

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**REVISION CAUSE NO. 01 OF 2017**

**(Arising from KAS-OO-CV-MA-01 OF 2017)**

5 **(Arising from Judgment of LC 1 Rwehingo Village, Nyakatonzi Parish, Munkunyu Sub-County)**

**NYAKIYUMBU GROWERS COOPERATIVE SOCIETY LTD:.....:APPLICANT**

**VS**

**TEMBO K. SALONGO:.....:RESPONDENT**

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**BEFORE: HON. MR. JUSTICE OYUKO. ANTHONY OJOK**

**RULING**

This is an application brought to Court by way of Notice of Motion under Sections 83 and 98 Civil Procedure Act, Order 46 & Order 52 of Civil Procedure Rules seeking for orders that;

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1. That all court orders and proceedings vide KAS-00-CV-MA\_01 of 2017 be revised, stayed and set aside.
  2. That costs of this application be provided for.

The application is supported by the Affidavit of Muhindo Christopher Makupe and the grounds briefly are;

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1. The Respondent filed in this Chief Magistrate Court of Kasese an application for consent to execute Court Judgment of Rwehingo Village, Nyakatonzi Parish, Mukunyu Sub-County delivered on the 8<sup>th</sup> day of July 2005 vide KAS-00-CV-MA-01 of 2017.
  - 25
  2. That the Application made an objection to the application to execute the said judgment and same was over ruled by the Chief Magistrate and ordered for the Judgment to be executed.
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  3. That the Trial Magistrate acted with material irregularity and injustice when he failed to examine that the Judgment on court record that it was not dated, signed, stamped by the Court which passed the Judgment and the names of the LC executive who passed the alleged Judgment do not appear.

35 4. Furthermore, the trial Magistrate acted with material irregularity and injustice when he failed to realize that the Judgment has taken 12 (twelve) years from the date it was delivered which makes it time barred to be executed.

40 5. That the trial magistrate acted with material irregularity and injustice when he failed to sustain the applicant's objection on the fact that the respondent died in 2009 and therefore he (the deceased) could not sign the application for consent to execute and neither the letter of Administration/Probate was brought to the attention of court.

6. That the applicant is not aware of the said LC I Court Judgment because the organisation was neither served nor informed of the said court proceedings.

45 7. That it was not proper for the Respondent to have executed the Judgment where the original plaintiff died and without obtaining letters of Administration or probate.

8. That the application and orders made in the said suit was malicious, vexatious, frivolous and intends to defraud the applicant.

50 The application was opposed by an affidavit sworn by Kabunzungwire Joseph

### **Representation**

The Applicant was represented by Ms Masereka C & Co. Advocates and the Respondent by Ms Sibendire Tayebwa & Co. Advocates. They both agreed to file written submissions.

### **Brief facts**

55 The Respondent alleged that he sued the Applicant in the LC I Court of Rwebingo Village, Nyakatonzi Parish, Mukunyu Sub-County for a declaration that the suit land belonged to him.

The Respondent alleged that the said Judgment was heard delivered in the same year (2005).

60 The Respondent thereafter made an application for consent to execute the LC I Judgment in the Chief Magistrate's Court of Kasese. The court allowed the application and a ruling was delivered by His Worship Matenga Dawa Francis on 22/2/2017.

65 On the 1<sup>st</sup> day of February 2017, the Chief Magistrate issued a notice to show cause why execution should not issue. After serving the said notice to the Applicant, the Applicant objected that the execution should not be issued because the applicant was never served and as a result was not aware of the said Judgment and affidavits were filed in court. The trial Chief Magistrate disregarded the Applicant's objection and ordered for the LC I Judgment to be executed hence this application.

The following issues were framed for determination.

1. Whether the LC I Court had powers and Jurisdiction to handle land cases/matters in the year 2005.

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2. Whether the trial Chief Magistrate acted with material irregularity or injustice.

### **Determination of issues**

#### **Issue 1: Whether the LC I Court had powers and Jurisdiction to handle land cases/matters in the year 2005**

75 Section 76A of the Land Amendment Act No. 1 of 2004 which was amended by Section 30 of the Land (amendment) Act 2004 provides for modification of Cap 8.

