IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL REVISION NO. 004 OF 2008

(ARISING FROM CHIEF MAGISTRATES COURT

MISCELLANEOUS APPLICATION NO. 0018 OF 2008)

KISAME SAMSON Alias SSERUWAGI::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **ALI KIYINIKIBI**
2. **BUDALLAH BAIDYE::RESPONDENTS**

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

ORDER ON REVISION

The applicant was the respondent in a suit for trespass brought against one Jamal Muhammad by the respondents in the Local Council II (LCII) Court at Bugembe Parish. The suit culminated in an order for eviction issued by the Chief Magistrate at Jinja. The applicant then brought this application seeking the revision of that order as having been issued with material irregularity which resulted in a miscarriage of justice.

The facts from which the dispute arose as stated in the affidavit in support of the application were that the respondents claimed the applicant, and others not sued, trespassed on land which they inherited from their father, the late Amisi Kiyinikibi. The applicant defended the suit and in his view he proved that the land belonged to him and his siblings who inherited it from their aunt Tereza Byali. The applicant stated that the land was formerly the property of Sir William Wilberforce Kadumbula Nadiope who had given it to his wife Tereza Byali. However, Tereza Byali died childless but before she died, she gave the land to her brother's offspring including the applicant. Thereafter, the applicant and his siblings sold the land to the family of one Ndikulwange who then took

possession of it. After hearing both parties, the LCII Court decided in favour of the respondents and ordered the applicant to stop the tenancies on the disputed land because it was not his.

The applicant averred that he appealed to the LCIII Court of Mafubira Sub-county but before the appeal could be heard, the respondents applied to the Chief Magistrates Court to have the orders of the LCII Court executed. The applicant also averred that he received no notice of the application because he was never served but the Chief Magistrate issued an order for vacant possession and execution ensued on 8/05/2008. But on 4/06/2008, the applicants obtained an interim order for an injunction against the respondents to prevent them from further developing or alienating the land in dispute which was still in force at the time of hearing of this application.

In a further affidavit in support of the application dated 12/05/2006, Jamal Muhammad averred that she is the administrator of the estate of the late Sheha Namagembe, having obtained a grant of letters of administration (Annexure "A" to her affidavit) from this court on the 12/09/2002. Further that Sheha Namagembe was the owner of the land and the buildings that were demolished following the order granted by the Chief Magistrates Court. She built the houses on the land in dispute in 1995, but she died in June 1996. Further that Sheha Namagembe acquired title to the land in dispute from the family of the late Sir Wilberforce Nadiope who gave a piece of land to his wife Tereza Byali. Jamal Muhammad also confirmed that before she died, Tereza Byali gave the land to her brother's (Gideon Mufuwa) offspring because she herself was childless. She further averred that the beneficiaries of the gift from Tereza Byali sold the land to the family of Ndikulwange which included the deponent's sister Sheha Namagembe. Further that the transaction was effected in the presence of Mukoda and Rose Nadiope, daughters of Sir Wilberforce Nadiope. A copy of the sale agreement to the Ndikulwange family was annexed to the affidavit as Annexure "A2," together with its translation into English, Annexure "AA2."

It was also Jamal Muhammad's averment that her sister Sheha Namagembe was survived by three daughters who were then minors: Shamimu Namagembe, Shida Nyinamahunde and Shifa Kembo, as well as a son, Sadam Kayumba, now deceased. She clarified that the Sheha Namagembe's offspring were now adults and the beneficiaries of her estate. She further averred that she learnt about this dispute when court brokers went and evicted the occupants of the land and demolished the permanent and temporary structures thereon. Further that in April 2006, the Chairman of Bugembe

Parish LCII issued summons addressed to her requiring her to attend that court and respond to a complaint raised by the respondents about trespass on their land (Annexure "B" to her affidavit). However, the summons did not reach her in time because she resides in Bweyogerere, Kampala, but she later learnt that the court substituted her in the proceedings with the present applicant. That as a result she too was aggrieved because the LCII Court failed to address the real issues and deal with the right parties to the dispute and passed a judgment that was ambiguous. She finally averred that to her information, the judgment of the LCII Court was a nullity because the court had no jurisdiction in the matter.

