THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL REVISION NO. 007 OF 2009

(Arising from Kamuli Court Civil Suit No. 036 of 2008

And

Judgment of Kapiokolo LCI Court, Kidera Sub-County, Kamuli District)

ABSOLOM BATUMBYA ::APPLICANT

VERSUS

1. **SENTALO MOSES**
2. **BESASIRA EMMANUEL ::::::::::::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

ORDER IN REVISION

Absolom Batumbya brought this application under the provisions of s.83 and 98 of the Civil Procedure Act (CPA) and s.33 of the Judicature Act. He sought the revision of the order of Kintu Moses Zirintusa Esq. sitting as the magistrate GI at Kamuli, dated 4/03/2009 in which he dismissed the applicant's suit against the respondents as *res judicata.* The applicant thus sought to have the said order set aside. The applicant also sought the revision of the proceedings of the Village Local Council (LCI) Court at Kapiokolo, Bukungu Parish in Kidera sub-county, Kamuli District, in which the LCI Court found that he did not buy the land in dispute. He wanted this court to set aside that order as well.

The grounds of the application were set out in the notice of motion but more particularly in a deposition by the applicant dated 24/04/2009. In his deposition, the applicant stated that in 2008, the 1st respondent sued him in the LCI Court at Kapiokolo for trespass on a piece of land in the same village. Judgement in the suit was given in favour of the 1st respondent but the applicant appealed to the Parish (LCII) Court at Bukungu. The applicant further averred that the LCII Court called for the record of proceedings of the LCI Court but that court failed to forward it to the LCII Court thus frustrating the hearing of his appeal. The applicant further averred that after the LCII Court failed to

get the record of proceedings from the LCI Court, the Chairman wrote to the Sub-County (LCIII) Court explaining how the appeal could not be heard for lack of a record of proceedings. That the LCIII Court then advised the applicant to take the matter to a higher court upon which he filed Civil Suit No. 36/2008 in the Magistrates Court at Kamuli. Further that the Grade I Magistrate dismissed the suit on the grounds that it was heard and completed by the LCI Court.

The applicant further averred that his advocates informed him that the matter was not *res judicata* because his appeal from the LCI Court had not been completed by the LCII Court. Further ground was that the Grade I magistrate did not have the jurisdiction to hear a matter that was still pending before the LCII Court and should have referred it to the Chief Magistrate to exercise his/her supervisory powers and decide whether to hear the suit afresh or refer it to the lower court to complete its hearing.

The applicant also averred that the LCI Court at Kapiokolo did not follow the procedures laid down for such courts. That as a result the trial was a nullity. He finally averred that the orders of the trial magistrate and the LCI Court occasioned a miscarriage of justice and therefore ought to be set aside by this court.

The 1st respondent filed a Written Statement of Defence (WSD) as his reply to the application. In his defence, he denied the applicant's allegations in the application and reiterated that the suit was *res judicata* since it had already been disposed of by the LCI Court at Kapiokolo. He prayed that the application be dismissed with costs.

I first considered whether this court has the jurisdiction to revise the proceedings of the LCI Court in light of the provisions of s.40 of the Local Council Courts Act, 2006. S. 40 of that Act provides that the general powers of supervision over Magistrates' Courts conferred upon the High Court by the Judicature Act may be exercised by the Chief Magistrate over local council courts on behalf of the High Court. The general powers of supervision of the High Court over magistrates' courts are provided for in s.17 of the Judicature Act. The powers are not limited, save that s.17 (2) states that they include preventing abuse of the court process by curtailing delays, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice. Because Chief Magistrates were vested with power to supervise these courts on behalf of the High Court, I came to the conclusion that jurisdiction to supervise local council courts by Chief Magistrates is concurrent

with the jurisdiction of the High Court to do so. I therefore went ahead to entertain both revisions sought in this application.

The application was first called on for hearing on the 24/11/09 but the file was missing. It was then adjourned to the 3/03/2010. On that day, Mr. Mangeni who appeared for the applicant requested for an adjournment so that he could trace the record from the LCI Court. The application was then adjourned to 8/07/2010 to enable him to do so. However, the application was by some error called for hearing again on 8/06/10 but none of the parties was present in court on that day. I then made the decision to render my order in revision without hearing the parties and adjourned the matter to the 26/08/10 for delivery of the order. But before I could do so, I realised that the hearing on the 8/06/2010 was fixed by an error made by the clerk because on 12/08/10 the applicant's advocates filed written submission in support of the grounds raised in the application.