Subsection 1 of section 76A provides that;

80 (1) Notwithstanding the provisions of Section 5,7 and 29 of the Executive Committees (Judicial Powers) Act, the parish or the Executive Committee Courts shall be the court of first instance in respect of Land disputes

That the date of Assent and Commencement date of the Land (Amendment) ACT 2004 was 18<sup>th</sup> March 2004.

85 The above provision in the land Act as amended is to the effect that from 18<sup>th</sup> March 2004 up to 2006 when the Local Council Act 2006 was enacted, the Local Council one (LC I) Courts had no powers and jurisdiction to handle land matters/cases.

The jurisdiction was vested in the Parish Executive Committee Courts which was Local Council Two (LC II) Courts.

According to the facts at hand, the alleged Judgment was passed by LC I Court of Rwehingo LC I Court in Nyakatonzi Parish, Mukunyu Sub-County.

90 The alleged Judgment indicates that the case was reported in Court on 15<sup>th</sup> day of June 2005 and Judgment was delivered on 21 day of July 2005.

He submitted that in 2005, the year in which the alleged case was heard and determined, the LC I Court had no powers and jurisdiction to handle land cases/matters.

In the case of **Phillips Vs Copping (1935) 1 KB 15**, Lord Scruton said;

95 “It is the duty of the Court when asked to give a judgment which is contrary to the statute to take the point although the litigants may not take it”

**Makula International Ltd Versus His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, CACA No. 4 of 1981 or 1982 HCB 11** where the Court of Appeal inter alia held that;

100 “A court of law cannot sanction what is illegal, an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality”.

The alleged judgment being relied upon by the Respondent was passed by the Local Council one (LC I) Court of Rwehingo Village, Nyakatonzi Parish, Mukunyu Sub-County in 2005.

105 According to the alleged Judgment, it clearly indicates that the case was lodged in the LC I Court on 15<sup>th</sup> day of June 2005 and Judgment was delivered on the 21/7/2005.

He submitted that basing on Section 76A of the Land Amendment Act No. 1 of 2004 which was amended by section 30 of the Land (Amendment) Act 2004, the said LC I Court had no powers to handle Land Matters/cases.

110 That the said LC I Court had no powers to entertain land matter/cases and the same should be nullified.

### **Issue 2 Whether the trial Chief Magistrate acted with material irregularity or injustice.**

The application to execute was made on the 31/01/2017 by one Thembo K. Salongo who was the applicant in MA-01 of 2017 and he signed as the applicant.

115 In the Notice to show cause, we objected to the issuance of the order on the ground that the applicant died in 2009 and cannot make and sign an application for consent to execute.

The proof of the Respondent's (applicant in the Chief Magistrate) death was proved by paragraph 22 of the affidavit in reply of Kabunzungwire Joseph where he attached a grant for the letters of Administration issued in 2011.

120 He submitted that it was erroneous and wrong for the trial Chief Magistrate acted with material irregularity and unjust when he allowed an application made by someone who had died and the Administrator did not put it on the attention of the trial Court.

Further still the copy of the Judgment submitted during the trial of the application was not dated signed by the official of the said LC I Court save for the attendance list which was attached. We thoroughly examined the record of the trial Court before we filed this application and it was true the Judgment submitted in Chief Magistrate was not signed and stamped.

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If the Judgment is now signed and stamped, we submit that it was a forgery on part of the Respondent. This can be evidenced on the fact that the LC I Judgment annexed to the affidavit in reply has no receiving stamp of the Chief Magistrate's Court of Kasese at Kasese.

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The issues raised by the Respondent in the affidavit in reply is a clear indication that the Judgment of the trial Chief Magistrate be revised and this court should order a retrial to enable the applicant to have an opportunity and chance to defend the suit because during the trial in the LC I Court, the Applicant was never summoned.

135 Key facts raised by the Respondent in the affidavit in reply includes;

- a. In paragraph 4 and 5 of the affidavit of Kabunzungwire Joseph, he states that the applicant (Nyakigumba Growers Cooperative Society Ltd) applied for land at lease fee from his father, a fact that was not brought during the trial in the LC I Court. The said facts are not within the knowledge of the Applicant.