In his affidavit in reply, the 1st respondent stated that the 2nd respondent and he were successful in their suit against the applicant in the LCII Court at Bugembe. That if the applicant wished to appeal the decision, he was supposed to have done so within 14 days of the judgment but he did not do so. In his view the memorandum of appeal that was attached to the applicant's affidavit as Annexure "B" did not prove that he filed an appeal in the LCIII Court because it did not bear a receiving stamp on it. Further that Annexure "C" to the affidavit which showed that the applicant paid shs 50,000/= to lodge the appeal in that court was an afterthought because it was not an official receipt of the Mafubira Sub-county LCIII Court. The 1st respondent also averred that the LCIII Court had official receipts and could not issue a mere letter to show that fees were paid to it. That in addition, the person who signed it was not an employee of that court. Further that the applicant was not a son of Tereza Byali and Tereza Byali was never the wife of Nadiope. He further averred that according to evidence that was adduced in the LCII Court, Tereza Byali had a husband called Lakeli Naikumi.

The 1st respondent further averred that after they won the appeal, the land in dispute was sold to several people as was shown in agreements that were attached to his affidavit as Annexure "A," "B" and "C." Also that he and the 2nd respondent were the owners of the suit land because they inherited it from Amisi Kiyinikibi. The 1st respondent also challenged Annexure "AA2" to the applicant's affidavit in support as a false document because it named one Maluzuku as having a piece of land neighbouring the land in dispute, but Maluzuku had never been a neighbour to the land in dispute. Finally, that the LCII Court had the jurisdiction to hear the suit and the applicant's claim had no merit; it was a waste of court's time and therefore should be dismissed.

The applicant deposed an affidavit in rejoinder on 9/07/2008 in which he clarified that his appeal before the LCIII Court was filed late because the LCII Court delayed to forward the proceedings to his advocate, Ms Mildred Nassiwa. He attached communication between the court and the lawyer to the affidavit. Further, that the fact that the respondents claimed to have sold the land in dispute after the judgment showed that they were land grabbers who were trying to grab land from the beneficiaries of the estate of Ndikulwange, especially the offspring of Sheha Namagembe.

When the parties and counsel appeared before me on 09/09/09, I ordered that they file written arguments in the matter and they did so. In her written submissions, Ms. Nassiwa who represented the applicant proposed that three issues ought to be resolved by court in this application as follows:

1. Whether the LCII Court was vested with jurisdiction to hear the suit.
2. Whether the Chief Magistrate's Court failed to exercise a jurisdiction vested in it.
3. Whether the Chief Magistrate's Court acted illegally or with material irregularity and thus occasioned a miscarriage of justice when it issued a warrant to give vacant possession of the land in dispute to the respondents.

Counsel for both parties addressed those issues in the same order as they appear above but I will address the 1st issue separately and then address the 2nd and 3rd issues together.

1. *Whether the LCII Court was vested with the jurisdiction to hear the suit.*

While addressing the first issue, Ms Nassiwa who represented the applicant submitted that the LCII Court had no jurisdiction to entertain the suit because by the time it heard and determined the matter the Local Council Courts Act of 2006 had come into force on 8/06/2006. She contended that because s.11 thereof made village LC Courts the courts of first instance, the LCII Court had no jurisdiction in the matter. She substantiated her argument by stating that the land in dispute was land held under customary law and the suit that was filed was in trespass. That as a result, it fell within the ambit of matters provided for in the 2nd Schedule to the LC Courts Act. She added that as a result of this, s.10 (2) of the Act restricts the jurisdiction of LC Courts to matters that do not exceed 100 currency points (i.e. shs 2,000,000/=). That however, the evidence on record (Annexure "A" "B" and "C" to the affidavit in reply) showed that after judgment was delivered, the respondents sold the land in dispute for shs 5m, 6.5m and 6m, respectively which far exceeded the monetary jurisdiction of the

LCII Court. That as a result the Court had no jurisdiction in the matter and the resultant judgment was illegal and ought to be set aside.

In reply, Mr. Mangeni, counsel for the respondents, argued that the LCII Court had jurisdiction to entertain the suit because it was commenced on 19/03/2006 yet the LC Courts Act came into force on 18/07/2006. That in addition, s. 30 (76A) of the Land Amendment Act vested the jurisdiction in land matters at first instance in the LCII Courts. Further that by virtue of s.13 (2) (c) of the Interpretation Act the LC Courts Act could not apply to proceedings that had already been commenced under the repealed Act. He concluded that the first issue should fail.