The respondents had filed no reply by the 26/08/2010 when I made this order. I therefore allowed them to address court on the application and they did. The 1st respondent reiterated that the dispute was resolved in his favour by the LCI Court at Kapiokolo but the applicant had refused to vacate the land. That he had in a high handed manner using the police caused him to be arrested on several occasions in relation to the land that he and his family occupied.

In his written submissions, Mr. Katongole Joseph for the applicant addressed three grounds. The first ground was that the trial magistrate at Kamuli Court ought not to have dismissed the suit as *res judicata* but he should have referred the suit to the Chief Magistrate to exercise his/her powers of supervision under s.40 of the Local Council Courts Act. That the Chief Magistrate would have then decided whether the suit was *res judicata* or ordered a fresh trial. He argued so because in his view, the trial magistrate did not first establish whether the LCI Court at Kapiokolo was a competent court and whether the LCII Court had disposed of the appeal.

The 2nd complaint raised by Mr. Katongole was to do with the Local Council Court in Kapiokolo. He stated that the court failed or refused to forward the record of proceedings to the LCII Court at Bukungu even after it was notified of the applicant's appeal. That as a result, the LCI Court mishandled the case thus frustrating the hearing of the appeal. He relied on the decision in the case of **Christine Namatovu Tebajjukira [1992-93] HCB** in which the Supreme Court of Uganda held that the administration of justice normally requires that the substance of disputes should be

investigated and decided on their merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. He asserted that this application should be allowed to enable the applicant to be heard fairly before a competent and fair court.

The 3rd ground was that the judgment and orders of the LCI Court and the order of the trial magistrate resulted in a miscarriage of justice. It was Mr. Katongole's opinion that the manner in which the case was handled could not have enabled the applicant to put his case properly and broadly so that the court may, hopefully come up with a fair decision on the crucial issues for trial (**Lebel EA Ltd. v. Lutwama [1986] HCB 41** cited). He thus prayed that the application be allowed so that the applicant is enabled to produce his evidence before a competent court.

From the submissions above and the pleadings filed by both parties, I formed the opinion that the issues for decision in this revision are as follows:

i) Whether the court observed principles of natural justice and/or followed the procedures laid down by law for hearing of cases in LC Courts and; if not,
ii) Whether the proceedings were a nullity that occasioned a miscarriage of justice.
iii) Whether the trial magistrate had the power to hear Civil Suit No. 36 of 2008.
iv) Whether Civil Suit No. 36 of 2008 was *res judicata*.
v) Remedies

I will now proceed to dispose of the issues in the same order as they appear above.

Issues 1 & 2

The procedures that are followed by LC Courts are provided for by the Local Council Courts Act of 2006 and the Local Council Courts Regulations of 2007. S.14 of the Act provides that suits shall be instituted by stating to the Chairperson the nature of the claim against the defendant and the relief sought by the claimant. S.14 (2) provides that the claim shall be read back to the claimant and then signed by him/her. The procedure for filing a claim is reproduced in Rule 32 of the LC Courts Regulations. After that the statement of claim is considered filed and a date for hearing is fixed. The court is convened by the Chairperson for that purpose.

In the instant case, there is no evidence on the record from the LCI Court that the Chairman or Secretary recorded the 1st respondent's claim before the court convened to hear it. However, when the court convened on 18/07/08, after the Chairperson introduced his executive and established that

the court had jurisdiction to entertain the matter, he reported that the 1st respondent made a complaint in the LCI office that someone bought his father's land. After introducing the matter, he gave the 1st respondent the opportunity to state his case. This was recorded by the court and is clear on the record of proceedings.

Rule 31 of the LC Courts Regulations provides for the form of the claim. It is stated that the claim must include the names, age, sex and physical location of the claimant or complainant. It must also include the facts constituting the claim and the remedy being sought, and where applicable the monetary value of the claim. The names and addresses of any witnesses and other relevant information to the claim shall also be included. It has to be accompanied by payment of the fee required by the rules.

I did not see the age and sex of the claimant and the defendant stated on the record of the LCI court but their address was stated as Kapiokolo village. The claimant (1st respondent herein) set out his claim in some detail, i.e. to the effect that someone alleged to have bought the land which his late father left for his mother. Further that this was in spite of the fact that after his father died he built a house on the land for his late mother. The claimant further stated that he tried to have the matter mediated by FIDA at Iganga but it was not resolved. That as a result he brought the suit in the LCI Court at Kapiokolo. However, before he could finish giving some explanations to the court, the appellant interjected and asked to be allowed to respond. Almost all of the rest of the proceedings comprised of the applicant's narration of his case as well as the evidence of other persons who attended the hearing. I did not consider the failure to record the age and sex of the parties a material defect that would vitiate the proceedings of the court.