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b. Further still in paragraphs 7,8,9,10 and 11 of the affidavit of Kabunzungwire Joseph, he talks about the land being allocated by the Government Resettlement Scheme which was not raised in the Chief magistrate's Court and the LC I Court during the trial. Such facts need evidence to be presented and evaluated before a competent court of law for determination.

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c. That both the Applicant and the Respondent were allocated land by the Government Resettlement Scheme. (refer to serial No. 32 and 115 for the resettlement list attached on the affidavit in support of the application).

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d. The respondent is quoting some court cases in the affidavit in reply which is not within the knowledge of the applicant.

He submitted that the facts in the respondent's affidavit in reply warrants a retinal where the applicant can be given chance to respond to them and examines the Respondent on the same.

155 That land being an important resource, it is un just and un fair to deliver an exparte Judgment. The applicant contends that it was never served with LC I Court summons and Judgment was delivered exparte. That this application be allowed and in the alternative court should invoke Section 98 of the Civil Procedure Act and order for a retrial.

However the Respondent opposed the application.

160 Counsel for the Respondent submitted that this honourable court derives revisional power from Section 83 of the Civil Procedure Act which provides that the High Court may call for the record of any case which has been determined by a Magistrate's Court is such court appears to have:

- a. Exercised jurisdiction not vested in it in law or
- 165 b. Failed to exercise jurisdiction so vested or
- c. Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.

170 The application and the affidavit in support of application complain that the learned Chief Magistrate ordered the execution of a Judgment that is allegedly not signed, stamped and dated, which had taken over twelve years, that the application was filed by a dead person and lack of service in the lower court.

It therefore follows that the applicant does not question the fact that the learned Chief Magistrate had jurisdiction to execute the Judgment or that he failed to exercise that jurisdiction but the conclusions reached by the learned Chief Magistrate.

175 He submitted that all the complaints raised in the application are not matter for revision but for appeal as expounded in the decided cases here below;

In the case of **Maguzi Grace Patrick Vs Ntungamo Local Government Mbarara High Court HCT-05-CV-CR-0032 of 2011**, the Hon. Justice Bashaija K. Andrew held at page 7 of the Judgment that;

180 “a court is said to exercise jurisdiction illegally or with material irregularity when such a court is seized with jurisdiction but wrongly through some procedural or evidential defect”

The learned Judge went ahead to rely on the case of **Matembe Vs Yamuringa [1968] EA 643**, in which it was held that the provisions of section 83 of the Uganda Civil Procedure Act apply to jurisdiction alone, the irregular exercise of or non exercise of it or the illegal  
185 assumption of it. That the section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. That where a court has jurisdiction to determine a question and determines that question, it cannot be said that has acted illegally or with material irregularity merely because it has come to an erroneous decision on a question of fact or even law. That it would appear that injustice or irregularity other than in exercise of  
190 jurisdiction must be remedied by appeal rather than revision.

As was held in the above case, conclusions of a Magistrate in exercise of Jurisdiction though erroneous cannot be a basis for review. He submitted that in the instant case, the complaints are purely about the conclusions reached by the learned Chief Magistrate which cannot be a basis for review.

195 Similarly in the case of **Muhindo Stephen Vs Mbafu German HCT-CV-CR-NO. 006 of 2009**, the brief background of the matter was that the applicant lost a land matter in the LC III Court of Bwera Sub-County but which has acted as a court of first instance, he did not appeal in time and therefore applied to the Chief Magistrate Court of Kasese to be allowed to appeal out of time which dismissed his application. The applicant applied to this honourable court to  
200 review the Chief Magistrate’s decision on the basis that the dismissal of his application meant that the Judgment of the LC III Court which had no jurisdiction over the matter would remain in force. This honourable court held at page 2 of the judgment that;

205 ***“The Chief Magistrate had jurisdiction to hear the application to appeal out of time, which is why the applicant applied to him. He indeed exercised that Jurisdiction by entertaining the application. There is no evidence of illegality, material irregularity or injustice that has been exercised by the Chief magistrate. I therefore find that this is a proper application for dismissal for failing to show that the record of the lower court is ripe for revision”***

In **Nadioppe & 8 Others V Maluku Development Association Ltd HCT-04-CV-MA-0073-2010**, the Hon. Mr. Justice Stephen Musota held:

210 ***“For a matter to qualify for revision, it must be apparent or shown that it involves a non exercise or irregular exercise of jurisdiction. Revision does not concern itself with conclusions of law or fact in which the question of jurisdiction is not involved. Dissatisfaction with a decision by a court with jurisdiction in favour of the other party cannot be a matter for revision.”***

215 He further submitted that it should be noted that in this matter before court the issue is not about whether or not the learned trial Magistrate had jurisdiction to handle the application or failed to exercise his jurisdiction but on conclusions reached by the Magistrate basing on facts. From the above decisions, it is clear that such conclusions can only be challenged by appeal and not by revision.