In order to resolve this first issue, I will begin with whether the LC Courts Act applied to the matter. The answer to this is quite obvious because s.50 of the Act provided for it. S. 50 (3) provides as follows:

> **(3) Any case pending before a court under the Executive Committees (Judicial Powers) Act at the commencement of this Act may be continued and concluded by that court notwithstanding the repeal of that Act.**

Therefore, in as far as the repeal of the Executive Committees (Judicial Powers) Act was concerned, the LCII Court could continue to hear the suit and conclude it and it correctly did so.

As to whether the LCII Court correctly heard the matter as a court of first instance, whereas it is true that the evidence on record as adduced by the respondents indicated that the value of the land was above shs 2m, s.5 of the Executive Committees (Judicial Powers) Act which provided for jurisdiction indicated that the LCII Court could hear the matter. Though s.5 (2) limited the monetary jurisdiction of suits in schedule 1 thereof to shs 5,000/=, s. 5 (2) (b) provided that the jurisdiction of the court in respect of causes and matters specified in Part 2 of the First Schedule and in the Second Schedule would not be restricted by the monetary value of the subject matter in dispute. Conversion and or damage to property and trespass fell within Part 2 of the 1st schedule. Therefore, the rule about monetary value did not apply to the suit at hand.

In addition to the above, though s.7 of the Executive Committees (Judicial Powers) Act made village LC courts the courts of first instance, the Land Amendment Act (2004) introduced Land Tribunals and made changes in the jurisdiction of LC Courts. S.30 thereof introduced a new section, 76A, and under that section the parish and ward Executive Committee Courts were made the courts of first instance in land matters. S.31 of the Land (Amendment) Act also amended s. 76 of the Land Act by substituting paragraph (c) of subsection (1) with a provision to the effect that the District Land Tribunals would be the courts of first instance in land matters whose value did not exceed two thousand five hundred currency points (i.e. shs 50,000,000/=). That being the law at the time the suit was filed, I find that the LCII Court had the jurisdiction in the matter as a court of first instance and it properly entertained and disposed of the dispute between the parties.

2 & 3. Whether the Chief Magistrate's Court failed to exercise a jurisdiction vested in it, or whether the court acted illegally or with material irregularity or injustice when it issued a warrant to give vacant possession of the suit land to the respondents.

With regard to the 2nd issue Ms Nassiwa submitted that the respondents were aware that an appeal had been lodged in the LCIII Court but they chose to proceed in execution in spite of it. Further that s.40 of the Local Council Courts Act vested the powers of supervision conferred upon the High Court with respect to LC Courts in the Magistrates Court. She relied on s.221 (2) of the Magistrates Courts Act for the definition of the ambit of the magistrates powers of supervision and submitted that when Misc. Application No. 18 of 2008 was filed in the Chief Magistrates Court, the Chief Magistrate should have called for the file from the LCII Court to ensure that all was in order before she granted a warrant to give vacant possession to the respondents. That if she had done so, she would have been able to find out that there was an appeal that had been preferred by the applicants in the LCIII Court at Mafubira and that the respondents lied when they averred in their application that there was no appeal. Ms Nassiwa concluded that when she omitted to call for the file, the Chief Magistrate failed to exercise a jurisdiction that was vested in her.

In reply, Mr. Mangeni argued that the Chief Magistrate was right when she issued the order to give vacant possession to the respondents because there was no evidence on the court file to show that an appeal had been lodged. In his view, the court had no obligation to look for documents that were not on the court record.

Turning to the third issue, Ms Nassiwa reiterated her submissions with regard to the 2nd issue. In reply, Mr. Mangeni submitted that the appeal lodged in the Mafubira LCIII Court was incompetent because it was lodged after 14 days had elapsed following the judgment on 23/08/2006. He argued that if the applicant had indeed got the record of proceedings late (i.e. on 15/08/2006) as was averred in his affidavit in support, then his appeal should have been filed by 17/08/2006 but not on 23/08/2006 as it was. Mr. Mangeni thus concluded that because the applicant had not complied with s.33 of the Local Council Courts Act, he filed his appeal illegally. Relying on the decision in **Makula International v. Cardinal Nsubuga [1982] HCB 11,** he submitted that the court cannot sanction that which is illegal and illegality once brought to the attention of court overrides all questions of pleadings including any admissions made thereon.

