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

REVISION APPLICATION NO. 21 OF 2012
(Arising from Misc. Application No. 003 of 2012 and Misc. Application No. 002/2012) (All arising from CS No. 002/2012 Nakasongola Chief Magistrates Court)

1. **GATSINZI EDWARD**
2. **KAKWIYE DAVID** **::::::::::::::: APPLICANTS**

VERSUS

1. **KABANDA SAM MBWANA**
2. **KALENGERA FRED** **::::::::::::: RESPONDENTS**
3. **FLORENCE MUTESI**

RULING BY HON. MR. JUSTICE MURANGIRA JOSEPH

1. Introduction

1.1 The applicants through their lawyers M/s Okokel Opolot & Co. Advocates brought this application against the three (3) respondents jointly or/and severally by Notice of Motion under Section 33 of the Judicature Act, Cap.13 Sections 83 and 98 of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 and 3 of the Civil Procedure Rules, S.I 71-1 seeking the following orders; that:-

a) **The Court revises the lower Courts orders in Misc. Application No. 003 of 2012 and makes such orders as it thinks fit.**

b) **That the lower court acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.**

c) **Costs of the application be provided for.**

This application is supported by an affidavit that was sworn by the 1st applicant. The said affidavit contains the detailed grounds of this application; briefly they are, that:-

1. That the trial magistrate granted an application under Order 41 rule (2) and (3) of the Civil Procedure Rules made orally and without evidence being led.

2. That the trial magistrate granted an interim order over the entire land of the applicant yet the plaint is premised on a kibanja interest.

3. That the trial magistrate ordered the applicant who was sick and on drip to pay security for costs even after he proved to Court his condition and the fact that his lawyer was involved in an accident and could not appear for the hearing.

4. That it is just and equitable that the orders against the applicants be revised to avoid a miscarriage of justice which shall be occasioned to the applicants if the orders of the respondents are executed.

1.2 The respondents through their lawyers M/s Ochieng, Harimwomugasha & Co. Advocates filed an affidavit in reply to this application sworn by the 1st respondent. In that affidavit in reply, the

respondents vehemently opposed this application. They prayed for its dismissal with costs. In rebuttal, the applicants filed in Court an affidavit in rejoinder to this application. In effect, therefore, the matter is contentious as between the parties.

2 Facts of this application

The respondents filed a suit against the applicants seeking for a permanent injunction against the applicants on a Kibanja interest that they allegedly have on the Block 219 Plot 2 situate at Buruli belonging to the applicants/defendants. The respondents/plaintiffs subsequently filed applications for a temporary injunction and an interim order.

That the interim order was granted restraining the applicants/defendants from interfering with the quiet possession of the land by the respondents/plaintiffs. That the interim order covered the entire land on Block 219 Plot 2 whereas the plaintiffs interest on the land was only a Kibanja (suit land) and not the entire land.

That on the date of scheduling of the case, counsel for the applicants notified the 1st applicant that he would not be available for the scheduling of the case because he was involved in an accident. The 1st applicant who was hospitalized at Bunamwaya Medical Center at the time travelled to court and informed court about his counsel's problem and also his health condition and sought for an adjournment.

Though the trial magistrate symphasised with the 1st applicants condition and granted the adjournment, he punished the 1st applicant by asking him to pay cost to the respondents counsel.

That on the day of the hearing of the case, counsel for the respondents/plaintiffs made an oral application to court for the 1st applicant to pay security for allegedly disobeying the interim order that was earlier issued. The application was granted without any hearing of the allegations.

It's on that basis that the applicants, filed this application for Revision by way of Notice of Motion under sections 98 and 83 of the Civil Procedure Act (CPA) and O.52 r (1) and (3) of the Civil Procedure Rules (CPR). The orders sought to be revised were made by the learned Magistrate Grade 1 in Nakasongola in Misc. Application No. 003 of 2012.

The orders sought in this application are that:

(a) The Court revises the lower courts orders in Misc. Application No. 003 0f 2012 passed by His worship Okongo Japyem on the 14th day of February 2012.

(b) Costs of this application.

3.Issues for determination in this application

a) **Whether the lower Court acted in the exercise of its jurisdiction illegally or with material irregularity.**

b) **Whether the circumstances of the case justify a revision of the proceedings**.

4. Resolution of this application

Under S. 83 of the Civil Procedure Act, the High Court may call for the record of any case which has been determined under this Act by any magistrate 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 shall be exercised.**
d) **Unless, the parties shall first be given an opportunity to be heard;**
e) **Where, from lapse of time or other cause, the exercise of that power would have involve serious hardship to any person".**

In accordance with Section 83 (d) the parties were given the opportunity to be heard. The applicants and the respondents filed their respective submissions together with the authorities.

a. **Whether the trial magistrate acted in the exercise of his jurisdiction illegally or with material irregularity.**

Counsel for the applicants submitted that the interim order granted by the trial Magistrate was to restrain the applicants from interfering with the quiet enjoyment and utilization of the entire land comprised in Block 219 Plot 2 at Buruli by the plaintiffs and not the Kibanja. That this was a total violation of the 1st applicant's right to utilize his other land on which the plaintiff lay no claim.

