THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 29 OF 2006

GAGULA BENEFANSIO :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

WAKIDAKA MERABU :::::::::::::::::::::::::::::::::: RESPONDENT

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

JUDGMENT.

Back ground.

This is a second appeal from the judgment and decree of his Worship Batema N.D.A., Chief Magistrate at Iganga *(hereinafter referred to as the "first appellate court")* dated 18/1/2005. The Respondent the Appellant in the L.C.I court for uprooting boundary marks, and the case was determined in favour of the Appellant. The matter was appealed up to the L.C.III court, which upheld the lower L.C courts' decision and ordered that the Appellant continues to use his land which was given to him.

The matter was appealed in the Chief Magistrate's court at Iganga, and Her Worship Tibulya Margaret ordered for a retrial before the Magistrate Grade 2 to determine the real issue of ownership. The matter went before His Worship James Kaswa, Principal Magistrate Grade 2 *(hereinafter referred to as the "trial court")* who on 14/07/2000 dismissed the Respondent's suit on the ground that the trial court lacked jurisdiction to try the matter, and directed the Respondent to file the claim in the Land Tribunal. Instead, on 12/03/ 2002 after a period of one year and eight months, His Worship D.B. Kidyanga, the then Chief Magistrate of Iganga met with Mr. Tuyiringire, a lawyer for one of the parties, and the two agreed to have the matter revived, and the Chief Magistrate directed the trial court which had previously dismissed the case to write a judgment.

On 19/12/03 judgment was delivered in favour of the Respondent, and the Appellant appealed the decision in the Chief Magistrate of Iganga, vide ***Civil Appeal No. 15 of***

2004 which he lost, and subsequently filed the instant appeal and ***Revision Application No. 177 of 2006*** in the High Court at Jinja. The application for revision was, however, abandoned for the appeal and four grounds of appeal were advanced as follows:

1. ***The learned Chief Magistrate erred both in law and fact when he dismissed the Appellant's appeal without proper evaluation of the whole evidence on record in the grade II Magistrate's court.***
2. ***The learned Chief Magistrate erred both in law and fact not to allow the appeal when the Grade II Magistrate had re-entertained the case he had dismissed for want of jurisdiction.***
3. ***The Learned Chief Magistrate erred in law when he allowed the judgment in the lower court – grade 11 court to stand in a suit which was reinstated after dismissal without an application formal or informal.***
4. ***The learned Chief Magistrate's decision occasioned a grave miscarriage of justice***.

The duty of this court as a second appellate court is not to re-evaluate the evidence unless the first appellate court failed in its duty of re-appraising the evidence, and as such drew wrong inferences of fact and/or did not properly consider the judgment from which the appeal arose. See ***Kifamunte Henry v. Uganda S.C. Crim. Appeal No. 10 of 1997; Baingana Kanona Willy v. Uganda S.C.Crim. Appeal No.26 of 2009.*** With these principles in mind, I now proceed to consider the grounds of appeal.

Counsel for the Appellant abandoned *Ground 1* at submissions stage, and concentrated on *Ground 2 and 3*, which were argued and responded to together. I will follow the same order in consideration of the grounds.

Ground 2 and 3.

The Appellant's main complaints in the two grounds are that the first appellate court did not allow the appeal when the trial court had erroneously re-entertained the case it had dismissed for want of jurisdiction, and that it was wrong for the first appellate court to

have allowed the judgment of the trial court to stand in a suit which was reinstated without a formal application.

Counsel for the Appellant submitted that when the trial court dismissed the suit for want of jurisdiction, it became *functus officio* at that point, and could not again entertain the same matter it had dismissed, and that the Respondent should have filed a claim in the Land Tribunal as ordered by court. Counsel further submitted that it was erroneous for the trial court to re-entertain the matter when there was no formal application to move it, and that all the actions by the trial court and first appellate court were irregular and illegal. To buttress his arguments, Counsel relied on ***Uganda Railways v. Ekwaru & 5104 or's, C.A. Civil Application No. 185 of 2007; and Makula International v. His Eminence Cardinal Nsubuga & A' nor, C.A. Civil Appeal No. 4 of 1987*** to the effect that once an illegality is brought to the attention of court, it cannot be ignored.

In response Counsel for the Respondent supported the decision of the first appellate court, arguing that it was a mistake for the trial court to have dismissed the suit in the first place, and that court owed the Plaintiff a duty to rectify the mistake and that the Chief Magistrate, His Worship Kidyanga, having identified the mistake called the defendant's lawyer, and that the two agreed to have the matter concluded.

Counsel for the Respondent further submitted that jurisdiction over land matters was subsequently restored to magistrates' courts, and the Chief Magistrate called the lawyer and the two agreed to have the dismissed suit reinstated, and the Chief Magistrate ordered the trial court to proceed and write judgment.

