant also contends that the learned Judge while handling the revision, erred when he held that the applicants had failed to show that their grievances could not be resolved by revision; and when he failed to reach a finding that the case before him fell within the provisions of section 83 of the Civil Procedure Act. The duty of the learned Judge who handled Miscellaneous Application No. 4/2007 on the merits was to resolve whether the grievances raised in that application passed the requirements under section 83(c) of the Civil Procedure Act.

Section 83 of the Civil Procedure Act, which sets out the grounds under which an application for revision of orders of any magistrate's court can be granted by the High Court, states as follows:-

"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have-

a) exercised jurisdiction not vested in it in law;

b) failed to exercise a jurisdiction so vested; or

c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice,

the High Court may revise the case and may make such order in it as it thinks fit...."

The record shows between pages 11 and 27 that hearing of Civil Suit No. 47/2003 commenced on 31st March 2004 and ended on 1st March 2006 when judgment was delivered by the magistrate grade 1 Kiboga. The record of proceedings for that court reveals that there were numerous adjournments and a number of preliminary objections from the plaintiff's counsel which were however all overruled.

It is shown on page 22 of the record of appeal that on 6th July 2005, both parties and their respective counsel were present. The learned trial magistrate stated to the parties that court would;

"Instruct a surveyor to begin work not later than 15 days after the deposit by the plaintiff is affected."

On 2nd November 2005, only the plaintiff's counsel was present, and he sought an adjournment which was granted by court. The case was adjourned to 16th November 2005. On that date, the defendants were absent, and the plaintiff's counsel again

prayed for adjournment. The court adjourned the case to 28th November 2005 at 2 pm due to non-service of defendants. On that date, only the plaintiff was in court. The defendants were absent. The learned trial magistrate did not ascertain whether the defendants and their counsel had been served. He noted that:

> *"... since there appears there is no further evidence expected from either side, case is set for judgment on the 27/12/05 but before that date, both parties are at liberty to write their submissions and deliver them to court not later than 16/12/2005.*
>
> *Case adjourned to the 27th/12/05."*

On 1st March 2006, the learned trial magistrate delivered the judgment which was in favour of the plaintiff (respondent in this application). According to the judgment, the defendants were evicted from the suit property. In addition, the 1st 2nd and 4th defendants were to pay shillings 200,000/= as general damages, while the 3rd defendant was exempted by the fact that after his vacation of the land the plaintiff is free to continue using the water in the well.

It is very clear from the record that the learned trial magistrate did not call for oral evidence, nor is there any explanation on record as to why this was so. He merely concluded that there is no further evidence expected from either side, and then proceeded to give a date for the judgment. In his judgment, as shown on pages 26 and 27 of the record of appeal, the trial magistrate referred to the survey report, court's visit to the *locus in quo*, and the written statement of defence.

There is no record of the *locus* visit, nor does the record show who participated. The learned trial magistrate only talked about the *locus* visit on page 4 of his judgment (page 26 of the record) that;

> *"Court on receiving the report visited the locus in quo and was satisfied that...."*

He then proceeded to enumerate 5 findings based on the *locus* visit. The findings were generally that the plaintiff was claiming more land than was actually allocated to him in the leasehold; that a big portion of the land was in the defendant's occupation and the plaintiff never carried out any work on that land; that the 1st and 2nd defendants were occupying the land in ignorance, and any further occupation of the same would be illegal and a contempt of court for which they shall be subject to prosecution; and that the 3rd defendant was also occupying a big part of the plaintiff's land presumably out of ignorance, where he had constructed wells for his cattle.

It is amazing how the trial magistrate chose to make assumptions for the defendants instead of calling for their oral evidence which then would be subjected to cross examination by the plaintiff through a proper hearing. The record shows that the question for determination before the magistrate's court was one involving ownership of land. In my considered opinion, this is a proper case where oral evidence should have been adduced to establish the proper claims of each of the parties. The proceedings were clearly defective and prejudicial to the appellants who were entitled to a fair hearing under Articles 28(1) and 44(c) of the Constitution which provide for the non-inviolable right to a fair hearing.