Counsel for the applicants further submitted that the trial Magistrate acted illegally and with material irregularity and injustice when he granted an application under Order 41 rule 2 (3) of the Civil Procedure Rules made

orally and without evidence being led by the applicants or the respondent being given a chance to be heard. The applicant was not given a chance to explain or give his side of the story after having reported the respondent to the LCI chairman for cultivating on his other part of the land which was not part of the suit land.

To support his case, Counsel for the applicants cited and relied on the following cases:-

In the case of **Gagula Benefansio Versus Wakidaka Merabu, High Court Civil Appeal No.29 of 2006,** where a case was reinstated without a formal application being made despite the law providing for it, it was held that,

> **"Even if the trial court had had the necessary jurisdiction, the reinstatement and retrial of a dismissed case without a formal application being made was grossly irregular procedure.**

In the case of **Mpungu & Sons Ltd V attorney General and Anor. (Civil Appeal No. 17 of 2001) 2006 UGSC 15** where 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 above explained illegalities that warrant a revision of all the orders thereto. This is premised on the dictum of the case of **Makula International Ltd V His Eminence Cardinal Nsubuga & Anr CACA**

No.4 of 1987 quoted with approval in **the case of Kisugu QuarriesV The Administrator General SCCA No.10 of 1998,** to the effect:

> **"that 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 or all matters pertaining thereto".**

I further agree with the decision in the case of **Hitila v Uganda (1969) E.A 219,** 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.

4.2 In the case of **Matembe vs Yamulinga [1968] E.A 643**, Mustafa J held that: **" it will be observed that the section applies to jurisdiction alone, the irregular exercise or non exercise of it, or the illegal assumption of it. The Section is not directed against conclusions of the law or fact in which the question of jurisdiction is not involved".**

Counsel for the respondents contended that on that day set for hearing of the application for an interim order the 1st applicant informed Court that his lawyer was involved in an accident and was unable to attend Court. The respondents' advocate agreed with the 1st applicant prayer for an adjournment but prayed that court awards costs for the adjournment. The trial magistrate in her ruling considered the prayer as to costs for the adjournment and having regard to the 1st applicant's explanation for the adjournment, and the respondent's counsel's submission and prayer for costs on adjournment, decided that it was just that costs for the

adjournment were indeed warranted. My finding is that this should not be faulted on a ground of illegal exercise of jurisdiction since the law allowed for the same nor was there any illegal or unjust application of the said jurisdiction as it was based on valid grounds.

Counsel for the respondents further contended that on the day of the hearing he informed Court that the 1st applicant had continued to prevent the respondents and their workers from cultivating on the suit property. These actions amounted to contempt of Court. The applicants never denied having stopped the respondents and their workers from using the suit property. Counsel cited the cases of **The Doctor & Gamble Co. vs Kyole James Matsiko & 2 others JCMA No. 135 of 2012 also cited in Stan bic Bank (U) Ltd and Jcobsen Power Plant Ltd vs URA HCMA No. 42 of 2010 on contempt of Court. COUnsel also cited Hadkinson vs Hadkinson [1952] ALL ER 567, church vs Cremer (I Coop Temp Coff 342)**. Justice in this case was served by the trail Magistrate's Court see: **Bakaluba Mukasa vs Nambooze Betty Bakireke S.C Election petition Appeal No.4 of 2009**. Whereas the trial Magistrate made reference to Order 41 rule 2 (3) of the CPR, the order issued did not occasion any injustice to the applicants since an interim order of injunction was in place.

Counsel for the respondents still contended that the applicant's attempt to allege that the respondents claim of a kibanja was over a portion of Block 219 plot 2 land at Buruli is a blatant fallacy. Para 5 (a) (b) (c) and (d) of the plaint clearly show otherwise. They clearly show that the respondents' claim of kibanja is on land comprised in Buruli block 219 plot 2 and the same is reflected in paragraph 2 of the 1st respondent's affidavit in support of the application for a temporary injunction. It therefore beggars belief

that the applicants attempt to fault the interim order on a “non-existent hypothesized difference”.

4.4 The applicants’ Counsel cited Section 98 Civil Procedure Act and Section 33 Judicature Act in their Notice of Motion as some of the locus under which the application is brought. However since there is a specific law in respect to revision that is to say section 83 of the Civil Procedure Act the other laws will be disregarded. The emphasis in resolving the matters before this Court will be Section 83 CPA as set the procedure of revision by the High Court.

