THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF JINJA HOLDEN AT JINJA

HCT-03-CV-RC-003-2022

(ARISING FROM FAMILY CAUSE NO.16 OF 2021)

1. **TALISOBOLA GODFREY**
2. **NANDOLO IRENE::APPLICANTS**

VERSUS

NABIRYE ROSE:::RESPONDENT

Revision Cause: *-*
Held: *Application Granted with Orders set forth in this Ruling.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

RULING

This Ruling follows an Application filed by Notice of Motion under **(Section 83 of the Civil Procedure Act Cap 71 (CPA), Section 17 of the Judicature Act Cap 13 and Order 52 R 1 & 3 of the Civil Procedure Rules SI 71-1 (CPR)** seeking the following orders:-

1. That the Protection Order against the Applicants from using or approaching the Applicants' home be revised, set aside and or reversed.
2. Costs of this application be provided for.

The Grounds upon which this Application is based are that:-

1. The trial Magistrate illegally and wrongfully exercised her jurisdiction when she granted a Protection Order against the Applicants from using or approaching their home, which was not a contention in **FC No. 16 of 2013**.
2. The applicants reside in the suit property which their matrimonial home and it is where they live with their 5 children.
3. The order of the Magistrate if not challenged would cause irreparable damage to the Applicants who are likely to lose their family house.
4. It is in interest of justice and equity that this Honourable court be pleased to grant this Application and the orders sought.

It is supported by the affidavits of the two Applicants which basically reiterated the above grounds in broader details.

In reply, the Respondent denied the allegations and averred that;

1. She started cohabiting with the 1st Applicant since the year 2001 and they produced four children.

2. The 1st Applicant started laying lame excuses against her that she was smelling and she was not fit to be his wife to get rid of her from the homestead where they lived and he consequently deserted her.

3. Her father Sepiriano Waiswa provided land which they cultivated with the 1st Applicant and grew sugar cane and other food crops together and built houses together.

4. She filed **Family Cause No. 16 of 2013** against the 1st Applicant seeking maintenance for their four children and a declaration that the house she was living in is a matrimonial home.

5. She jointly contributed to the construction of both the residential and commercial structures with the 1st Applicant.

6. The then Magistrate Her Worship Nvanungi Sylvia paid a visit at the locus and found her residing in the contentious commercial house with rentals as per her ruling.

7. A Maintenance Order was granted directing the 1st Applicant to provide maintenance for their four children.

8. Her Worship Nvanungi Sylvia found the accommodation suitable for her and the children as such she did not make any mention of it in her ruling.

9. The commercial house and the pit latrine is out of her effort of cultivating her father's land which the 1st and 2nd Applicants want to disentitle her from using.

10. The 1st Applicant is in the habit of destroying the home pit latrine, throwing dry cells on the rooves of the house she resides in with her children with the intention of causing them to leak and spraying herbicides on the crops she grows to sustain her children.

11. The grant of the Protection Order by Her Worship Nakato Josephine Dembe was granted for the general welfare of the children namely; Nantego Joshua, Talisobola Sam, Magoola Emma and Nakisige Doreen because they were entitled to a decent shelter; and because the Applicants were acting in contempt of the court order which was previously granted by Her Worship Nvanungi Sylvia.

13. Her Worship Nakato Josephine Dembe was justified in granting the Protective Order for purposes of ensuring that her occupation of the commercial

house together with her children which her predecessor Her Worship Nvanungi Sylvia granted is not tampered with both applicants.

14. The welfare of her children cannot be enjoyed in the absence of decent shelter; and she has been using the commercial house to operate a small business and sell pancakes the proceeds which she uses to look after her children and relocating will adversely affect her business.

16. The Applicants are threatening to evict her and her children from the commercial house and as such she prays that the Protective Order be maintained.

17. She constructed a pit latrine out of her efforts which the 1st Applicant had failed to construct in total disregard of the court order granted by Her Worship Nvanungi Sylvia.

18. The 1st Applicant is the habit of disobeying orders of Local Authorities Courts of law.

19. The 1st and 2nd applicants were served with court documents relating the Application for the Protective Order but he did not bother to file appropriate responses for reasons best known to him.