Section 15 (1) of the LC Courts Act provides that notice of the claim has to be served on the defendant. According to s.15 (2) of the Act summons have to be served on the parties requiring them to attend court. The record of the LCI Court shows that on the 18/07/08 both the applicant and the 1st respondent were before it. When the applicant was given the opportunity to respond to the 1st respondent's case, he started his defence by handing over the summons to the Chairman and then stated his defence to the claim. I therefore came to the conclusion that though there was no evidence on the record that summons were issued, notice of the hearing was given to both parties to the suit.

Section 21 of the LC Courts Act provides that the language of the court and its record shall be the language widely spoken in the area of jurisdiction. In this case, it is not stated what language was used because the record that was sent to the Magistrates Court appears to have been a translation of the original record into English. Nonetheless, it had the stamp of the LCI at Kapiokolo in several places. The omission to submit a record in the local language would not, in my opinion, vitiate the proceedings of the LCI Court.

S. 22 of the LC Courts Act provides that the record shall consist of the serial number of the case, the statement of claim, date of witness summons, date of hearing of the case, names and addresses of the claimant and witnesses as well as those of the defendant and his witnesses, a brief description of the case and the documentary exhibits, if any. The judgment and final orders of the court and their dates shall also be included. In this case, the record sent to the lower court had no serial number but it had the names and addresses of the witnesses and the parties to the suit who were from Kapiokolo, Kyoga A and Lufula-Bukungu villages. However, the record did not include the agreements that were referred to in the proceedings and the judgment, but I had the opportunity of perusing the main agreement relied on by the applicant because he attached it to his plaint in C/S No 36 of 2008. It had also been admitted as an identification item in during the partial hearing of the suit. The judgment of the court showing the opinions of each of 8 members of the court was included in the record.

It is pertinent to note that s.23 of the Local Council Courts Act provides that local council courts shall hear every case before them expeditiously and without undue regard to technical rules of evidence or procedure. Rule 41 (2) of the LC Courts Regulations goes on to provide that notwithstanding the detailed procedures laid down in rule 41(1), the court shall when conducting the hearing be as informal as possible and offer guidance to the parties. As a result of the two provisions, I find that it was not mandatory that the rules relating to the hearing of the suit (except those that relate to observance of principles of natural justice) be followed to the letter. Having so evaluated the record of proceedings, I came to the final conclusion that the failure to follow the rules to the letter did not vitiate the proceedings.

Most importantly, s.24 of the Local Council Courts Act enjoined LC courts to observe the principles of natural justice. Among the requirements is that each party is given an opportunity to be heard, notice of the proceedings and of the case against them, and ample opportunity to call witnesses to support their case. The record shows that the court complied with these principles. Each of the

parties stated their case and the court also heard several witnesses in the case including Kayanja, Kojja, Aisa Nansikombi and Mate Seruzi. Other representations were recorded by John Onyango (the Secretary) from Walumbe Musa, Jane Kwaza, Kyazze Stephen, Mudhasi George, Nankula Brenda and Nakisuyi Eseza who were all neighbours of the late Seruzi, the respondents' father. I therefore came to the conclusion that the court occasioned no miscarriage of justice by its proceedings and the 2nd issue framed for this revision is therefore answered in the affirmative.

I next considered that applicant's complaint that that the court was not properly constituted. In that regard S.4 (1) of the Local Council Courts Act and rule 4 of the Regulations provide that the village local council court shall be constituted by all the members of the executive committee of a village. Rule 19 (1) (a) of the Local Council Courts Regulations goes on to provide that the quorum of the court for the village shall be five members including the person presiding, and two of the quorum shall be women.

The record of proceedings for the 18/07/2008 did not show how many members of the LC were present at the hearing. It only stated briefly that the Chairperson introduced his executive without naming them. However, the record shows that on 27/07/08, eight members of the executive met to consider the evidence and thereafter came to a decision on the ownership of the disputed land. Two of them, Norah Kyamu and Nakyuka Betty were women. In each of their opinions on the case, the members showed that they listened to the evidence that was presented to the court by and for both parties to the suit.

Given the evidence above about the proceedings, I came to the conclusion that the court was properly constituted and therefore the resultant proceedings were proper and could not be vitiated for lack of quorum.