220 Counsel for the respondent submitted that here below we consider the grounds of the  
application as contained therein:

- 225 1. The failure to examine whether the Judgment was not dated, signed or stamped by  
court and that it had no names of the people who passed the Judgment even if it was  
true but which we challenge is not an issue of failure to exercise jurisdiction but a  
legal issue that should be challenged by appeal. However the 2<sup>nd</sup> paragraph of page 3  
of the Applicant's written submissions clearly answers the above allegation when  
Counsel submits that the case was reported on the 15<sup>th</sup> day of June 2005 and Judgment  
passed on 15<sup>th</sup> July 2005. How else would he have established this other than from the  
signed, dated and stamped judgment. It is clear that the Judgment the learned  
230 Magistrate acted upon was clearly signed, stamped and dated and it appears on record  
and a copy thereof is attached to the affidavit in reply.
- 235 2. The other complaint is that the Judgment had taken over twelve years. This again is  
answered by the admission by counsel for the respondent that the Judgment is dated  
15<sup>th</sup> July 2005. The order complained of was clearly made before July 2017 which is  
within the twelve years.
- 240 3. The other complaint is about the signature on the application. It is clear that the  
application was made in the name of the Judgment holder Thembo K. Salongo but  
signed by the Administrator of his estate a one Kabunzungwire Joseph. The signature  
on the application and that on the affidavit in reply are clearly the same.
- 245 4. The issue of lack of service in the lower court was not an issue for the Magistrate to  
consider at the time of execution of the Judgment. The applicant ought to have  
appealed.
- 250 5. It is clear that the application was filed by and signed by the administrator of the  
estate and he is the one who signed the application and it made no harm to have filed  
it in the names of the Judgment holder as long as it was the Administrator signing the  
application.

It is clear again that all these are not ground related to wrong exercise of jurisdiction as to  
result into immaterial irregularity but issues of law and fact which as clearly indicated in the  
above decisions are supposed to be handled by appeal.

255 He submitted that this application has failed to meet the standards set out in section 83 Civil  
Procedure Act and the decisions cited above and it should be dismissed with costs to the  
Respondent.

260 However, it is very important for us to note that Thembo K. Salongo is a decreed owner of  
this land by Judgment of the Chief magistrate's Court of Kasese at Kasese. However, the  
applicant which entered the land illegally after suing a wrong party as expounded above and  
which Judgment the Chief Magistrate's court of Kasese set aside continues to occupy the land  
to the detriment of the estate of Thembo K. Salongo. This honourable court should not allow

people who defy court orders to seek protection of courts. All these Judgments are attached to the affidavit in reply.

265 He submitted that counsel for the Applicant argues that a retrial should be ordered. If this honourable court should be pleased to order the same, it should first order the applicants who are on the land clearly in defiance of court orders to vacate the land and sue the administrator of the estate of Thembo K. Salongo in view of the fact that Thembo K. Salongo was decreed the land by the Chief magistrate's Court of Kasese.

270 It would be unjust and a travesty of justice to allow a defiant trespasser to continue being on the land at the expense of a Judgment holder. This would put our honourable courts in serious disrepute.

He submitted that this honourable court specifically looks at annexures G and J to the affidavit of Kabunzunwire Joseph which are the Judgment in favour of Thembo K. Salongo  
275 in which the same counsel now representing the applicant was representing the losing party and the ruling that the applicant has defied to remain on the land. This honourable court should not allow such defiance of court orders to continue, otherwise court's jurisdiction risks being taken for granted.

Counsel submitted that the applicant should be ordered off the land in compliance with  
280 annexure J and if the applicant will so wish, it may file a fresh suit not against Roman Mutsampi but against Thembo K. Salongo whom the courts unless otherwise recognises as the owner of the land by virtue of annexure G. This will promote the sanctity of our courts.