20. The court could not operate at the convenience of the 1st and 2nd Applicants and court was justified to proceed with the hearing the Application exparte and court could not be faulted.

21. The 2nd Applicant having parted ways with the 1st Applicant close to twenty three years ago was brought back by the 1st Applicant to claim ownership of the commercial house yet the 2nd Applicant never contributed towards its construction.

22. The Applicants refused to abide by the Protective Order which Her Worship Nakato Josephine Dembe had granted accordingly the trial Magistrate was justified to order the arrest of both Applicants because they were acting in contempt of an existing court order.

23. The Applicants being dissatisfied with the Ruling of Court, did not bother to take appropriate legal steps in time to challenge the same, but instead chose to disobey the same.

24. The 1st Applicant instead of handing over the house to her officially chose to connive with his senior wife a one Nantale Monica and constructively evicted tenants in the said house on which she partially contributed money towards its construction depriving her and the children rent from the said house.

25. The 2nd Applicant was brought in the said house with the intention of depriving her the commercial house.

26. In the event the above Application is granted, she will suffer undue hardship which will affect the welfare of her children as she has no alternative source of livelihood and accommodation for them; and that it's fair, just and equitable that the application be dismissed with costs.

BACKGROUND

The brief background according to learned counsel for the Applicants are that the Respondent in 2013 filed **Family Cause No. 16 of 2013** against the 1st Applicant seeking maintenance for the four children she begot with the Applicant and a declaration that the house she was living in was a matrimonial home; and on the 18th day of August, 2014, a Maintenance Order was granted in favor of the Applicant (now Respondent). The Respondent (now the Applicant) was ordered to maintain his children by paying Ugx 100,000/= per month. On the 24th day of September, 2020, a Protection Order was also granted in the favor of the Applicant (now Respondent).

The Respondent filed **Family Cause No. 16 of 2014** against the 1st Applicant in the Chief Magistrate's Court of lganga Holden at Iganga seeking orders for maintenance of the children she begot with the 1st Applicant. That in compliance of the Maintenance Order, the 1st Applicant handed over four rooms from his commercial house to the Respondent which she would collect rent from to be used for maintenance of the children; and the 1st Applicant remained with his matrimonial house which is located behind the commercial house.

That on the 24th day of September, 2020, Her Worship Nakato Josephine Ddembe issued an order in **FC No. 16 of 2013** granting a protection order against the Respondent in favour of the Applicant. She also issued an order stopping the 1" Applicant from using the Respondent's home or approaching the premises of the Respondent.

Following the Magistrate's order, the Applicants were evicted from their matrimonial home claiming the same as premises of the Respondent. Consequentially, the Applicants filed this Revision Cause before this Honorable Court seeking orders revising the decision of the Magistrate which was issued on the 24th day of September, 2020.

In reply, learned counsel for the Respondent presented their brief background that the Respondent in 2013 filed **Family Cause No. 16 of 2013** against the first Applicant seeking maintenance for the four children she begot with the

Applicant and a declaration that the house she was living in was a Matrimonial home; and on the 18th day of August 2014, a Maintenance Order was granted in favour of the Applicant now Respondent.

The Respondent now the Applicant was ordered to maintain his children by paying Ugx 100,000/= on 25th day of September 2020 a Protection Order was also granted in favour of the Applicant (now Respondent).

REPRESENTATION

When this matter came for hearing before me, the Applicants were represented by learned counsel Mr. Naita Julius of M/S. Naita & Co Advocates, while the respondent was represented by M/S. Uganda Network on Law Ethics & HIV/AIDS. Both parties were directed to file written submissions, they complied and I have taken them into account in this ruling.

THE LAW

According to **Black's Law Dictionary (9th Edition),** revision is defined as:-

"A re-examination or careful review for correction or improvement or an altered version of work."