In my opinion, based on the findings, and after subjecting the evidence to fresh appraisal and scrutiny, the grievances raised in Miscellaneous Application No. 4/2007 passed the requirements under section 83(c) of the Civil Procedure Act. It is very clear that there were illegalities, material irregularities, and injustice regarding the way the learned trial magistrate conducted the trial, to the prejudice of the appellants.

It is my finding therefore, that Miscellaneous Application No. 4/2007 was a proper case for revision before the learned Judge at the High Court. I agree with the appellant's counsel that the learned Judge should have perused the record of proceedings of the magistrate's trial court to establish whether in law, there was a mistrial before delivery of the judgment dated 1st March 2006. In **Kampala District Land Board & Another V Venansio Babweyaka & Another,** already cited, where the Supreme Court considered a similar point, Justice Tsekooko noted at page 4 of the judgment that the failure to adduce evidence before trial was a mistrial which rendered the trial court proceedings fundamentally defective.

Thus, on basis of the evidence on record, and the authorities cited, it is my conclusion that the proceedings before the learned trial magistrate were clearly a mistrial since the learned trial magistrate did not accord an opportunity to the defendants (appellants in this case) to give oral evidence to substantiate their claims. Instead he relied on a survey report and court's visit to the *locus* which did not involve the parties to the suit. In doing so, he denied the appellants a fair hearing under Articles 28(1) and 44(c) of the Constitution.

The irregularities and errors on the part of the learned trial magistrate were so pronounced, glaring and fundamental that it baffles me how the trial Judge on revision closed his eyes to them or ignored them, such that even if it was to be assumed that the procedure adopted by the appellants was wrong, such defective and prejudicial proceedings would have required rectification by invoking court's inherent powers under section 98 of the Civil Procedure Act, or even Article 126(2)(e) of the Constitution.

For the reasons given above, I find merit in grounds 1, 2 and 4 of this appeal.

Ground 3

The first part of ground 3 has already been deliberated under grounds 1, 2 and 4 above where it is already my finding that the learned Judge on revision failed to exercise his jurisdiction on revision when he failed and or declined to peruse and appraise the record of the lower court before him, and in particular, when he failed to find *inter alia* that the trial magistrate in the lower court had not conducted a trial of the matter and issues before him before he reached the decision he reached.

I will therefore proceed to address the second part of ground 3 which is that the learned trial magistrate relied on evidence regarding a subject matter different from the subject matter of the suit when regarding judgment.

The record shows page on 113 that it is the trial magistrate's court Kiboga which instructed the Land Officer Kiboga District to survey/open boundaries on Block 647 Plot 7 Singo. However the covering letter and survey report on pages 114, 115 and 116 show that the survey was carried out on block 647 plot 19 Singo, which is different from the plot indicated in the instructions of the trial court. Indeed the learned trial magistrate noted in his ruling at page 21, second paragraph, that the subject matter was not clearly described. There is no amendment on record to show that it was an error. However the trial magistrate later referred to the suit land as Block 647 Plot 19 in his judgment on page 26 of the record, yet his instructions were originally in regard to Block 647 Plot 7. The judgment does not clarify the discrepancy.

This could infer that a different piece of land other than the suit land was surveyed, or that the court's reference that surveyors were commissioned to open boundaries on block 647 plot 19 is false, considering that the instructions to survey were in relation to block 647 plot 7, not plot 19.

In that regard, the inevitable conclusion is that the survey report was irrelevant and useless regarding the dispute in court, because it was in respect of a different property. It was erroneous for the trial magistrate to rely on such report.