Issues 3 & 4

As to whether the trial magistrate had the power to entertain C/S 36 of 2008, the applicant contended that he did not because his appeal before the LCII Court was still pending and the LCI Court had mishandled the case when it failed to forward the record of proceedings to the LCII Court. Mr. Katongole for the applicant proposed that the trial magistrate ought to have sent the case file to the Chief Magistrate for him/her to exercise powers under s. 221 of the MCA instead of dismissing the

suit as *res judicata*. In his view, the Chief Magistrate would have then decided whether the suit should be and if not, ordered that the suit be heard *de novo*.

Regarding the pendency of the appeal before the LCII court, the proposition of counsel for the applicant was that where an appeal is still pending, a suit cannot be declared *res judicata*. However, s.7 of the Civil Procedure Act (CPA) provides for the concept of *res judicata* as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."**

Following that there are 6 explanations of the concept of *res judicata*. In particular, Explanation 2 provides that for the purposes of s.7, the competence of a court shall be determined irrespective of any provision as to the right of appeal from the decision of that court. My understanding of that explanation is that a suit will be *res judicata* for as long as that court is competent and has finally determined the suit. If that particular court had the jurisdiction to entertain the suit and substantively heard it and delivered judgment on the basis of the evidence adduced, the matter is properly *res judicata*.

There is no doubt that the LCI Court had the jurisdiction to entertain the dispute between the parties by virtue of the provisions of s.10(1) (e) of the Local Council Courts Act of 2006. S.10 (1) (e) provides that every LC Court shall have the jurisdiction to entertain matters relating to land. But before that, s. 10 (1) (a) provides that the LC Courts have the jurisdiction to entertain civil matters specified in the Second Schedule to the Act. Included in that schedule are actions for trespass which the respondent's case in the LCI Court clearly was. On the respondent's part, the dispute involved a contract that he alleged to have entered into with the respondents' father. Contracts are also included in the Second Schedule to the Act as matters over which LC Courts have jurisdiction. The LCI Court therefore had jurisdiction and was competent to entertain the suit.

In addition to the above, Explanation 3 under s.7 CPA provides that for a suit to qualify as *res judicata*, the matter referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. In other words, the issues in the former suit must be similar to those in the latter suit. In the suit before the LCI Court, the respondent claimed to be in possession of the suit land and that it was part of property left to his family by his father. He claimed that the applicant had trespassed on it. The applicant on the other hand claimed to have purchased the land from the respondents' father before his death. He relied on an agreement made in 1999. In C/S 36 of 2008, the applicant claimed to be the owner of the same land having purchased it from the respondents' father. He produced an agreement of sale, apparently the same one that he had produced before the LCI Court.

The LCI Court heard evidence of both parties on their claims, reviewed the agreement produced by the applicant and rendered a judgment. It is that judgment that was produced before the trial magistrate. Given those facts, C/S No. 36 of 2008 was definitely *res judicata* and the trial magistrate's decision in that regard cannot be faulted.

Regarding the contention that the trial magistrate did not have the power to entertain the suit, I considered Mr. Katongole's submission that he ought to have referred the case to the Chief Magistrate who had powers to decide what to do with it under s. 221 MCA. The powers of a Chief Magistrate under s. 221 of the MCA are similar to those exercised by this court under the provisions of s.83 of the CPA. However, I do not agree that the case was such as warranted the intervention of the Chief Magistrate at that stage. Similar to s.83 of the CPA, s. 221 (2) MCA provides as follows:

> **"Without prejudice to the generality of subsection (1), a chief magistrate may call for and examine the record of any proceedings before a magistrate's court inferior to the court which he or she is empowered to hold and situate within the local limits of his or her jurisdiction for the purpose of satisfying himself or herself as to the correctness, legality or propriety of any finding, sentence, decision, judgment or order recorded or passed, and as to the regularity of any proceedings of that magistrate's court."**

It is therefore not for the magistrates under the jurisdiction of the Chief Magistrate to call for his/her intervention but for the Chief Magistrate to call for a file so as to satisfy him/herself of

the correctness, legality or propriety of proceedings and orders of such a court. This could not have happened before the trial magistrate made his findings. I am also of the view that Mr. Katongole's proposition that the Grade I magistrate ought to have brought the file to the attention of the Chief Magistrate before making his decision in the case would defeat the very purpose for which the Grade I magistrates are appointed. If it were true it would mean that Grade I magistrates are not independent of the Chief Magistrate in making decisions in their courts. I therefore find that the trial magistrate had the power to entertain the suit and to make any decision that he thought legal and just in the circumstances. If he failed to do so, his decision, findings and orders would be subject to an appeal to this court, or to a revision by the Chief Magistrate under s.221 MCA or to revision by this court under the provisions of s.83 CPA, whichever was most appropriate in the circumstances.