S.83 of the Civil Procedure Act Cap 71 reads that: -

"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that court appears to have—

a. *Exercised a jurisdiction not vested in it in law;*
b. *Failed to exercise a jurisdiction so vested; or*
c. *Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit; but no such power of revision shall be exercised—*
d. *Unless the parties shall first be given the opportunity of being heard; or*
e. *Where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person".*

On the other hand, **Section 17 of the Judicature Act Cap 13** provides that:-

*"**Supervision of Magistrates Courts***

1) *The High Court shall exercise general powers of supervision over magistrates' courts.*

2) *With regard to its own procedures and those of the magistrates' courts, the High Court shall exercise its inherent powers-*

a) *To prevent abuse of process of the court by curtailing delays, in trials and delivery of judgements including the power to limit and discontinue delayed prosecutions;*
b) *To make orders for expeditious trials; and*
c) *To ensure that substantive justice shall be administered without undue regard to technicalities."*

And **Order 52 rule 1 & 3 CPR** provides for the procedure that court must follow in dealing with Applications of this nature.

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable, I will now turn to the substantive matters as raised in this case.

RESOLUTION OF THE APPLICATION

It was submitted by learned counsel for the Applicants that the Revision jurisdiction of the High Court is established by **Section 83 of the Civil Procedure Act** *(supra)* which he cited verbatim. They relied on the case of ***Hitila vs. Uganda (1969) 1 E.A. 219*****,** where the Court of Appeal of Uganda held that;

"In exercising its power of revision, the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred."

They argued that having established the law relating to the power of revision, it is therefore incumbent upon the applicants to prove that the Trial Magistrate exercised a jurisdiction not vested or that she exercised the jurisdiction vested in her illegally or with material irregularity and or that she failed to exercise the jurisdiction rightfully vested in her.

That at paragraph 11 of the Affidavit in support deposed by the 1st Applicant, he deposed that the Trial Magistrate exercised the jurisdiction vested in her irregularly when she issued a Protection Order against the 1st Applicant without even granting him an opportunity to be heard. Under paragraph 13 of his affidavit in support of the application, the Respondent never filed any application arising from **F.C. No. 16 of 2013,** not even an application for execution of the orders therein and that he does not know the basis of the orders issued against him by the Trial Magistrate.

They submitted that our justice system is built on the *"Audi Alterem Partem'* rule, which simply translated means that no man should be condemned unheard or both sides must be heard before passing an order. This is one of the principles of Natural Justice. Lord De Smith in the case of ***Maneka Gandhí vs. Union of India (1615) 11 Co. Rep 93 b: 8 Digest 218,*** when he stated that: *"no proposition can be more clearly established than that a man can not incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the case against him. A party is not to suffer in person or in purse without an opportunity of being heard."*

Further, that it is on the basis of this very principle that **Article 42 of the Constitution of the Republic of Uganda** is coined. It provides for the right to a fair hearing, but a fair hearing cannot be expected where a person has been denied an opportunity to be heard. That in the case of ***Mpungu & Sons Ltd vs. Attorney General (Civil Appeal No. 17 of 2001) 2006 UGSC 15***, the learned Justices of the Supreme Court found as follows: - *"I agree that the Audi Alteram Partem rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural justice that no man should be condemned unheard."*

That the *Audi Alteram Partem* principle demands that before any action is taken in a case, the affected party is given notice of the complaint against him because a person cannot know the complaint against him without being given notice. That the notice should include the time, place and date of hearing, jurisdiction under which the case is filed, the charges and proposed action against the person.

That the second ingredient of the *Audi Alteram Partem* principle is the rule of hearing which is to the effect that if an order is passed by the authority without providing the reasonable opportunity of being heard to the person affected by it adversely will be invalid and must be set aside.

That failure to give one a chance to be heard violates the *Audi Alteram Partem* rule which renders any decision or order given thereafter a nullity; and relied on the case of ***Marko Matovu & Anor vs. Muhammed Seviri & Anor 1979 HCB 174.***

That in the instant case, according to **Annexure A** to the Affidavit in support deposed by the 2nd Applicant, Nandolo Irene, specifically paragraph 2 of the Order dated 12th day of January 2022 in ***Misc. Application No. 154 of 2021 (Arising from F.C. No. 16 of 2013)***, it states that *"the Chairperson wrote to the*

Court informing Court that the 1st Applicant had brought the 2nd Applicant into the house, yet she had left a long time ago".

