

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0015 OF 2015

(Arising out of the Orders of the Magistrate Grade One at Adjumani given on 20th March 2015 in C.S. No. 0001 of 2012)

LONSUK EDWARD..... APPLICANT

VERSUS

OPIRA THOMAS MAWADRI RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This application arises from the orders of His Worship Kitiyo Patrick, Magistrate Grade One of Adjumani, in civil suit No. 0001 of 2012, given on 23rd April 2012, by which he dismissed the suit with costs for want of prosecution under O.17 r 5 of the *Civil Procedure Rules*. In the resultant decree dated 18th July 2014, the court further ordered thus; “the land is hereby decreed to the defendant.”

The applicant seeks a revision of that decision and orders for; setting aside the decision, a declaration that the applicant is the owner of the land, a permanent injunction against the respondent and in the alternative, a fresh suit to be instituted for the determination of the ownership of the suit land. These orders are sought on grounds that in making the impugned orders, the court below acted in exercise of its jurisdiction with illegality and material irregularity, that the application was instituted without unreasonable delay and that it is just and equitable that the decision be revised. In his affidavit in support of the motion, the applicant deposes that he bought the land in dispute in 1998 from the now deceased Phillip Mawadri, the

father of the respondent. He took possession of the land until October 2014 when he received the now impugned decree of the court below, following which he was on 25th June 2015 evicted from the land and his houses thereon demolished. He denies having ever instituted the proceedings which gave rise to the decree.

In his affidavit in reply, the respondent opposes the application and avers instead that it is the applicant who initiated the proceedings in the court below and the court was justified in dismissing the suit since the applicant had failed to prosecute it.

In his submissions in support of the application, counsel for the applicant, Mr. Henry Odama argued that the court below acted illegally and with material irregularity in exercise of its jurisdiction when it dismissed the suit with costs against the applicant when the applicant never instituted the suit. It also erred when it pronounced itself regarding the ownership of the disputed land in the decree whose terms are not a reflection of what the court decided on 23rd April 2012. The subsequent eviction of the applicant from the land and demolition of his houses thereon was therefore not backed by any lawful order. He prayed that the proceedings be considered a nullity and set aside on those grounds.

In his response, counsel for the respondent, Mr. Richard Bundu, opposed the application. He argued that it is indeed true that it is the applicant who filed the suit and the court below was justified in dismissing it for want of prosecution. The resultant declaration that the land belongs to the respondent was not illegal and as an aggrieved party, the applicant had the option to apply for reinstatement of the suit. He prayed that the application be dismissed with costs.

Under section 83 of the *Civil Procedure Act*, the High Court is empowered to call for the record of any civil suit which has been determined 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, may revise the case and may make such order in it as it thinks fit. Revision entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court. It entails satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of the court below. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case

or involving a miscarriage of justice, occurred. From the pleadings and submissions of both parties, I have framed the following issues;

1. Whether the applicant filed civil suit No. 1 of 2012 in Adjumani Magistrates' Court.
2. Whether the court below was justified in dismissing the suit.
3. Whether it was a proper exercise of jurisdiction by the court below to decree the disputed land to the respondent.
4. Whether this is a proper case for the court to make any of the orders sought.

I will proceed to decide the issues in the order in which they are presented above.

1. Whether the applicant filed civil suit No. 1 of 2012 in Adjumani Magistrates' Court.

Regarding the first issue, the applicant claims that he did not file the suit in the court below while the respondent contends the suit was filed by the applicant.

The burden of proof lies on the party who would fail if no evidence at all were given on either side (see s 102 of the *Evidence Act*). On this issue, the impugned decision would not stand unless there is proof that the applicant filed the suit. Section 103 of the *Evidence Act* further provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The general principle of law which runs through the entire corpus of our jurisprudence is that, the general burden of proof in civil suits rests on the party who asserts the affirmative of the issue. This principle is captured by the Latin expression; *matim ei qui affirmat non ei, qui negat incumbit probatio*. The position was re-affirmed by the Kenya Court of Appeal in *Maria Ciabaitaru M'mairanyi and Others v Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280* where it was held that:-

Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof and is equivalent to our section 102 of the Evidence Act), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of

proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. (Emphasis added).

This is further illustrated in *Jovelyn Bamgahare v Attorney General S.C. C.A. No 28 of 1993*, where it was decided that he who asserts must affirm. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof. The burden on this issue lay on the respondent to adduce such evidence as would satisfy court that it is the applicant who filed the suit.

In paragraph 2 of the affidavit in support of the motion, the applicant avers that he bought the land in dispute on 23rd April 1998 and took possession. He enjoyed quiet possession until June 2014 when the brother of his predecessor in title started claiming the said land. On 17th June 2014, he settled that adverse claim as well. This sequence of events is not assailed by the affidavit in reply of the respondent. If believed, it would mean that the applicant enjoyed quiet possession of the land between April 1998 and June 2014. I do therefore do not see any reason why he would have filed a suit in 2012 or any time before since there was no threat to his occupancy then.

