

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL No.260 of 2019**

5 (Coram: R Buteera DCJ, CB Bamugemereire & S Musota JJA)

**BITHUM CHARLES ::::::::::::::::::::::::::::::::::: APPELLANT
VERSUS**

10 **ADONGE SALLY ::::::::::::::::::::::::::::::::::: RESPONDENT**
*(Appeal from the Judgment and orders of Stephen Mubiru J in High Court Civil
Appeal No.020 of 2015 delivered on 21st December 2017 at the High Court
Arua Circuit)*

15 *Civil Procedure - correctness of records on appeal – whether appeal can
be determined without typed and certified copy of record of proceedings
and a copy of the Judgment – Res Judicata.*

JUDGMENT OF CATHERINE BAMUGEMEREIRE JA

This is a second appeal against the decision of the High Court
in Civil Appeal No. 0020 of 2015, arising from Civil Suit No. 005
20 of 2006 at the Chief Magistrates Court in Arua.

Background

Gleaning from the pleadings on record, the dispute between the
two parties is over a customary piece of land. The appellant's
claim is that he is the rightful owner of land situate at Ocolini
25 village, Buntu Parish, Oluko Sub-County in Arua District,
otherwise referred to as the 'the disputed piece of land' which
he claims to have inherited, together with his siblings from his
late father Quirino Opio who passed on in 2002. On the
contrary, the respondent contends that she is the legal
30 representative of the estate of Silvano Wayi and bares Letters of
Administration. Her claim is that the disputed piece of land was

part of the estate of her late uncle Silviano Wayi who owned the disputed piece of land under Customary Tenure dating as far back as 1932 when he settled there-on, grew seasonal and perennial crops, and planted fruit trees for timber and firewood.

- 5 The respondent avers that the appellant trespassed on her ancestral property. It is alleged that he forced the family of the deceased out of the land and took over possession thereof.

The respondent filed Land Claim No. DLT/AR/CL/005 of 2007
10 before the Arua District Land Tribunal, which was later transferred to Arua Chief Magistrate Court as Civil Suit No.005 of 2006. Being dissatisfied with the decision from the Magistrates Court, the appellant appealed to the High Court in Civil Appeal No.020 of 2015. The main contention on appeal is
15 that the Learned Appellate Judge determined the appeal without a certified copy of the record of proceedings and wrongfully dismissed the suit for lack of merit. Being dissatisfied with the decision of the High Court, the appellant appealed to this Court on 2 grounds.

20 **Grounds of Appeal.**

1. That the Learned Trial Judge erred in law and fact when he handled Arua Civil Appeal No.0020 of 2015 without typed and certified record of proceedings and judgment of the lower court in Arua Chief Magistrate Court Civil
25 Suit No.0005 of 2006 and thus failed to properly evaluate evidence in relation to ownership of the disputed piece of land due to the mistrial.

2. That the Learned Trial Judge erred in law and fact when he failed to find that the suit land was res judicata yet there was ample evidence to prove that the suit land was res judicata.

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Representation

The respondent was represented by Mr. Emmanuel Kigenyi and Mr. Gerald Etuk. On the other hand, the appellant and his lawyers were absent but for the record, the appellant's case had earlier been defended by Mssrs Alaka and Co. Advocates. Both counsel relied on written submissions that were adopted by this court.

Appellant's Submissions

Counsel for the appellant approached each ground of appeal separately. Regarding Ground No. 1, Counsel for the appellant questioned the procedure of the Learned Appellate Judge for hearing Civil Appeal No.020 of 2015 without a typed and certified record of proceedings pertaining to Arua Chief Magistrates Court, in Civil Suit No.05 of 2006. It was counsel's submission that, as a result of relying on a record that was not certified, the 1st Appellate Judge failed to properly evaluate the evidence in relation to ownership of the disputed piece of land which in counsel's opinion, led to a mistrial. Counsel for the appellant contended that the merits of Arua High Court Civil Appeal No.0020 of 2015 would only be substantively considered after the judge and the parties to the appeal were availed with the typed and certified copies of the record of appeal. Counsel

criticised the Learned Appellate Judge for concluding the suit based on his own evidence from an unknown source. Counsel added that there was no way the Learned Appellate Judge could determine whether the suit was res judicata or evaluate the ownership of the land without the record of appeal. Counsel prayed that the appeal be allowed and the judgment from the high court be set aside with costs to the appellant.