Mr. Mangeni also challenged the proceedings before the LCIII Court because he alleged that an advocate represented the applicant in spite of the provisions of s. 16(2) of the LC Courts Act which bar advocates from representing litigants except in proceedings for infringement of byelaws. He further submitted that the appeal was a nullity since there was no evidence that the memorandum of appeal was served on the respondents as is required by the Local Council Courts Act. He thus asserted that the Chief Magistrate acted correctly when she issued the warrant of eviction but prayed that in the event that court finds that the application has merit, it should order that the aggrieved party file a fresh case before a court competent to that would determine who the lawful owner of the land is.

While dealing with the 1st issue, I ruled that the LCII Court correctly completed the hearing of the suit before it under provisions of the Executive Committees (Judicial Powers) Act. But after they delivered judgment, any further proceedings instituted on appeal or for the execution of the judgment in another court had to be instituted under the provisions of the Local Council Courts Act of 2006. I say so because these would be new proceedings that could not be instituted under the repealed Act. I shall therefore refer to the Local Council Courts Act in the resolution of the 2nd and 3rd issues.

There is no doubt that Local Council Courts have powers to levy execution of their own judgments and orders and there are several provisions of the Local Council Courts Act to that effect. Execution

may be levied by the Chief Magistrates Court only in matters provided for by s.10 (3) of the Act which provides as follows:

> **(3) In any suit relating to causes and matters specified in the Second Schedule and in the Third Schedule, *where the court awards compensation exceeding twenty five currency points, the court shall refer the case to the Chief Magistrate of the area for the purposes of execution* of the order and the Chief Magistrate may, if he or she finds that the judgment award is grossly excessive, reduce the amount of the award taking into account awards in similar cases.**

The relevant terms of the judgment of the LCII Court were as follows:

> *"Lastly, since the defendant has stayed in the land for more than ten years (the) he qualifies to be the owner of the land.*
>
> *All members of the court agreed that Samson Kisaame Seruwagi should stop the tenancy of the undeveloped part of the land since it is not his."*

Although the suit was in trespass to land, and therefore fell under Schedule 1 of the Local Council Courts Act, the court did not award compensation to any of the parties. There was therefore no reason for the applicants to apply to the Chief Magistrates Court for execution of the decree. In addition, it was not for the applicants to apply for execution. If the court had deemed it fit, it would have been its duty to refer the case to the Chief Magistrates Court for execution of the decree. When this did not happen, I am certain that the respondents had no right to apply to the Chief Magistrate for execution of the orders of the LCII Court, and the Chief Magistrate had no power to issue a warrant to deliver vacant possession of the land to them as she did. She therefore exercised a jurisdiction that was not vested in her.

Regarding the proposition by Ms. Nassiwa that the Chief Magistrates had the obligation to call for the whole record of the LCII court and revise it before granting the warrant of eviction, s.40 of the Local Council Courts 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. In that regard, s.17 of the Judicature Act provides that the High Court shall exercise powers of supervision over magistrates' courts. S.17 (2) delimits those powers as follows:

> **(2) With regard to its own procedures and those of the magistrates' courts, *the High Court shall exercise its inherent powers to prevent abuse of the process of the court by curtailing delays*, including the power to limit and stay delayed prosecutions as may be necessary for achieving the ends of justice.**

I am of the view that the powers that are granted in s.221 of the Magistrates Court's Act which refer to the Chief Magistrates supervision of other magistrates courts need not be imported here in order to give meaning to the provisions of s.40 Local Council Courts Act because the provisions of s.17 of the Judicature Act are sufficient for that. I shall next deal with the particular circumstances of this case as they relate to revision and supervision by the Chief Magistrate.