Resolution.

Two issues, in my view, emerge from the record of the lower courts and submissions above. The first one relates to the retrial of the suit by the same trial court which had dismissed it for want of jurisdiction, while the second concerns lack of a formal application to reinstate the case. Both are issues of law, and I will start with one on jurisdiction.

It was certainly erroneous for the trial court to entertain the suit it had earlier dismissed for lack of jurisdiction after it was reinstated. The court had become *fanctus officio;* meaning that it had no power to re-open the case either of its own motion or an application of the parties. Even if subsequently jurisdiction could have been conferred on such a court, as Counsel for the Respondent seems to imply, still it would not operate retrospectively to cases already determined. The proper recourse was for the parties to file in the court of competent jurisdiction.

At page 6 of its proceedings, the trial court appears to have been acutely alive to its lack of the necessary jurisdiction when it stated as follows:

> ***"It has come to my knowledge that under the Land Tribunal Act, this court has no power to decide a land case."***

Having reached this evidently correct finding, the trial court ought not to have turned around and in the same breath re- entertained the case. The position would not be any different even if the trial magistrate was ordered by the Chief magistrate; for jurisdiction cannot be conferred by orders of any court however superior, but by express provisions of a statute.

Therefore, orders of the Chief Magistrate and the subsequent retrial, which was actually only to write the judgment upon the earlier dismissed proceedings, were grossly irregular and are null and void. Similarly, no subsequent appeal or orders flowing from a null and void trial could be of any legal consequence.

Counsel for the Respondent, in the submissions (at page 2) seems to suggest that the Chief Magistrate calling the lawyer and the two having agreed to have a retrial validated the proceedings, and hence the subsequent appeal. To this effect Counsel quoted the first appellate court where it stated thus:

> ***"I would find this in line with the constitutional provisions made under Article 126 (2) (e) of the Constitution of the Republic of Uganda which provides that***

in the adjudication of all cases courts shall consider giving the parties substantive justice without giving undue regard to technicalities."

With due respect, this was a misdirection on part of the first appellate court. The lacks of jurisdiction by a court over a matter cannot be regarded as a mere technicality under ***Article 126(2) (e) (supra).*** Issues of jurisdiction are substantive and go to the core of a case, and if a court lacks jurisdiction, whether pecuniary or territorial, over the subject matter of litigation its judgment and orders, however precisely certain and technically correct, are mere nullities, and not only viodable. They are of no legal consequence and may not only be set aside any time by the court in which they were rendered, but be declared void in very court in which they are presented. Similarly jurisdiction cannot be conferred on court by consent of the parties and any waiver on their part cannot make up for the lack of jurisdiction. See ***Assanand & Sons (U) Ltd.v. East African Records Ltd. (1959) E.A 360.***

In addition, because of the gross irregularities and outright illegalities observed above, the first appellate court should have proceeded to hear the appeal flowing from null and void proceedings of the trial court and left them to stand. If indeed it was felt or found that there were any defects in the matter, which actually was not brought to the Chief Magistrate's attention by way of an appeal, the only recourse under ***Section 221(2) of the Magistrates' Courts Act*** was to forward the matter to the High Court for further directions, but not to order a retrial in absence of a formal application, which I deal with below.

Indeed, no such procedure exists as was adopted by the Chief Magistrate and the lawyer, and in the circumstances one cannot resort to ***Article 126(2) (e) (supra***) which stipulates that it is applicable "subject to the law". In ***Utex Industries v. Attorney General, S.C.C.A No. 52 of 1995*** the expressed view is that ***Article 126(2)(supra)*** was not enacted to wipe out the rules of procedure, and that it is not a magic wand in the hands of erring parties. Also see ***Proline Soccer Academy v. Lawrence Mulindwa & 4 or's, HTC – CV – MA – 495 of 2009; Matovu & Or's v. Abacus Pharmacy (Africa) Ltd, HCT. No 11 of 2012***.

It would follow that even if the trial court had had the necessary jurisdiction, the reinstatement and retrial of a dismissed case without a formal application or order was a grossly irregular procedure, and the subsequent appeal in the first appellate court too was irregular and its orders illegal. As held in ***Makula International Ltd v. His Eminence Cardinal Nsubuga & A' nor (supra); Kisugu Quarries v. Administrator General (supra)*** a court of law would not allow an illegality that escaped the eyes of the trial court to cause undesirable consequences; and that a court cannot sanction what is illegal, and an illegality once brought to the attention of the court overrides all questions of pleadings or all matter pertaining thereto.

The net effect is that the two grounds of appeal succeed. The discussion of foregone grounds also disposes of *Ground No.4.* The appeal is allowed with costs in both lower courts and in this court to the Appellant.

BASHAIJA K. ANDREW

JUDGE

12/12/12