That the lower Court record doesn't bear any application which was filed by the Respondent seeking any order upon which the Trial Magistrate could have been moved to grant the orders that she granted.

They therefore submitted that in absence of any application by the Respondent on the lower Court record, it is safe to say that the Trial Magistrate was moved by the letter of the Chairperson as stated in the order dated 12th of January, 2022 to grant the Protection Order that was issued in the Order dated 24th day of September, 2020. That based on the letter written by the Chairperson, the Trial Magistrate reopened **F.C. No. 16 of 2013** which was concluded in 2013 and orders granted in the same year **(Ruling annexed as Annexure B).**

Further, that the Trial Magistrate reopened the case and issued new Orders and in so doing, she exercised her jurisdiction irregularly and illegally as the Court became **functus officio** as far as **F.C. No. 16 of 2013** is concerned when the ruling was delivered in 2013; and the only way the case could have been reopened is by application for review which wasn't the issue in this case.

In addition, the Trial Magistrate issued the said Order without issuing any Notice to the Applicants and without giving them an opportunity to be heard which was in violation of the *Audi Alteram Partem* rule; and as such any Order that was granted therein is invalid. That even though the Trial Magistrate was vested with the jurisdiction to grant the Protection Order, the procedure she undertook to issue the same went against everything that our Judicial System stands for.

That in this particular instance, the end does not justify the means because in our jurisdiction, the means by which the end is reached actually matters. They stood with the agreement that the Judicial System should be seen to be powerful and effective lest people start to doubt or even question why they should trust a system that is ineffective and powerful. More important still, is the fact that people need to trust that they are protected by the same legal system whose power we seek to protect, they need to have the confidence that they would at least be afforded an opportunity to be heard and their voice or evidence considered before their fate sealed by the Judicial Officer.

Further, that the Judicial Officers wield a lot of power as with a stroke of a pen, they can seal the fate of a man, his property, his livelihood, his entire existence; and for that very reason, the legislators deemed it necessary to put laws in place to ensure that as much power as the Judicial Officers wield, the same ought not to be abused but rather exercised judiciously. That it is abhorring to think of a

world where a man is condemned to incarceration and his right of liberty taken away based on a letter of the L.C.1 who was not even a party to the suit, was not even called in to verify the contents of his letter but the Magistrate took it as gospel truth and granted orders against the Applicants. Worse still, is the fact that all this done without bringing the same to the attention of the Applicants and yet they are the ones who suffered as a result of the Trial Magistrate's actions. That they cannot put it in better words than the words of Lord De Smith, *"a man's liberty should not be taken away by judicial proceeding without being given a chance to be heard".*

They concluded that the Trial Magistrate's orders not only costed the Applicants their liberty but also costed them their matrimonial home, she also illegally and irregularly exercised the jurisdiction vested in her. They prayed that her orders be set aside with costs to the Applicants.

In reply, it was submitted by learned counsel for the Respondent that in the case of ***Sentamu Jamilu and 2 Others vs. Sekatawa (Civil Revision 21 of 2018)*** , court stated that **S.83 of the Civil Procedure Act** applies to jurisdiction alone, the irregular exercise or non-exercise of it, or illegal assumption of it. That this section is not directed against conclusion of the law or fact in question of jurisdiction is not involved and according to the case of ***Amir Khan vs. Sheo Baksh Singh (1885) 11 CA 16 A 237***, it was settled that *"where a court has jurisdiction to determine a question, it cannot be said that acted illegally or material irregularity because it has come to erroneous decision on the question of fact or even law".*

That Domestic Violence as defined under **S.2 of the Domestic Violence Act** is *"an act or omission of a perpetrator which, inter alia, harms, injures or endangers the health, safety, life, limb or wellbeing, whether mental or physical, of the victim or tends to do so and includes causing physical abuse, sexual abuse, emotional, verbal and psychological abuse and economic abuse".*

That the Respondent in her Affidavit in reply in **Civil Revision No.03 of 2022** under Paragraph 12-clearly proves the violent acts of the 1st Applicant towards the Respondent and her children as provided under the law, thus warranting Protection. They relied on **Section 2 of the Domestic Violence Act** which states that *"court means a magistrate's court, local Council court or a family and children court.*