On the other hand, apart from the assertion made by the deponent, the affidavit in reply does not offer any evidence that it is the applicant who filed the suit. From the affidavit in reply, it is not possible to tell the date of filing of the suit, the date of payment of the court fees and by whom they were paid, the date of service of summons and by whom the summons were served, the date of filing of the written statement of defence, if any or any other similar facts as would have enabled the court determine that it is the applicant who filed the suit. There is no evidence to assail the assertion by the applicant denying having filed the suit. I therefore find that on the preponderance of the evidence before me, there is nothing to show that the applicant filed the suit in the court below.

2. Whether the court below was justified in dismissing the suit.

With regard to the second issue, under O 17 r 5 of the *Civil Procedure Rules*, if the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, set down the suit for hearing, then the defendant may either set down the suit for hearing or apply to the court to dismiss the suit for want of prosecution, and on the hearing of the application the court may order the suit to be dismissed accordingly, or may make such other order, and on such terms, as to the court may seem just.

From the record availed to court, the date of filing the suit is not disclosed. The court therefore is not in position to determine whether by 23rd April 2012, eight weeks had elapsed without the suit having been set down for hearing, such as would have justified invoking of the option to dismiss the suit for want of prosecution. It is as well not clear how the suit was fixed for hearing so as to have enabled the respondent to move court to dismiss the suit, since under this provision, the court may not on its own motion dismiss a suit. Court would only do so on its own motion under O 17 r 6 of the *Civil Procedure Rules* upon the lapse of two years or more without either party making an application or taking a step with a view to proceeding with the suit.

There is nothing in O 17 r 5 of the *Civil Procedure Rules* to suggest that such applications are made, heard and determined *ex parte*. The rules of natural justice and a fair trial would therefore impose an obligation on the defendant to serve and on the court to hear the plaintiff before court may invoke its power to dismiss the suit, just in case there is a reasonable justification for the plaintiff's failure to take a step within that time. The exception would be where the plaintiff upon being served, chose for no good reason to absent himself from the proceedings. Dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of cautious discretion by the court (See the opinions of Danckwerts, LJ in *Nagle v Fielden* [1966] 2 QBD 633 at p 648, and Lord Diplock in *Birket v James* [1978] A.C. 297). The principle to be applied in such situations is enunciated in the case of *Ivita v Kyumbu* [1984] KLR 441, where Chesoni, J. (as he then was) stated that;

The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because

it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

In paragraph 3 of the affidavit in reply, the respondents reveal that service was by radio announcements. It is not disclosed why service was effected in that manner. Substituted service is only effective with a prior order of court upon being satisfied that personal service cannot be effected on the litigants, otherwise service must be personal at the addresses of the litigants indicated in their pleadings. Resort to radio announcements as a mode of service was not effective service. According to *Yalwala v Indumuli and Another [1989] KLR 373*, service of process is a crucial matter in litigation and courts must encourage the best service, i.e. personal service, unless it is shown that personal service was not practicable despite attempts to effect such service.

In the instant case, there is no proof of any diligence that was undertaken in trying to find the applicant. Service by way of radio announcements in absence of proof of such diligence and an express order to that effect was not effective service on the applicant. It was necessary to show that the radio announcements were made pursuant to an order of the court, when they were made and the time allowed between the announcements and the date appointed for the hearing. In absence of such proof, it appears to me that the applicant was denied the opportunity of being heard before court decided to dismiss the suit for want of prosecution. Dismissal of the suit in those circumstances, even assuming that it was filed by the applicant, was an irregularity in procedure.

3. Whether it was a proper exercise of jurisdiction when the court below to decree the disputed land to the respondent.

In relation to this issue, dismissal of a suit for want of prosecution is not a final decision on the merits of the suit. Orders for dismissal for want of prosecution cannot fall into the category of orders granted in finality in any matter as the merit aspect of the particular matter affected is never interrogated before the Court makes such an order. Such orders are therefore usually made purely on technicalities. Determination of the issue of ownership of the land in dispute is a question largely of fact that would be decided on basis of evidence. It is not a matter as can be decided on a technicality such as failure to prosecute a suit that results in a dismissal under O 17 r 5 of the *Civil Procedure Rules*. The court below therefore misdirected itself when it pronounced itself on the merits of the case without having listened to any evidence. The finding that the land belongs to the respondent is not supported by any evidence on record.

