THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

CIVIL APPEAL NO. 22 OF 1996

FRANCIS LYAMULEMYE……. APPELLANT

VS

DAMIANO NKURIYE…….. RESPONDENT

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

JUDGMENT

This is a very short appeal indeed. It is against the judgment and orders of the Chief Magistrate's Court sitting at Kabale. The judgment and orders were passed against the appellant on 20th October, 1995.

The case, giving rise to this appeal, has had a very long history. It was first instituted in the LC 1 Court of Nyagatembe in Kisoro District by the present respondent. The case went on, upon appeal, to the LC II Court of Mulindura Parish. It was finally determined, in favour of the present respondent, by the LCIII Court of Mulore subcounty. The appellant lost the case in all the LC Courts. The appellant then appealed to the Chief Magistrate's Court at Kabale, in Civil Appeal No. 61/94. The Chief Magistrate's Court dismissed the appeal with costs. The appellant, with leave of the Chief Magistrate's Court, granted under section 232 of the Magistrates' Courts' Act, 1970, appealed to this court. The appellant contended that the appeal raised a substantial question of law.

However, the Memorandum of Appeal which was subsequently filed in this court by the appellant did not altogether restrict the grounds of ‘appeal to points of law only. Indeed, the memorandum also contained points of fact or evidence. The grounds were:

“1. The Chief Magistrate erred in holding that the respondent had locus standi in the suit when the alleged owner of the suit land had disclaimed or showed no interest in the subject matter.

2. The leaned Chief Magistrate erred in law and fact in holding that one Nyrabucwari could give the suit property to one Musa when the same was not vested in the said Nyirabucwari.

3. The learned Chief Magistrate misdirected himself in not considering the fact that the appellant had occupied the suit property for more than 21 years.

4. The learned Chief Magistrate erred in law in not considering the irrelevant and illegal orders of the RC III Court.”

Briefly, the background to the case is as set out below:

The appellant (Iyamulemye) and respondent (Nkuriye) are biological brothers. Their father, one Senyoni died in 1974. He left his Kibanja with his wife Nyirabucwari, the mother of the parties. The land in dispute was only a part of Senyoni’s kibanja. It consisted of a banana plantation and was between the house of Senyoni and the Kisoro/Kabale Road. It appears that the suit land was cultivated by the mother of the parties for many years until she became weak and unable to cultivate

any longer. She then called a family meeting and publicly distributed pieces of land which had been left to her late husband. Among those so distributed was the suit land. She gave it to one Musa,son of Nkuriye, the respondent. The reason was that Musa, son of Nkuriye, the respondent. The reason was that Musa had lived with and looked after her grandmother for about 15 years. She wished to show appreciation to him. Nyirabuchwari subsequently died in 1994.

Soon after their mother’s death, the appellant claimed that the same piece of land which their mother had publicly given to Musa s/o Nkuriye had earlier privately been given to him by their father Senyoni.The appellant prevented Musa and the respondent from cultivating it. The respondent then sued the appellant in the L.C 1Court of Nyagatembe seeking a declaration that the disputed land belonged to his son Musa and that as such he was entitled to use it. The case has now reached this court through the various appeals which I have already mentioned.

When the appeal came up for hearing Mr.Rwaheru appeared for the appellant. The respondent appeared in person.

On the first ground of appeal, regarding the locus standi of the respondent, learned counsel, Mr.Rwaheru argued that the dispute lay between Musa and the appellant who were the claimants to the disputed land. The respondent even though he was the father of Musa, he had no right to relief in the matter. As such, he had no cause of action. According to counsel, the respondent could maintain an action in his names only if he had been a donee of powers of Attorney. Counsel also argued 15(2) of the resistance committees (judicial powers) statute, 1988, did not vest the right to sue where were such right did not exist. He submitted that the learned chief magistrate had misdirected himself in holding so.

Indeed it is well known that under the ordinary law, no person can maintain an action in a court of law unless the person has a right to a relief from such court. Order 1 rule 1 of the civil procedure rules seems to suggest just .In **Auto Garage v Motokov No.3(1971) E.A 514,** the court defined a cause of action as comprising three essential elements. These were that the plaintiff must have enjoyed a right. The right must have been the violated or interfered with .Where a party in court of law. Under Order 1 of rule 11, a court may appoint a person to conduct a suit on behalf of another person. Also under order 111 a donee of powers of attorney may maintain an action on behalf of the donor.

As I stated above, the position which I have just described pertains under the ordinary law and procedure. It appears to me that the resistance committees (judicial powers) statute 1988 is far from being an ordinary law. It has extra ordinary provisions. One of those is section 15(2) which provides

"(2) The court shall hear every case before it expeditiously and without undue regard to technical rules of evidence of procedure."