Annexure "E" to the affidavit in support of this application was a Photostat copy of the notice of motion and the affidavit in support in Misc. Application No. 18 of 2008 from which the application arose. It showed that the respondents made their application to the Chief Magistrates Court under the provisions of Order 52 of the CPR and s.98 of the Civil Procedure Rules. In their application, which appears to have been filed by the respondents *pro se*, the 1st applicant (now the 1st respondent) stated that judgment had been delivered by the LCII Court on 30/07/2006 and the applicant did not appeal. In the affidavit in support of the application, Ali Yebese Kiyinikibi stated that it was 1 ½ years since judgment was delivered but the successful party had not yet reaped the benefits of the judgment. Attached to the affidavit was a Photostat copy of the judgment of the court. It was therefore the applicants' contention that the LCII Court had delayed the proceedings, so they prayed that in the interests of justice and equity, the Chief Magistrates Court grants an order allowing execution of the judgment.

The application need not have been brought under s.98 of the CPA because s.40 of the Local Council Courts Act specifically provides for the circumstances that the respondents complained about. But even if they did not, since the complaint was about delay, the court ought to have employed the provisions of s.40 of the Local Council Counts Act where it draws its supervisory powers from. And

because that provision links to s.17 of the Judicature Act, it was incumbent on the Chief Magistrate to call for the file from the LCII Court and establish why there was such a long period of time between the delivery of the judgment and the execution of the orders therein. Having done so, the Chief Magistrate would then have established that delay was occasioned by the applicant's appeal to the LCIII Court.

I came to the conclusion above because pursuant to the judgment that was delivered on 30/07/2006, on 29/08/2006, the LCII Court issued a notice to the family of late Kiyinikibi that they would in conjunction with the Administration Police hand over the undeveloped piece of land on Thursday 31st August 2006 at 4.00 p.m. This document was Annexure "D" to the affidavit in support of this application; but before the proposed hand over, the LCII Court received a notice, also marked Annexure "D" to the affidavit in support. The notice which was a letter dated 24/08/2006 informed the Chairman LCII and Parish Chief of Bugembe that the applicants had lodged an appeal in the LCIII Court at Mafubira. That letter indicated that it was copied to Ali Yebese Kiyinikibi and Budala Baidye Kiyinikibi, the respondents herein.

The record of the LCIII Court at Mafubira was transmitted to this court subsequent to the filing of this application and was received in the registry on 16/07/2009. Mr Mangeni complained about this and contended that this court should not consider it while disposing of this application because it was improperly filed without leave of court. He relied on the decision in the case of **Samwiri Mayanja v. Uganda Revenue Authority, H.C.M.A. No. 17/05** for his submission that where one wishes to file any additional document to support an application, he/she must first obtain leave of court.

I am of the view that the circumstances in the case of **Samwiri Mayanja v. U.R.A.** (supra) can be distinguished from those in the instant case. While the decision in the former related to the filling of a further affidavit in support of the application, what was complained about in the instant case was the filing of a record of proceedings and judgment of a lower court. That was a necessary step in an application for revision even without an additional affidavit. On the contrary, the decision in the case of **Samwiri Mayanja** was premised on the provisions of Order 52 rule 3 of the CPR which requires an applicant proceeding thereunder to file any affidavit that he/she is to rely on in the application with the notice of motion. Since rule 3 of Order 52 appears to be mandatory any further affidavits in support by of the application would have to be filed with leave of court.

Suffice it to add that in the instant case, when counsel for both parties appeared before me on 16/04/2009, Mr. Mangeni complained that he had not been served with the record of proceedings and judgment of the LCIII Court. He therefore prayed the he be availed with copies of the two documents. Court then ordered that the record of that court and judgment be typed and served on him before the next hearing date. Subsequently, the record and judgment were transmitted to this court and received in the registry on 17/07/2009. I believe that service of the record and judgment was effected on counsel for the respondents as ordered by court because had it not been so, he would have raised a complaint when the matter was next came for hearing on 09/09/2009.

That being the case, Mr. Mangeni's objection to this court's reliance on the record of the LCIII Court in the disposal of the revision contradicts his earlier prayers and is overruled. In the interests of justice, and in the spirit of Article 126 (2) (e) of the Constitution that substantive justice shall be administered without undue regard to technicalities, I will take the record of the LCIII court into consideration in order to come to a fair decision in this matter.