Respondent's Submissions

Counsel for the respondent on the other hand, invited this court to affirm the findings and conclusions of the First Appellate Judge. He added that the 1st appellate Judge should be affirmed for properly evaluating the evidence in relation to ownership of the disputed piece of land. Counsel questioned the appellant's line of argument arguing that it was preposterous to claim that there was a mistrial. He submitted that the appeal lacked merit and was rightly disregarded. Counsel contended that the appellant ought to have raised the issue of lack of a record at the trial and not on appeal. On Ground No.2, the respondent invited this court to find that the first Appellate Judge offered an extensive review, with reasons, as to why the decision of the Magistrates Court was not res judicata. Counsel prayed that the appeal be dismissed with costs in this court and in the courts below.

Consideration of the Appeal

I have critically studied the record of appeal and the conferencing notes of both the appellant and the respondent. This being a second appeal, it should be heard bearing in mind the principles that govern second appeals. The Supreme Court in **Henry Kifamunte v Uganda Criminal Appeal No.10/97** held that,

"On second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: **R v Hassan bin Said (1942) 9 EACA 62.**"

I will now resolve each ground of appeal separately.

Ground No.1

1. That the Learned Trial Judge erred in law and fact when he handled Arua Civil Appeal No.0020 of 2015 without typed and certified record of proceedings and judgment of the lower court in Arua chief magistrate court civil Suit No.0005 of 2006 and thus failed to properly evaluate evidence in relation to ownership of the disputed piece of land due to the mistrial.

It is the appellant's contention that the Learned Appellate Judge heard the appeal without a typed and certified record of proceedings from the lower court, in spite of counsel repetitively pointing out this lacuna. From the record of proceedings in the High Court, it is evident that on 23rd October 2017, the appellant sought a two-week adjournment to enable the typists to proofread the record after she had corrected a mistake she had made on the record. In response to this, the Learned Appellate Judge ruled that,

10 "In light of counsel for the appellant's indication at the previous sitting, there is no justification for an adjournment. The appellant has had nearly five months within which to complete the process of preparation of a certified copy of record of proceedings. Hearing of the appeal is stood (*sic* over) until 2:30 pm today. The record should be procured from the court below in the meantime, irrespective of the stage of preparation. Since both counsel appeared in the court below, the court will proceed on the basis of the original manuscript for as long as it is legible."

15 Both counsel thereafter made their oral submissions before the learned judge who then delivered a judgment in the matter on 21st December 2017 after relying on an original manuscript of the court proceedings.

20 The term court record refers to any document or other material, in any written form, that is received or maintained by the court to or in connection with judicial proceedings (see the meaning

of a record of court proceedings attributed to the **Judicial Council of California, 2011)**

A record of court proceedings is one of the most valuable and vital public records of any country. The court record is of value
5 to the courts and to the parties to the case, among others. Good records either increase or decrease trustworthiness in the court system. It goes without saying that a dysfunctional system of records-management undermines a judicial system.

Magistrate courts are at the lowest level in the hierarchy of
10 judiciary in Uganda meaning that most of the cases begin at this level. The Magistrate's courts bear a duty to ensure that records in their courts are created, maintained, secured, and preserved in an effective manner so that they can be available at the right place and time when they are needed.

15 In this case the Magistrate's court was indeed the court of first instance. There is ample evidence to demonstrate that indeed great effort was made to avail the original manuscript of the court record from a remote Magistrate's Court closest to Onzivu Parish, to the High Court in Arua District. There is
20 demonstrable proof that the first appellate Judge went an extra mile to ensure that the original records were before the court and was at pains to describe the delay of over five months as the court awaited the typed record.

Indeed, in this first appellate court, the learned Judge did not
25 deal with the situation of a displaced, misplaced, lost and or stolen court records. In this appeal counsel for the appellant does not question the availability, accuracy and or the

authenticity of the original record relied on by the 1st appellate Judge. The ground on appeal which is the main ground of contention is that the available original record on appeal was not fully typed and certified. It was counsel's contention that the
5 record ought to have been typed and certified and that failure to do so led to a mistrial. The appellant was not satisfied that the courts in a hard-to-reach area had duly produced an original manuscript of the court record. We have reproduced Order 43 Rule 10 of the Civil Procedure Rules. The rule does not require
10 that the record of proceedings must be certified.