S. 9(1) and (2) and S.10(1) *provide for jurisdiction in matters of domestic violence and in the issuance of protection orders to the effect that such matters and applications may be heard and determined by the Magistrates Court.*

S. 17(1) and (2) *provides for the jurisdiction of the family and children court and states that a family and children court may hear and determine a matter of domestic violence, whether or not it involves a child and may also issue a protection order.*

That the Family and Children Court under ***S.13 (2) of the Children Act*** is *"one presided over by a magistrate, not below the grade of Grade II Magistrate".*

They submitted that from the above provisions, it is clear that matters of domestic violence and applications for Protection Orders as in the instant case are supposed to be heard and determined by the Magistrates Court. That the Trial Magistrate in granting the Protection Order did so within her jurisdiction' the Respondents (now the Applicants) after the Ruling in 2014 created a hostile environment to the Respondent and her children thereby inflicting psychological violence to the Respondent and her children. That Paragraphs 12-16 of the Respondents' affidavit, clearly justifies the grant of Protection Order against Applicants, consequently, the Trial Magistrate was vested with the jurisdiction to grant the Protection Order.

That it is therefore in the best interest of the Respondent and her children; and they prayed that this Honorable Court finds it fit and proper and the application is dismissed with costs to the Applicants because if the application is granted the Respondent will suffer undue hardship which will affect the welfare of the children as the Respondent does not have any source of livelihood and accommodation for the children in her custody. That at Paragraph 21 and 22 of the Respondent's affidavit, all efforts were made to ensure the Applicants are served with court documents for the Protection Order, but the applicants adamantly ignored to file a response.

That under **Order 9 Rule 11(2) of the Civil Procedure Rules SI-71-1**, a plaintiff is allowed to set down the suit for hearing exparte, where the defendant fails to file his or her defense within the required time.

That in this case, the Applicants adamantly failed to file their Reply and or to respond by appearance when were served with the court documents and neither is there any application on record for extension of time within which to file the same. They relied on the case of ***Proline Soccer Academy vs Lawrence Mulindwa & Others (HCMA NO.459/2009)*** where His Lordship Justice Yorokamu Bamwine observed that; *"in serving summons, what is important is achieving the purpose, which is informing the Applicants of the allegations against him under Paragraph 20 of the Respondent's affidavit in Reply, the first Applicant has the habit of disobeying orders of local authorities and courts of law."*

They therefore submitted that since the Applicants were served court documents relating to the Protection Order as stated in Paragraph 21 and 22 of the Respondent's affidavit, they willfully ignored the Summons and deliberately refused to appear on the day fixed for the hearing as it is his habit of disobeying both local authorities and court orders. Consequently, the Trial Magistrate rightly proceeded and heard the case ex parte under **Order 9 Rules 10 & 11 of the Civil Procedure Rules**.

That in light of the above, they prayed that this Honorable Court finds it just and equitable to maintain the Protection Orders against the Applicants as the accommodation/shelter for the children should be of paramount consideration in every court decision.

I have carefully examined the application, the supporting affidavits as availed to me and the Affidavit in Reply by the Respondent. I have also taken into account the law and the written submissions of both learned counsel as captured in this Ruling.

The current application is for Revision and the major objective, purpose and import of **Section 83 of the Civil Procedure Act Cap 71 (supra)** is to deter Magistrate Courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It vests the High Court with authority and power to ensure that the proceedings of the Magistrate Courts are conducted in accordance with the law, within the bounds of their jurisdiction and in furtherance of justice.

Further, under **Section 17 (1) of the Judicature Act**, the High Court is vested with supervisory powers over Magistrates Courts and this power enables the High court, when necessary, to correct errors of jurisdiction committed by subordinate courts and provides means to an aggrieved party to obtain rectification of orders entered without jurisdiction and have occasioned injustice to them.