Secondly, under O. 21 r 7 (1) and (2) of the *Civil Procedure Rules*, a decree must not only bear the date of the day on which the judgment was delivered but must also be drawn up in accordance with the judgment. This means that the contents of the decree should be a concise reflection of the material findings, declarations and orders made by court in the judgment. On the face of it, the decree as extracted does not reflect the decision and orders made by court on 23rd April 2012. On that day, the court dismissed the suit with costs. It did not make any additional orders or directions and neither did it pronounce itself as regards the ownership of the land in dispute. This is not just an irregularity which can be cured. It is a fatal defect which goes to the very heart of the decree and the Court is entitled to set it aside / nullify it *ex debito justitiae*.

Furthermore, under O. 22 r 19 (1) (a) the *Civil Procedure Rules*, where an application for execution is made more than one year after the date of the decree, the court executing the decree is required issue a notice to the person against whom execution is applied for, requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her. In this case, the decision sought to be enforced was made on 23rd April 2012, the decree is dated 18th July 2014 while the warrant to give vacant possession of land is dated 13th January 2015. It was executed on 25th June 2016. Nowhere in that process is there any indication that a notice to show cause why the decree should not have been executed against the applicant was ever issued to him, yet more than three years had elapsed since the court had made the order dismissing the suit. There is further no indication that the respondent ever made an application for execution within a year after the dismissal of the suit. The court did not record any reasons it

considered that the issue of the notice would cause unreasonable delay or would defeat the ends of justice, such as would have justified a departure from this mandatory requirement.

4. Whether this is a proper case for the court to make any of the orders sought.

As mentioned earlier in this ruling, the power of revision is designed for correction or improvement, of a decision of a magistrate's court. It is exercisable where court finds an incorrect, illegal or improper finding, order or decision of the court below or an irregularity or error in the proceedings which is material to the merits of the case or one that has occasioned a miscarriage of justice. From the analysis made while considering the foregoing issues, it has been established that in exercising his discretion, the learned trial magistrate proceeded with material errors and irregularities which occasioned a miscarriage of justice.

The applicant sought the following reliefs; setting aside the orders of the court below, a declaration that the applicant owns the land in dispute, a permanent injunction against the respondent, direction for the institution of a fresh suit and costs. At the hearing of the application, counsel for the applicant withdrew the prayer seeking a declaration of ownership, and rightly so in my view.

A permanent injunction can only be granted after determination of the substantive dispute on its merits. The court cannot direct a fresh suit to be filed when the genesis of the current one is disputed. Any party who may wish to sue may do so at his own volition but not upon the orders of the court. The prayer for all these remedies is rejected for the stated reasons.

In exercise of its power of revision, court is empowered to make such orders in it as it thinks fit. In this case, the applicant was deprived of his possession and occupancy of the land in dispute as a result of a flawed judicial process. It is only fair that he is restored by way of a mandatory injunction aimed at stopping an ongoing violation of his legal right not to be deprived of property without the due process of the law.

In *Pacific Television Inc. v. 147250 Canada Ltd.* (1987), 1987 2653 (BC CA), 14 B.C.L.R. (2d) 104, [1987] B.C.J. No. 1262 (C.A.), a mandatory injunction for the transfer of certain shares was sought. The action in which the application was brought sought specific performance of an

alleged sale of the shares, so the injunction, if granted, would provide to the plaintiffs the remedy they sought in the action. Observing that such orders, apart from certain exceptions, will not be granted, Justice McLachlin, as she then was, at p 108–109, listed the following exceptions;

1. Orders for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute;
2. Where generally the processes of the court must be protected even by initiatives taken by the court itself;
3. To prevent fraud both on the court and on the adversary;
4. *Qua timet* (because he fears) injunctions under extreme circumstances to prevent a real (threatened) or impending threat (though not yet commenced) of removal of the assets from the jurisdiction.

In this application, allowing the execution of the decree to go ahead would see the threatened or imminent alienation of the land realized before the dispute is resolved. Such an eventuality would practically constitute a fraud on the applicant resulting into a deprivation of property facilitated by a seriously flawed court process. I consider this to be a fit and proper case for the grant of a mandatory injunction since courts are charged with the responsibility of safeguarding the fundamental rights of citizens, in the face of harm which cannot be readily quantified in monetary terms or which cannot generally be cured by an award of damages. An injunction is hereby granted requiring the respondent, his servants, agents, workmen and persons claiming under him, to restore the applicant into possession and occupancy of the land in dispute.

I accordingly set aside the orders, proceedings and decree of the court below, order a stay of execution of the decree and direct the restoration of the status quo that existed before execution of the decree began by requiring the respondent, his servants, agents, workmen and persons claiming under him, to restore the applicant into possession and occupancy of the land in dispute. The costs of this application are awarded to the applicant. I so order.

Dated at Arua this 7th day of September, 2016.

Stephen Mubiru

Judge.