The record of the LCIII Court shows that subsequent to the notice of 24/08/2006 to the LCII Court and the respondents, the LCIII Court issued notices for hearing of the appeal. The record also shows that a hearing notice dated 1/09/2006 was served on the respondents and Ali Yebese received it and acknowledged receipt thereof by writing his name and signing next to it. The record further shows that on the 4/09/2006, the LCIII Chairman of Mafubira Sub-county wrote to the respondents in respect of the appeal. He reiterated that the applicant had lodged an appeal in the LCIII Court and the respondents should desist from making any new developments on the land. The letter was received by Ali Yebese who again wrote his name on the copy that was returned to court and signed next to it. The court wrote to the LCII Court on 25/09/2006 requesting for all court proceedings pertaining to the case. The letter was copied to the respondents and a copy that was returned to court showed that Abdullah Baidye received a copy of it. He acknowledged receipt of it by writing his name on it and countersigning against it. On 5/10/2006 the LCIII Chairman wrote to the LCII Chairman Bugembe requesting for more components of the record of proceedings viz: statements of the claimants, the defendants and witnesses in the case. This letter was copied to the respondents but the copy returned to the court indicated that the LCII Chairman declined to receive the letter, and so did the respondents. The LCIII Court again summoned the respondents to attend a hearing of the

appeal on 31/10/2006. The notice was received by Ali Yebese on the 27/10/06 and he acknowledged receipt by writing his name and signing against it.

It would appear that there was another hearing scheduled for the 6/11/2006 but the respondents wrote to the LCIII Court to inform them that they could not attend court because they had lost a child; the mother was still in hospital having delivered the child by caesarean section. The record also revealed that the respondents *did* attend the LCIII Court on the 29/12/2006 but they refused to give evidence. They referred the court to the record of proceedings in the LCII Court; they countersigned the record of proceedings for that day in confirmation of their reference to the LCII Court proceedings.

From the record of the LCIII Court therefore, there is no doubt that the respondents were aware of the appeal and they even participated in it. By virtue of s.31 (2) of the Local Council Court's Act, an appeal against an order of a lower court acts as a stay of execution. It is only the appellate LC Court that can sanction the waiver of the pending appeal so as to levy execution if it is of the opinion that further stay of execution would defeat the ends of justice. I therefore find that the respondents did not go to the magistrates' court with clean hands. They lied to the Chief Magistrate that there was no appeal pending against them and as a result she issued a warrant of eviction against the occupants of the land. If the Chief Magistrate had insisted on the correct procedure in such applications or called for the file of the LCII Court, she would have discovered that there was an appeal against the judgment and declined to issue the warrant for vacant possession to the respondents.

It is also the case that in matters of land, blatant dishonesty such as the respondents herein were shown to be guilty of amounts to fraud. In **Waimiha Saw Milling Co. Ltd v. Waione Timber Co. Ltd. [1926] A.C 101,** Lord Buck master defined fraud, at page 106, as follows:

> *"Now, fraud clearly implies some act of dishonesty. Lord Lindley in Assets Co. v. Mere Roihi (1905) A.C.176., states, "Fraud in these actions i.e. actions seeking to affect a registered title means actual fraud, dishonesty of some sort not what is called constructive fraud – an unfortunate expression and one very apt to mislead, but often used for want of a better term to denote transactions having consequences in equity similar those which flow from fraud."*

I am mindful of the fact that the land in issue was not registered land but I think that the definition above is apt and can apply to all land disputes. I am also mindful of the fact that the issue of fraud was not raised by any of the parties to this application. However, it has been held by this court in **G. M. Combined v. A. K. Detergents Ltd. H.C.C.S. No. 348 of 1994** and **Jabir & Another v. Jabir & Others H/C C/A No. 1 of 2003** that even if fraud was not specifically pleaded, on the basis of the conduct of the parties, it would be incumbent on a court of justice to find that there was fraud under s.98 of the Civil Procedure Act and Article 126 (2) (e) of the Constitution. Fraud is an illegality and a court of law cannot sanction what is illegal. Illegality once brought to the attention of the court, overrides all questions of pleading, including any admissions made thereon (**Makula International v. Cardinal Emmanuel Nsubuga,** supra). Because the respondents deliberately lied to court, I find that they obtained the order for vacant possession fraudulently. The order therefore ought to be set aside for that reason, among others.