Secondly, the record of 6th July 2005, at page 22 indicates that the surveyor was to be appointed by court. The plaintiff was only supposed to pay one million shillings to the surveyor appointed by court. However, the learned trial magistrate states on page 26 of the record, second paragraph, that the surveyors were introduced by the plaintiff. This

therefore departed from the court orders as revealed by the record of proceedings on page 22 of the record. The learned trial magistrate further states in his judgment on page 26 that although the court states that both parties' counsel agreed on the surveyors, this is not reflected anywhere in the record of proceedings.

It is evident from the foregoing, that, in the instant case, there was no investigation of the dispute between the parties. As correctly stated by the second appellant's counsel in his submissions, the administration of justice usually requires that the substance of a dispute should be investigated and decided on the merits. This position was stated by the Supreme Court in the case of **The Executrix of late Christine Mary Namatovu Tebajukira & Another Versus Noel Grace Shallitastananzi [1992-1993] HCB 87** where the Supreme Court gave a guidance in handling land disputes, that:-

> *"The administration of justice usually require that the substance of dispute should be investigated and decided on their merits..."*

In the instant case, there was no investigation of the dispute between the parties, let alone the established fact that the learned trial magistrate relied on evidence regarding a subject matter different from the subject matter of the suit when regarding judgment.

In that connection, I find that there is merit in ground 3 of this appeal.

In that regard, based on the evidence on record and the authorities cited, it is my finding that the learned Judge on revision, though he did not necessarily revisit the issues handled by a previous Judge in the same matter, he erred in law when he held that the applicants had failed to show that their grievances could not be resolved by revision. He also erred in law and fact when he failed to reach a finding that the case before him fell within the provisions of section 83 of the Civil Procedure Act.

The learned Judge on revision further failed to exercise his jurisdiction when he failed and or declined to peruse and appraise the record of the lower court before him and, in particular, when he failed to find that the learned trial magistrate in the lower court had not conducted a trial of the matter and issues before him before he reached the decision he reached; and that the learned trial magistrate relied on evidence regarding a subject matter different from the subject matter of the suit when making his decision.

I would therefore allow this appeal with costs here and in the High Court to the second appellant who pursued it. Secondly, having found as I did above that the proceedings were a mistrial, I would annul them and order for a re trial in the same court before a

different magistrate. The costs of the re trial in the magistrate's court will abide the outcome of the case.

Dated at Kampala this 22nd day of Oct 2019

10 Percy Night Tuhaise
Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Tuhaise & Muhanguzi, JJA*]

Civil Appeal No. 61 of 2012

(Arising from High Court Civil Revision No.004 of 2007)

BETWEEN

Stephen Musuhukye==========Appellant No. 1
Benon Subujisho==========Appellant No. 2

AND

Faustine Ntambara========== ========== Respondent

(*On appeal from a ruling of the High Court [Murangira, J.] delivered on 30th September 2010*)

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity to read in draft the judgment of my sister, Tuhaise, JA. I agree that this appeal should succeed and that the orders proposed be made.

[2] As Muhanguzi, JA also agrees, this appeal is allowed with costs and in the High Court. A re-trial is ordered before the Magistrates Court costs in that court will abide the outcome of the re-trial.

Dated, signed and delivered at Kampala this 22nd day of Oct 2019

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMAPALA

CIVIL APPEAL NO. 61 OF 2012

(Coram: Egonda-Ntende, Muhanguzi, Tuhaise, JJA)

1. STEPHEN MUSUHUKYE

2. BENON SUBUJISHO.....APPELLANTS

VERSUS

FAUSTINE NTAMBARA.....RESPONDENT

JUDGMENT OF EZEKIEL MUHANGUZI, JA

I have had the benefit of reading in draft the judgment prepared by my learned sister Hon. Lady Justice Percy Night Tuhaise, JA.

I agree with her reasons, decision and orders. I have nothing more useful to add.

Dated at Kampala this.....22nd.....day of.....Oct.....2019.

.....

Ezekiel Muhanguzi

Justice of Appeal