**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MBARARA**

**HCT-05-CV-CA-0055-2010**

1. **ARHUR TINDIMWEBWA**
2. **SAMUEL TEGENGARO**
3. **STEPHEN MUGWANYA**
4. **PATRICK KAREMA :::::::::::::::::::::: APPELLANTS**

***VERSUS***

1. **JOY MUHEREZA**
2. **MBARARA MUNICIPAL COUNCIL :::::::::::::::::: RESPONDENTS.**

**BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW**

***JUDGMENT***

This appeal arises out of the decision of the Chief Magistrate sitting at Mabarara *(hereinafter referred to as the "trial court")* in which the trial court dismissed ***Civil Suit No.477/2009*** on a preliminary objection on a point of law, that the trial court lacked the jurisdiction to entertain the matter.

***Facts.***

The brief facts are that the Appellants own different plots of land located in the same area in Mbarara Municipality, and were using Mukasa Link and Karyawari Road to access the High Way (Fort Portal Road). Some time back, the 2nd Respondent, Mbarara Municipal Council, changed the plan of the area by approving a different cadastral map of the area. This effectively erased Mukasa Link from the earlier plan of the area. The Appellants

contend that as a result, the 1st Respondent took advantage of the said alteration of the plan and blocked the said Mukasa Link and Karyawari Road by constructing a structure thereon.

When the matter came up for hearing, the trial court dismissed it, as earlier stated, on a preliminary objection on a point of law, in that the court lacked the necessary jurisdiction to try the matter. The Appellants were dissatisfied with the decision, and filed this appeal. They advanced three grounds of appeal as follows:-

1. ***The learned trial chief magistrate erred in law and fact when she found that she did no have jurisdiction to hear the matter.***
2. ***The learned trial magistrate erred in law and fact when she completely ignored the submissions of counsel for the Appellants, the evidence so far on record and as such reached a wrong conclusion.***
3. ***The learned chief magistrate erred in law and fact when she failed to take judicial notice of the fact that the High Court rejected the Appellants' pleadings when presented for filing and instead forwarded them to the chief magistrate's court.***

The grounds will be resolved in the order in which they were presented.

***Resolution.***

***GROUND 1.***

***The learned trial chief magistrate erred in law and fact when she found that she did not have jurisdiction to hear the matter.***

It was argued for the Appellants that the cause of action in the instant case lay in the Common Law tort of nuisance, since the Respondent blocked the access roads to the Appellants' properties by constructing in the midst of the said access roads, and that the trial court is clearly seized with the necessary

jurisdiction to entertain such a matter. Further, that ***Section 208 of the Magistrates Courts Act (Cap.16)*** provides that every magistrate's court shall, subject to the Act, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. Counsel for the Appellants also relied on ***Winfield and Jolowiz, On Tort, By WVH Rogers, at page 647 paragraph 14-5,*** that the tort of nuisance provides a remedy for the infringement of servitude such as the obstruction of a right of way.

Further, Counsel cited the case of ***Colls v. Home & Colonial Stores Ltd (1904) AC 179*** where Lord MacNaghten regarded the action for the interference with an easement as *sui generis*, the function of the action being to remedy the infringement of a right. Counsel for the Appellants opined that the trial court has jurisdiction, and the case against the 1st Respondent should have been heard on its merits.

In response, counsel for the 1st Respondent submitted that the suit land is located in a municipality, which is a planned area. That under ***Section 45*** *of* the ***Land Act (Cap.227,*** such land must conform to the provisions of the ***Town and County Planning Act (Cap 246)*** and any other law. That in order to have co-ordinated planning in its area, the Mbarara Municipality acquired its planning scheme by virtue of ***Statutory Instrument No.24b – 6,*** which is the ***Town and County Planning (Declaration of Schemes) (No.1) Instrument.***

Counsel also cited ***Section 10 (2)*** *of* ***The Town and County Planning Act (supra),*** to the effect that the scheme prepared may make provisions for any of the matters set out in the ***2nd Schedule to the Act*** . Under the said ***Schedule***, the matters set out include, *inter alia*, providing for the closing of, or diversion of existing roads and public and private rights of way and traces. To that extent, all the developmental activities within the

municipality must conform to the planned scheme of the area. Anybody aggrieved by any matter arising from such planning has a recourse to appeal to the ***Town and County Planning Board*** in accordance with provisions of ***Section 25 (Cap 246),*** and when not satisfied with the decision of the Board can appeal to the High Court.