Counsel for the respondent argued that the appeal had been filed out of time and therefore was a nullity. But if that had been the respondents' complaint in the appeal, then they ought to have brought it to the attention of the LCIII Court on 29/12/2006 when they appeared before it and participated in the proceedings. The respondents cannot bring up that issue now, after they blatantly lied to the Chief Magistrate that there was no appeal when they very well knew that there was one in which they had even participated. Having participated in the appeal, they waived their right to having the appeal dismissed for having been filed out of time. They cannot complain after judgment was delivered therein.

Going on then to Ms. Nassiwa's argument that the Chief Magistrate ought to have revised the whole proceeding of the LCII Court before making the order for vacant possession, s. 219 (1) of the MCA provides that every suit or appeal in the court of a Chief Magistrate or a Magistrate Grade I shall be instituted and proceeded with in such a manner as may be prescribed by rules applicable to suits and appeals instituted in the High Court. In this case, the proceeding before the Chief Magistrate was one in which it was sought to execute a decree from another court. In that regard Order 22 rule 4 of the Civil Procedure Rules provides as follows:

4. **Procedure where court desires that its own decree shall be executed by another court.**

A court sending a decree for execution by another court shall send—

a) a copy of the decree;
b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and
c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

Therefore, before issuing the warrant of eviction, the Chief Magistrate ought to have required the party applying for it to produce a copy of the decree or the certificate required by Order 22 rule 4 (b) of the CPR. In the absence of the relevant documents, the magistrate ought to have called for the record of the LCII Court, or altogether refrained from issuing the order.

Though it was not brought out in the submissions of counsel for the applicant, I am also of the opinion that service of the notice of motion on the respondent (the applicant herein) in the application for execution was wanting. In his affidavit of service dated 21/04/2008, John Egesa stated that on 11/04/2008, he went to Budumbuli LCI Zone with Ali Kiyinikibi to effect service of a notice of motion on the respondent. That he first reported to the LCI Chairman, Wambuzi Hamza, and told him the purpose of his visit. That the respondent was summoned to receive the application and he went to the LCI Chairman's home but he refused to acknowledge receipt of the notice and instead asked the Chairman to acknowledge receipt on his behalf.

I examined the copy of the application that was returned to court. It showed that it was received by Wambuzi Hamza as the Chairman LCI Budumbuli Zone, but he did not state that he received the notice on behalf of the respondent. Neither did he state that the respondent was present when he received it but had refused to acknowledge receipt thereof. If the respondent received the notice of motion and read through it as was alleged in the affidavit of service, it is inconceivable that he would have ignored the fact that it was alleged therein that there was no appeal, and taken no steps to attend the hearing. I was therefore neither satisfied nor convinced that service of the application was effected on the respondent as alleged in John Egesa's affidavit of service.

Given the circumstances above, I have no hesitation in finding that the Chief Magistrate not only exercised a jurisdiction that was not vested in her but she also acted with material irregularity and injustice and thus occasioned a gross miscarriage of justice. But before I conclude, it is important that I point out another defect in the proceedings before the LCII Court that may have tainted the whole of the proceedings before the LCII and LCIII Courts, as well as those before the Chief Magistrates Court.

In their claim before the LC II Court, the respondents had sued Jamal Muhamad who is the administrator of the estate of the late Sheha Namagembe. Summons were issued by the court to be served on her but according to paragraphs 8, 9 and 10 of her affidavit in support of this application, she complained that though the suit was filed against her, the applicant herein was replaced as a party. That as a result she was aggrieved because this resulted in the LCII Court failing to address the real issues in controversy and the correct parties and thus arriving at an ambiguous decision. The record of proceedings in the LCII Court shows that when the case first came for hearing, Jamal Muhamad who had been sued was not in court. The applicant herein then told the court that he would answer the case on her behalf because it was he that sold the land to the late Abey Ndikulwange. The court then, without much ado, substituted him for Jamal Muhamad as the respondent in the suit.