In ***D.L.F Housing and Construction Co. Ltd vs Sarup Singh (1996) 3 SCC 807: AIR (1971) SC 2324***, the Supreme Court observed that; *"The words illegally and with material irregularity as used in this clause do not cover either errors of fact or of law; they do not relate to the decision arrived at, but rather the manner in which it's reached. The errors contemplated in this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate, and not to errors either of fact or law, after the prescribed formalities have been complied with."*

Relating the above to this matter, I have carefully analyzed and examined the manner in which the Protection Order awarded by the Trial Magistrate Her Worship Nakato Josephine Dembe which is the subject of this Revision was entered into wherein she issued a Protection Order against the Applicants stopping them from using anything connected to the Respondent's alleged home or approaching the premises of the Respondent in which she resided with her children.

I'm also alive to the law that a decision from the Magistrate's Court is only revised where the trial Magistrate fails to exercise his or her Jurisdiction or where he or she acts illegally or with material irregularity or injustice.

In the first place, I have taken time to analyze all the records related to this case. I have found that the learned trial Magistrate Grade 1 Her Worship Nakato Josephine Dembe did not base her decision to grant a Protection Order against the two Applicants on consideration of a Social Report prepared by the Social Welfare Officer; indeed a careful examination of the record reveals that this is lacking.

It is not disputed that the matter was first handled by Her Worship Sylvia Nvanungi in **Family Cause No. 16 of 2013** brought by the Respondent against the 1st Applicant seeking maintenance for the four children she begot with the Applicant and a declaration that the house she was living in was a matrimonial home. On the 18th day of August, 2014, a Maintenance Order was granted in favor of the Respondent and the 1st Applicant was ordered to maintain his children by paying Ugx 100,000/= per month.

It is also not disputed that in compliance of the above stated Maintenance Order, the 1st Applicant handed over four rooms from his commercial house to the Respondent from which she would collect rent to be used for maintenance of the children; and that the 1st Applicant remained with his residential house which is located behind the commercial house.

The matter was later reopened on the 24th day of September 2020 before Her Worship Nakato Josephine Ddembe in **Miscellaneous Application No. 158 of 2023** who issued a Protection Order against the Applicants in favour of Respondent stopping the 1st Applicant from using what she referred to as the Respondent's home or approaching the premises of the Respondent. These Orders are the subject of this Revision.

Following the orders of Her Worship Nakato Josephine Ddembe, the 1st Applicant who had brought back his first wife the 2nd Applicant were evicted from the residential house they were occupying claiming the same as premises of the

Respondent; and as a result, both were also thrown into Civil Prison allegedly for contempt of Court Orders.

The decision to keep the two Applicants in Civil Prison was overturned by this Honorable Court in **Miscellaneous Application No. 038/2022** after finding that it was unjustified and arrived at in a manner that did not comply with the law.

In resolving the current Application and after a careful analysis of the facts before me, I have found that the Respondent with her counsel disguised the Orders earlier granted by Her Worship Sylvia Nvanungi in **Family Cause No. 16 of 2013** and invoked the provisions under the **Domestic Violence Act 2010** which was not in any way the subject of the original suit **FC No. 16 of 2013**. While learned counsel for the Respondent in her written submissions put up spirited arguments based on the **Domestic Violence Act 2010**, it is clear that this was done in error and was used to divert court from the real issues that were heard and resolved by a court of the same jurisdiction in **FC No. 16 of 2013**.

To me, this was an error amounting to a breach of a material provision of law or to material defects of procedure affecting the ultimate decision. While I agree that **Section 207 (2) of the Magistrates Courts (Amendment) Act** provides for the jurisdiction of Magistrate presiding over Magistrates' Courts for the trial and determination of causes and matters of a civil nature and a Magistrate Grade 1 shall have jurisdiction where the value of the subject matter does not exceed twenty million shillings, in this case, the importation of **the Domestic Violence Act 2010** in a matter which had already been heard and resolved in 2014 without filing a fresh application was in error.