The applicants’ application is in respect to Section 83 (c) of the CPA and their grievance is that the trial Magistrate acted in the exercise of his jurisdiction illegally or with material irregularity. It is not in dispute that the trial Magistrate had no jurisdiction. What is in dispute is that he exercised his jurisdiction wrongly through some procedural or evidential defect. The procedure defects complained of by the 1st applicant in this case include:

(a) Granting of an interim order over the 1st applicants land yet the plaint is premised on the plaintiffs’ claim on a kibanja.

(b) Granting an application under Order 41 rule 2 (3) of CPR made orally and without evidence being led by the applicants or the respondents being given a chance to be heard.

(c) Subjecting the 1st applicant to costs to Counsel when he sought for an adjournment even when he was sick.

A clear view of the proceedings before the trial magistrate on 29/05/2012 when the suit came up for hearing Counsel for the plaintiffs/respondents moved Court under Order 17 rule 2 for costs occasioned by an adjournment. The 1st defendant/applicant prayed for an adjournment and sought to pay costs of 100,000/= to the plaintiffs' advocate. The plaintiffs' advocate however prayed for 800,000/= as costs. The trial magistrate held that:

> **"……. Costs are incidental to cases adjourned, expenses incurred which inevitable the costs of 800,000/= may be seen as on the upper side and costs of 100,000/= may be seen as on the lower side for the advocate who has travelled from Kampala to Nakasongola. This Court will award costs of Shs 250,000/= which should be paid on or before the next hearing date".**

From the above, the trial Magistrate under Section 98 CPA exercised his discretion judiciously by awarding costs under Order 17 rule 2 of CPR and Section 195 (1) (e) Magistrate Court Act 1970 as amended to 250,000/= which was reasonable. It was the 1st applicant who sought for an adjournment and to pay costs of 100,000/=. The trial Magistrate cannot as a result be condemned for awarding costs having exercised his discretion.

On 11//09/2012 when the matter came up for hearing before the trial magistrate counsel for the plaintiffs/respondents moved Court for the applicants to be found in contempt of Court and penalized under order 41 rule 2 CPR. Counsel for the applicants/defendants in his reply stated that it was the plaintiffs' in violation of the order and it was his prayer that they

stick to grazing but be as it may they should proceed and give evidence which was done by the plaintiffs. The trial magistrate in his ruling held that:

> **“ I have carefully considered the application and submissions of both learned counsel and find that it is true the interim order was intended to restrain the respondents, their servants, agents, employees and or any other persons claiming through …….utilisation of land….. I therefore find they are covered under the interim order. The 1st respondent by preventing the applicants and his workers from cultivation is in contravention of the interim order…. Following Order 41 rule 2 (3) of CPR, the 1st respondent is hereby ordered to give security for compliance with the court order for it’s duration…….”**

From the above, it shows that the applicants were given a right to be heard in respect to the disobedience of the Court orders which right was exercised by thier counsel. However, under order 41 rule 9 of CPR it provides that all applications under rules 1 and 2 in which the application in question falls shall be made by summons in chambers. The trial magistrate granted the oral application by the respondents which was in contravention with order 41 rule 9 of CPR. However the importance of chamber summons is to summon all parties to appear before a judicial officer who will hear them and give his decision. In the instant case though no chamber summons where filed by the respondent, all parties were heard by the trial magistrate and the principles of natural justice were followed. Counsel for the applicants should have raised this issue in the magistrate Court. Raising it under revision in this Court amounts to an afterthought

which will not be entertained. Counsel for the applicants should have pursued this issue through an appeal and not revision.

In the case of **Matemba vs Vamulinga (1968) EA 643; Mustafa J**. held that:

> **"It will be observed that the Section applicant to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The Section is not directed against conclusions of the law or fact in which the question of jurisdiction is not involved.**
>
> **2) that as regards alleged illegality or material irregularity urged by the applicant, according to the case of Amir Khan vs Sheo Bakish Singh (1885) II Cal. 6 I.A 237 a privy counsel case – it is settled that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to erroneous decision on a question of fact or even of law".**

In the matter before this Court the trial magistrate acted within his jurisdiction is deciding Misc. Application No. 003 of 2012. The issue of the trial Magistrate hearing the application orally yet it was supposed to be formal (Chamber summons) and basing his decision on it is no reason for this Court to revise the orders as noted in the case of **Matemba vs Yamulinga (supra).**

5. Conclusion

From my analysis and evaluation of the affidavits evidence adduced by both parties and in consideration of the submission by Counsel for the parties, there is no way how this Court can fault the trial magistrate on issues complained of by the applicants. The trial magistrate did whatever he did in his ruling within the law.

Consequent to the above, the applicants failed to prove to this Court that the orders made by the trial magistrate occasioned miscarriage of justice against the applicants. The applicants must obey the said interim order and orders that were issued by the trial Court pending the hearing of the main application of a temporary injunction.

In the result and for the reasons in this ruling, this revision application no. 21 of 2012 has no merit. It is accordingly dismissed with costs to the respondents.

Dated at Kampala this 21st day of June, 2013.

sgd
Murangira Joseph
Judge