### **I will resolve all the issues together**

I have had the benefit of looking at the notice of motion and affidavit in support and affidavit  
285 in rejoinder seeking that all orders and proceedings vide KAS-00-CV-MA-01 of 2017 be revised, stayed and set aside. In summary it is all about the LC Court proceedings, not dated, stamped and signed, the suit barred by limitation, jurisdiction of LC I and that the learned Chief Magistrate acted with bias hence occasioning injustice to his client among others.

I also looked at the affidavit in reply and the supplementary affidavit in reply stating about  
290 different things all together. I have had the benefit of looking at the Judgment of Chief Magistrate Kasese His Worship Matenga Dawa Francis dated 30/08/2016 upon which is the basis of the application.

On careful perusal of his Judgment he does not state or rely on any LC Court ruling apart from mentioning on Page 2 paragraph 6, line 3 that "PW5 Makamba Vincent the chair person  
295 Land Committee gave evidence that they handled the matter and found the land belonged to Mbuli Fenehasi though the decision was quashed". In fact his decision was based on ...."The question is therefore whether or not this land belonged to the Government and if so whether the defendants rightly acquired the suit land as bonafide beneficiaries under a Government resettlement Scheme". He gave reasons and analysis and concluded that the suit land  
300 belonged to the plaintiff as a beneficiary.

I will not go into the merits or demerits of the Chief Magistrate's Judgment dated 30/08/2016 because it is not on appeal but an application for revision.



It is trite law that a party is bound by his/her own pleadings. O.6 r.7 Civil Procedure Rules  
“No pleading shall, not being a petition or application, except by way of amendment, raise  
305 any new ground of claim or contain any allegation of fact inconsistent with the previous  
pleadings of the party pleading that pleading. The case of **Interfreight Forwarders Vs EA  
Development Bank (1990-1994) EA PP117**

A party is bound by his pleadings. He will not be allowed to succeed on a case not set up by  
him and be allowed at trial to change his case or set up a case inconsistent with what he  
310 alleged in his pleadings except by way of amendment of his pleadings”

S. 83 of the Civil Procedure Act which provides that the High Court may call for the record  
of any case which has been determined by a Magistrate’s Court as such court appears to have:

- a. Exercised jurisdiction not vested in it in law or
- b. Failed to exercise jurisdiction so vested or
- 315 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
- 320 e. Where, from lapse of time or other cause, the exercise of that power would involve  
serious hardship to any person.

The case of **Maguzi Grace Patrick Vs Ntungamo L.C Mbarara H.C HCT-05-CV-CR-  
032 of 2011**, the honourable Justice Bashaija K. Andrew held at Pp7 of the Judgment that;

“a court is said to exercise Jurisdiction illegally or with material irregularity when such a  
325 court is seized with jurisdiction but exercises it wrongly through some procedural or  
evidential defect”

To me the issue would have been whether the learned Chief Magistrate exercised jurisdiction  
not vested in him in law; or failed to exercise his jurisdiction so vested; or acted in the  
exercise of its jurisdiction illegally or with material irregularity or injustice but not on his  
330 conclusion. If conclusion then he/she would have challenged it through an appeal to High  
Court but not through revision. This is so in the case of **Matembe Vs Yamuringa [1968]  
E.A 643, Muhindo Stephen Vs Mbafu German HCT-CV-CR-No. 006 of 2009, Nadioppe  
& 8 Ors Vs Maluku Development Association Ltd HCT-04-CV-MA-073 of 2010 where  
Hon. Justice Stephen Musota held;**

335 “For a matter to qualify for revision, it must be apparent or show that it involves a non-  
exercise or irregular exercise of jurisdiction. Revision does not concern itself with  
conclusions of law or fact in which the question of jurisdiction is not involved.  
Dissatisfaction with a decision by a court with jurisdiction in favour of the other party cannot  
be a matter of revision. ”

340 It is my considered opinion that this application is dismissed with costs and the lower court  
decision and orders upheld. I so order.

Right of Appeal explained.

14/12/2017

345 .....  
**OYUKO ATHONY OJOK**  
**JUDGE**