Secondly, as submitted by learned counsel for the Applicants, the matter is barred by *res judicata*. **Section 7 of CPA** provides that :-(This is our Finding, not for Counsel)

> "*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.*"

To determine the perimeters envisaged under **S.7 CPA** above, I have relied on the case ***Posiyano Semakula vs Susane Magala [1979] HCB 90*** where the Court of Appeal held inter alia that:-

> "*In determining whether or not a suit is barred by res judicata the test is whether the plaintiff in the second suit is trying to bring before the court in another was in the form of a new cause of action a transaction which has already been presented before Court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively the plea of res jidicata will then not only apply to all issues upon which the first court was called upon to adjudicate but also to every issue which properly belonged to the subject of litigation and which might have been raised at the time through the exercise of due diligence by the parties".*

In my analysis, once the court determined the issue of maintenance order between the Applicant and Respondent, the Her Worship Nakato Ddembe had no power to recall it. The principle is that once the court has sat in a matter and made a decision, it is functus officio and cannot revisit it. That the Learned Trial Magistrate Her Worship Nakato Ddembe couldn't approbate and reprobate.

In ***Chandler Vs Alberta Association of Architects [1989] 2 SCR 484*** *the facts* were that the tribunal took a decision in the matter after conducting a hearing. It levied fines, imposed suspensions and ordered the firm of architects to pay costs.

The aggrieved parties appealed against the findings and sanctions. The appeal was allowed.

Then the trial Board notified the appellants that it intended to continue the original hearing to consider certain matters.

The intended fresh proceedings were successfully challenged. The reason for this was that:

"*As a general rule, once such a tribunal has reached a final decision in respect of the matter that is before court in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within its jurisdiction or because there has been a change in circumstances. It can only do so if authorised by statute or if there has been a slip or error....*"

I entirely agree with the above decision. In the instant case a final decision was reached of maintenance of the 1st Applicant to the children he begot with the Respondent. The respondents have just embarked on a process to resolve that issue. The above case is on all fours with the instant case.

The import of the above decision in relation to this matter is that the Trial Magistrate Her Worship Nakato Josephine did not exercise all due diligence to ensure that before she granted the Protection Order, there was a proper

Application filed before her and that all issues properly belonged to the subject of litigation. Instead in this case, it is clear that she reopened a matter **Family Cause No. 16 of 2013**, which had come before her predecessor seeking Maintenance Orders in respect of the four children whom the 1st Applicant had with the Respondent.

That matter as per the record had already been heard and resolved by Her Worship Sylvia Nvanungi on the 18th day of August 2014, whereby a Maintenance Order was granted in favor of the Respondent and the 1st Applicant was ordered to maintain his children by paying Ugx 100,000/= per month.

Since the Respondent in this case did not have issues of protection in the maintenance proceedings this could not be entertained over 9 years after; and indeed it is my finding that she was barred by *res judicata* to resurrect the matter in 2022.

Following up on that, after reevaluating the evidence in this matter, it is clear from the record under paragraph 13 of his affidavit in support of the application as availed to me that the Respondent never filed any application arising from **F.C. No. 16 of 2013;** and as rightly submitted by learned counsel for the Applicants, the Respondent also never filed any application for execution of the Maintenance Orders she was granted in **F.C. No. 16 of 2013**.

Instead, the uncontested facts reveal that there seems to have been a degree of compliance of those orders by the 1st Applicant. The record of **Family Cause No. 16 of 2013** as availed to me that issues of Domestic Violence were not part of that case, and as such, by smuggling in orders that could only rightfully be granted under the **Domestic Violence Act 2010** in a matter that was already closed. It is not in dispute that the orders of Her Worship Nvanungi were issued on 18th March 2014, so, by reopening the case in a disguised manner and issuing orders thereunder on 24th September 2020, the learned Trial Magistrate Grade exercised jurisdiction that was not vested in her.

Secondly, the *Audi Alteram Partem* rule is a cardinal rule in our administrative law; and in this case, the fact that the Applicants were condemned by the learned Trial Magistrate unheard before passing an order was a violation of their Constitution rights to be heard as provided under **Article 42 of the Constitution of the Republic of Uganda** and the cases of ***Maneka Gandhí vs. Union of India (supra)*** and ***Mpungu & Sons Ltd vs. Attorney General (supra)*** relied upon by learned counsel for the Applicants are applicable.