This law precisely reads as follows:

“10. High Court to give notice to court where decree appealed from.

(1) When a memorandum of appeal is lodged, the High
15 Court shall send notice of the appeal to the court from whose decree the appeal is preferred.

(2) The court receiving the notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the High Court.

(3) Either party may apply in writing to the court from
20 whose decree the appeal is preferred, specifying any of the papers of the court of which he or she requires copies to be made; and copies shall be made at the expense of, and given to, the applicant on payment of the requisite
25 charge.”

From my understanding of Order 43, Rule 10 of the Civil Procedure Rules, there is no obligation on the court to produce a typed and certified record of the proceedings. When I zoom in, and particularly spotlight sub rule 2, it stipulates that “the
5 court receiving the notice shall send with all practicable dispatch all material papers in the suit...”

In my understanding, this rule envisages that there may be difficulty in obtaining records of proceedings. The rule endears the court and parties to use all their best endeavours to avail the
10 court records in a timely fashion. The 1st appellate judge appears to have had difficulties procuring these proceedings, he however noted that having received the original manuscript of the proceedings, he would proceed without further delay. This was acceptable since the law does not require the 1st appellate
15 court to receive certified proceedings. One would bear in mind the remoteness of the trial courts in these cases as attempts are made to procure proceedings in hard-to-reach areas. In this case, the appellate judge was able to proceed with the availed original and typed court record. I would not fault the 1st
20 appellate Judge for relying on the record that was freshly obtained from the trial court.

Ground No.1 of this appeal fails.

Ground No.2

5 That the Learned Trial Judge erred in law and fact when he failed to find that the suit land was resjudicata yet there was ample evidence to prove that the suit land was res judicata.

While resolving the question of res judicata, 1st Appellate Judge extensively evaluated this matter. In his judgment, he specified that by the time the Local Council II proceedings in this case
10 were initiated, Land Tribunals had been constituted and the Local Council Courts were no longer possessed of competent jurisdiction over land disputes. The 1st Appellate Judge clarified that the proceedings and judgment of the LC II court were a nullity as the court lacked jurisdiction to entertain the matter.

15 I agree with the reasoning of the first Appellate Judge. Jurisdiction is a creature of the law. It cannot be assumed. A court cannot exercise a jurisdiction that is not conferred upon it by law. Whatever a court purports to do if it is without jurisdiction, is **null ab initio**. See **Peter Mugoya v James**
20 **Gidudu & Anor [1991] HCB 63, Mubiru & Ors v Kayiwa (1979) HCB 212 (CA)**.

Also, in **Burashe Nalongo v Mangadalena Kekitiibwa CACA No. 89 of 2011** this court set aside decisions and orders of a Local Council II executive committee court as the court lacked
25 competent jurisdiction to entertain the matter.

In conclusion, the suit was not res-judicata. We therefore disallow Ground No.2 of this appeal.

This appeal having failed on both grounds is hereby dismissed
with costs in this court and in the courts below.

5 Dated this 30 day of March 2023.

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15 **CATHERINE BAMUGEMEREIRE**
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

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CIVIL APPEAL NO. 260 OF 2019

(Coram: Buteera DCJ, Bamugemereire & Musota JJA)

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APPELLANT

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ADONGE SALLY

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RESPONDENT

(Appeal from the Judgment and orders of Stephen Mubiru J in High Court Civil Appeal No. 020 of 2015 delivered on 21st December 2017 at the High Court Arua Circuit)

JUDGMENT OF BUTEERA, DCJ

I have had the advantage of reading in draft the Judgment of Bamugemereire JA and I agree with her findings and the orders she has proposed.

Since all the members of the panel agree with her Judgment, the Appeal is hereby dismissed with costs in this Court and in the Court below.



R. Buteera

DEPUTY CHIEF JUSTICE

3/03/2023

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*(Arising from the Judgment and orders of Mubiru, J in High Court Civil Appeal
No. 020 of 2015)*

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CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister
Hon. Justice Catherine Bamugemereire, JA.

I agree with her analysis, conclusions and the orders she has
proposed.

Dated this 3rd day of March 2023



Stephen Musota

JUSTICE OF APPEAL