Counsel for the Respondent further argued that, indeed, the trial court has no jurisdiction in the matter because it was expressly not conferred on it. Counsel relied on the case of ***Seperanza Kekishaka v. Arthur Muhoozi [1992 – 93] HCB 150,*** where Karokora J., (as he then was) held that jurisdiction of every court was conferred by law. Further, on the issue of jurisdiction, Counsel cited the case of ***Oscroft v. Benabo [1967]2 ALL ER 548 AT 557 C.A*** in which Lord Diplock had the following to say:-

> ***"Jurisdiction is an expression which is used in a variety of sense takes its colour from the context. In the present appeal …we are concerned only with statutory jurisdiction in the sense of an authority conferred by statute on a person to determine, after an inquiry into a case of kind described in the statute, conferring that authority and submitted to him for decision, whether or not there exists a situation, of a kind described in the statute, the existence of which is an inquiry, to which effect will or may be given by the executive branch of government."***

In the instant case, it is clear that the jurisdiction to entertain disputes in the first instance is expressly conferred on the ***Town and County Planning Board*** by provisions of ***Section 25(Cap246)***. It is also certain that the said Act stipulates its own appeal process such that an appeal from the decision of the Board lies directly to the High Court. The magistrate's court is not contemplated by the Act. To that effect, it is my view that, indeed, the trial court lacked the requisite jurisdiction to entertain the matter.

It is settled that jurisdiction is always a creature of statute, and where the statute does not expressly confer such jurisdiction, a court cannot competently entertain the matter. See ***Imelda Ndiwalungi v.Roy Busuulawa & A'nor. (1997) HCB 73,***

I have also noted that from the submissions of counsel for the Appellants, their cause of action fell under the common law tort of nuisance. It cannot be gainsaid that nuisance is indeed a common law tort. However, common law principles cannot apply and/or override the express provisions of a written law; where there is a specific Act that provides for the situation.

In the instant case, ***Section 9 MCA*** provides that jurisdiction of every magistrate's court shall be exercised in conformity with the law with which the High Court is required to conform in exercising its jurisdiction under the ***Judicature Act(Cap 13).*** Under ***Section 14 (2)*** (*supra)*, it is provided that:-

> ***"The jurisdiction of the High Court shall be exercised -***
>
> ***a) In conformity with the written law...***
>
> ***b) Subject to any written law and in so far as the written law does not extend or apply, in conformity with--***
>
> ***c) The common law...".***

From the above, it would appear to me correct that any party aggrieved by the altering of the planning of a given area has remedy under the ***Town and County Planning Act;*** and not under common law tort of nuisance. The former, nonetheless, does no vest jurisdiction in the magistrates' courts. In the result, I find that the trial court did not errer in any way to find as it did. *Ground 1* of the appeal fails.

It follows that *Ground 2 and 3* also fail since it would have been futile for the trial court even to attempt to determine any other issues in a matter where it clearly lacked the jurisdiction.

I wish also to observe that even if the matter had not been dismissed for want of jurisdiction, it would still not survive with regard to the 1st

Respondent against whom the Appellants clearly have no cause of action. As indeed the Appellants rightly claimed, the Respondent only took advantage of the changes effected by the 2nd Respondent in the area plan to do construction. I have not found evidence to suggest that she played any part in the decision of the 2nd Respondent to erase Mukasa Link from the area plan that would make her be liable.

It is settled that for a cause of action to accrue the plaintiff enjoys a right, that right is violated, and the defendant is responsible. If one of the elements is lacking, then no cause of action is established and the suit must be dismissed. See ***Auto Garage & O'rs v Motokov [1971] EA 514.*** **The** 2nd Respondent was not responsible for the violation of the Appellants' right, if any at all.

The appeal is dismissed with costs.

**.....**

***BASHAIJA K. ANDREW***

***JUDGE***

***21/09/2012.***