Unlike the provisions of Article 126(2)(e) of the Constitution of the Republic of Uganda, 1995, which provides that courts of law shall administer substantive justice without undue regard to technicalities, thus preserving wholly the rules of procedure and evidence, section 15(2) of that statute appears to allow a lot of flexibility to LC courts not to be restricted by any rule of evidence or procedure and, indeed, the practice of the ordinary courts.

Of the provisions of section 15(2) of the Resistance Councils (Judicial Powers) Statute 1988, the learned Chief Magistrate stated in his judgment, “The appellant did not cite any law governing RC court that requires parties to obtain Powers of Attorney in order to pursue a case on behalf of another. I have not come across any such law. S. 33(1) of the Statute provides that the Minister may by Statute Instrument, make Regulations prescribing the procedure to be followed by RC courts but to date no such Regulations have been made and as things stand, at the moment, there is no legal requirement that a person to be represented in RC courts must have donated Powers of Attorney. What is important is for the defendant to know who is claiming against him and prepare his defence accordingly. There is no ambiguity in the present case and grounds one fails.”

I have no reason to fault the reasoning of the learned Chief Magistrate on that particular point. It seems to me that the instant case falls in line with the spirit of the RC (Judicial Powers) Statute which is to dissolve disputes in a more practical and simpler manner. There is no evidence to show that Musa ever disclaimed interest in the suit property. There was no evidence that he was available and could have pursued the case in his personal capacity. However, there was evidence that Musa was the son of the respondent. He was still part of the respondent‘s family as he had not yet acquired a family of his own. As the father of Musa and in such circumstances, the respondent can be said to have had some degree of interest I the disputed land and he could sustain action in an RC court where he was not required first obtain powers of Attorney from Musa or for Musa to sue through the respondent as the next of kin.

In my view, it would not be appropriate to apply the rules of procedure to the instant case after it has come on appeal when the same rules of procedure were ,by law excluded from applying to it in the court of first instance, that permission cannot be interfered with on appeal by invoking rules of procedure that were not applicable to the case initially.

I think that the principle invoked in Yunusu Ismail t/a Bombo City Store v Alex Kamukamu and others t/a O.K.Bazaar civil appeal no.7 of 1987 should apply in this case. For the respondent purported that he had both authority and interest to sue on behalf or instead of his son. That was apparently allowed by the law governing the RC’S and had not been contradicted by contrary evidence .The respondent’s suit was proper. Accordingly, the first ground of appeal fails.

The second ground of appeal does not appear to me to raise a matter that was ever raised before the learned Chief Magistrate, in the court of the first appeal. I do not think that it can appropriately be raised on second appeal. In any case, the record bears no evidence upon which the learned Chief Magistrate could have based a finding that Nyirabucwari had no testimentary powers over the suit property.

The third ground of appeal does not appear to me to raise any point of law. It, on the contrary, merely raises a point of fact. But, be that as it may, it appears to me that the learned Chief Magistrate found as a matter of fact that the appellant was never in possession of the suit property. On the contrary, it was Nyirabucwari and the respondent who had been in possession. The evidence on record is overwhelming in support of that finding. There is, therefore, no reason for interference.

The fourth ground of appeal alleges that the learned Chief Magistrate sanctioned orders of the LC III court that were irrelevant and illegal. It is the position of the law, as pronounced in Makula International Ltd. vs. H. E. Cardinal Nsubuga And Rev. Dr. Father Kyeyune, Civil App. No. 4 of 1981 (Unreported), that a court of law cannot sanction that which is illegal. The question, however, in the instant appeal is, were the orders of the RC III court of Mulora illegal?

Learned counsel, Mr. Rwaheru, merely submitted that some of the orders of the RC III court as given at page 8 of the judgment of that court were irrelevant and could not be easily enforced. He particularly pointed out orders number 2 and number
3. Order number 2 reads “Their mother’s house must be repaired and not destroyed” while order number 3 is in the following words: “Their mother’s will must be respected.”

I find nothing illegal about both those orders of the RC III court. I, however, agree with Mr. Rwaheru that the two orders might have been irrelevant considering the issues which were raised in the case which was before the court. The two orders could also be said to be rather difficult to enforce by the court which made them. But those two factors do not render the orders illegal so as to have given rise to interference by the learned Chief Magistrate or this court. Whereas illegality would always be a good cause for appeal, I do not consider irrelevance or unenforceability of an order of a court to be equally good ground for appeal.

I find, in final result, that this appeal has no merit. All the four grounds of appeal fail. It is dismissed with costs in this court and in the court below.

V.F Musoke Kibuuka
Judge
30/11/2000.