It clear that the learned Trial Magistrate Her Worship Nakato Josephine Ddembe who issued the Protection Orders exercised powers of Revision of a decision of a

Magistrate of the same jurisdiction Her Worship Nvanungi which were not within her jurisdiction thereby offending the provisions of **S.83 (a) of the Civil Procedure Act Cap 71 (supra).**

It is also apparent having found that the learned Trial Magistrate based her decision to grant the Protection Orders without recourse to a proper application before her and without a Social Inquiry Report as is required by law, this means that she based her decision on her own whims and on non-existent evidence.

It is therefore my finding that her decision can rightfully be a subject of Revision.

The above means that the Protection Orders passed against the Applicants without providing the reasonable opportunity of being heard to the person affected by it adversely are a nullity and are invalid and must be set aside.

That failure to give one a chance to be heard violates the *Audi Alteram Partem* rule which renders any decision or order given thereafter a nullity; and relied on the case of ***Marko Matovu & Anor vs. Muhammed Seviri & Anor 1979 HCB 174.***

I also agree with learned counsel for the Applicants that while there is reference to **Misc. Application No. 154 of 2021 (Arising from F.C. No. 16 of 2013)**, according to **Annexure A** to the Affidavit in support deposed by the 2nd Applicant, Nandolo Irene, the lower Court record as availed to me doesn't bear any application which was filed by the Respondent seeking any order upon which the Trial Magistrate could have been moved to grant the orders that she granted. It is also clear that the L.C.1 who was not even a party to the suit and a close scrutiny of his letter seems to be addressing issues of ownership of the property as opposed to the subject matter in **Family Cause No. 16 of 2013.**

It is therefore my finding that the letter of the Chairperson as stated in the order dated 12th of January, 2022 to grant the Protection Order that was issued in the Order dated 24th day of September, 2020 could not be a basis for the Trial Magistrate to reopen **F.C. No. 16 of 2014** which was concluded in 2014 and orders granted in the same year **as per the Ruling annexed as Annexure B).**

I therefore agree that the Magistrate Grade 1 Court was already **functus officio** as far as **F.C. No. 16 of 2013** is concerned when the ruling was delivered in 2014; and the only way the case could have been reopened is by application for review which wasn't the issue in this case.

Since it is clear that the matter was first handled by Her Worship Nvanungi Sylvia in **Family Cause No. 16 of 2013**, it is my finding and decision that the Orders she gave be retained whereby she granted a Maintenance Order in favor

of the Respondent and the 1st Applicant was ordered to maintain his children by paying Ugx 100,000/=.

Secondly, in view of the fact that the 1st Applicant was in compliance of the Maintenance Order and had handed over four rooms from his commercial house to the Respondent which she would collect rent from to be used for maintenance of the children, this is the order that can be executed by the Respondent.

Thirdly, since the Maintenance Order allowed the 1st Applicant to remain with his matrimonial house which is located behind the commercial house, this should also be maintained; and this means that the Applicants are free to occupy the residential house in question since this order has not been appealed against or reversed on appeal.

Fourthly, the Order provided for an alternative toilet to be constructed by the 1st Applicant to be used by the Respondent and her children; this if not already complied with, the Respondent is free to seek execution of the same.

Finally, it is now well-established law that costs generally follow the event. *See* **section 27 Civil Procedure Act** and the cases of ***Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC) and Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35***. Indeed, in the case of ***Sutherland vs. Canada (Attorney General) 2008 BCCA 27*** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a *'reasonable expectation'* of obtaining an order for costs.

In this case, having found that the matter involves closely related parties who have children to fend for, I will desist from granting any costs in this case in the spirit of **Article 126 (2) (d) of the Constitution of the Republic of Uganda** and instead order that each party bears its own costs.

My decision is that: -

1. All the grounds of the Application Succeed.
2. The Protection Order against the applicants from using or approaching the Applicants' home be revised set aside.

I SO ORDER

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
11/10/2023

This Ruling shall be delivered by the Honorable Magistrate Grade 1 attached to the Chambers of the Senior Resident Judge Jinja who shall also explain the right to seek leave of appeal against this Ruling to the Court of Appeal of Uganda.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
11/10/2023

OBITER DICTUM

It is advised that if the Respondent in this case feels in any way threatened by the Applicants in this case, she is free to file a proper case in a competent Court which can be heard on its own merits.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
11/10/2023