As I have already ruled above, at the time that the proceedings took place, the court entertained the suit under the Executive Committees (Judicial Powers) Act, because s.50 of the Local Council Courts Act allowed it to continue with and dispose of suits before it that had been filed under the repealed Act. Therefore s. 14 thereof still applied. S. 14 (1) of the Executive Committees (Judicial Powers) Act provided for representation by nominees as follows:

> **(1) Where the party is unable to appear in court due to mental or physical incapacity, the court may, on being satisfied that a person has been nominated by that party or is in charge of that party or his or her property, allow the person to represent him or her in court.**

There was no evidence before court that Jamal Muhamad had a physical or mental incapacity. Neither was there evidence that the applicant herein had been nominated by Jamal Muhamad to

represent her or that he was in charge of her or her property. Jamal Muhamad was the administrator of the estate of Sheha Namagembe who had been the owner of the property. The Succession Act is very clear on who may represent the deceased in an action in a court of law. According to ss.189 and 192 of the Act, the rights of the deceased are vested in the Administrator of his/her estate or the executor of his/her will and no other person. The court therefore could not substitute the applicant herein for the administrator of the estate unless she had given him express powers of attorney to represent her in the proceedings. The substitution of the applicant for Jamal Muhamad was therefore illegal making the subsequent proceedings in the names of the applicant null and void because he was not the right party to be sued in the estate of Sheha Namagembe.

Going back to the order in dispute, in their judgment, the members of the LCII Court had ordered that the applicant ceases to let the undeveloped land because it did not belong to him. In spite of this, the order for vacant possession which was issued to Ronald Oundo on 2/06/2008 did not specify which part of the land was to be handed over to the respondents. As a result, when the court bailiff and police went to execute the order they also demolished the buildings on the land which was contrary to the order of the LCII Court. That was no doubt an illegal act because there was no court order awarding them the land that had developments on it. According to his averments in the affidavit in reply to this application, the 1st respondent confirmed that they purported to sell all the land that was in dispute yet the judgment in their favour was for only the undeveloped land. As a result, the respondents sold land that they did not have. I therefore find that the purported sale of land to Sanga Daniel, Badhaga Hamza and Lubale Godfrey Bukumbi were null and void *ab initio*.

Section 83 of the CPA provides that the High Court may exercise its powers of revision in matters where a magistrates' court has exercised a jurisdiction not vested in it in law; failed to exercise a jurisdiction so vested in it; or acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. This court may then make such orders in it as it thinks after the parties are given the opportunity of being heard. However, according to s. 83 (d) CPA the powers of revision shall not be exercised where from lapse of time or other cause, the exercise of such powers would involve serious hardship to any person.

I have considered the circumstances of the parties herein and their conduct during the proceedings and come to the conclusion that no hardship will be occasioned to them if orders are made in

revision. The eviction order complained of was issued on 2/05/2008 and executed on 8/05/2008. This application was filed on 13/05/2008 just 5 days after the order was executed. On 4/06/2008 this court issued an interim order for an injunction to restrain the respondents, their agents or successors in title from further alienating and developing the suit land pending the determination of this application. The interim order was extended on several occasions and the last of such extensions was to expire today, the 22/02/2010, on delivery of this order. I therefore expect that the land is in the same state that it was on 8/05/2008, immediately after the purported execution of the order for vacant possession. For that reason, I do not expect that any orders made herein will have any adverse effect on the purported buyers of the land. If they (the purported buyers) made any further developments on the land after the restraining order, then they did so in contempt of orders of this court and that cannot be countenanced by this court because it was illegal.

In conclusion, this application succeeds with the following orders:

i) The order of the Chief Magistrate dated 2/06/2008 is hereby set aside.
ii) The judgment of the LCII Court and any subsequent judgments of the LCIII Court are also set aside.
iii) It is hereby ordered that the respondents and or their agents or successors shall vacate the land in dispute;
iv) The said piece of land shall be handed back to the family of Ndikulwange who occupied it before the suit;
v) The respondents shall also compensate the family of Ndikulwange for the destruction of their property that resulted for use of the fraudulent court order;
vi) The respondents shall also be liable to refund any monies obtained as proceeds of the illegal sale of the land following the execution of the impugned order;
vii) Any party that is aggrieved may institute another suit in the Chief Magistrates Court which will then determine the lawful owner of the land.
viii) The respondents shall pay the costs of this revision.

Irene Mulyagonja Kakooza

JUDGE

22/02/2010