Issue 5

Regarding remedies due to the applicant in this application, it was proposed that the decisions of the LCI Court and the magistrate GI be set aside. However, the applicant did not prove any of the grounds that he advanced so as to justify setting aside any of the two decisions. Both decisions are therefore hereby upheld.

As to whether the applicant is entitled to stay of execution until the final disposal of this matter, that prayer was overtaken by events. The application has now been disposed of and there appears to be no need to consider that prayer. However, there is the possibility that the applicant may still desire to pursue his appeal in the LCII Court, as he ought to have done instead of filing a fresh suit in the magistrates' court. I say so because if it were truly established that the LCI Court had refused or neglected to forward the record of proceedings in order for the LCII Court to hear and dispose of the appeal, then the LCII Court could have had recourse to the provisions of 34 of the Local Council Courts Act. S.34 of the Act provides for witnesses in the appellate court as follows:

> **"On the application of either party to an appeal, or on its own motion, an appellate court may, if in its opinion it would be in the interests of justice to do so, call witnesses and receive additional evidence as it may in its discretion determine, or may hear the case afresh."**

The court could have exercised its discretion to entertain the dispute afresh and come to its own findings on the basis of the evidence adduced before it but that did not happen. The LCIII Court may also adopt the same procedure, but not before getting a decision from the LCII Court. As the dispute stood before this application was filed, the only remedy that the applicant had was to pursue his appeal in the LCII Court.

Nonetheless, when this court entertains a matter in revision it is enjoined to point out all illegalities and irregularities in the proceedings under revision. I will therefore point out one other aspect of the law that I thought pertinent to this case. The suits under revision were about a piece of land that formed part of the estate of the late Seruzi Livingstone. The applicant herein sued the respondents (Seruzi's two sons) because one of them, the 1st respondent, had previously sued him in the LCI Court at Kapiokolo for unlawfully entering onto his late father's land. While the 1st respondent had the locus to sue the applicant alleging unlawful entry on land which he and other members of his family occupied, the applicant could not properly sue any of the respondents in respect of the same land. This is because s.192 of the Succession Act limits claims of right to the property of deceased persons as follows:

> **"191. Right to intestate's property, when established.**
> **Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction."**

As a result of this provision, claims to the property of an intestate deceased can only be made against the administrator of his/her estate. In the case of a person who dies testate such claims can only be brought against the executor of his/her will who has obtained probate thereof (s.188 Succession Act). By virtue of the grant of probate or letters of administration, all the property of the deceased person vests in the administrator, or the executor of his or her will, as such (s.181 Succession Act).

In view of the position of the law stated above, the applicant's appeal in the LCII Court has almost no chances of success. Although he purported to have completed purchase on the basis of provisions in Seruzi's will, probate of the alleged will had not yet been obtained by 1999 when the applicant purported to complete the purchase with the members of Seruzi's clan and his widows in Buruli.

Therefore any persons to whom he purported to have paid the balance of the purchase price, or the whole of the price for the land after Seruzi's death had no right to receive it. They also had no legal capacity to sign any agreements on the late Seruzi's behalf. The applicant also could not sue any of the beneficiaries to the estate since none of them was the legal representative of the deceased. In the circumstances, it would be prudent for the members of Livingstone Seruzi's family to obtain probate of his will and if there is no valid will, then to obtain letters of administration in respect of his estate. It is only then that the applicant and any other claimants will be able to establish their right to the property in his estate.

For the time being (i.e. before the grant of letters of administration or probate and lawful distribution of the estate of the deceased by his legal representative) all the members of Seruzi's family are equally entitled to occupy his land and to use of his other property. With regard to his offspring, this is regardless of whether they are considered the offspring of "legal wives" or other women with whom the deceased bore children because the provisions of s.27 Succession Act do not discriminate in that regard. The decision as to which one of the beneficiaries is to apply for letters of administration or probate has got to be taken by the Administrator General.

In conclusion, the applicant has not proved that the trial magistrate and the LCI Court at Kapiokolo exercised a jurisdiction not vested in them in law, failed to exercise a jurisdiction so vested in them, or that they acted in the exercise of their jurisdiction illegally or with material irregularity or injustice. He is therefore not entitled to any of the remedies he claimed in this application which is dismissed with costs to the respondents. The respondents are of course entitled to the costs in the court below.

Irene Mulyagonja Kakooza
JUDGE
26/08/2010