

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

**REVISION CAUSE NO. 017 OF 2015
[ARISING FROM LUGAZI CHIEF MAGISTRATES COURT CIVIL SUIT NO. 43 OF
2010]**

**BOARD OF GOVERNERS OF
ST JOSEPHS H/S NAMAGUNGA.....APPLICANT**

VERSUS

MWANJE SEMUJJU JOHN FELIX.....RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

Background

The applicant proceeded under Section 83 Civil Procedure Act (CPA) seeking an order for the High Court to revise the orders of the trial Magistrate in Lugazi Civil Suit No. 43/2010 citing the following grounds:-

1. The suit was brought against the wrong party
2. The respondent has no cause of action against the applicant
3. The trial Court in exercise of its jurisdiction and in making its orders sought to be revised, acted illegally or with material irregularity or injustice
4. It is in the matter of justice that this application be allowed.

Msgr. Kayondo Gerald, the Vicar General of Lugazi Diocese filed an affidavit in support of the application, and Mwanje Semuju opposed the application in his affidavit filed on 27/6/2018. Akuulo Barbra holding brief for Muganwa C. ,represented the applicant while the respondent was represented by Patrick Bugembe.

The preliminary objection

At the hearing of 12/10/2016, counsel Bugembe raised an objection that the applicant filed two previous actions (Revision Cause No. 20/2014 and Revision Cause No. 13/2014) still pending and with respect to the same matters being raised in this action which offends Section 6 of the Civil Procedure Act (CPA). In reply, Akullo stated that she had confirmed with the record that Revision Cause No. 20/2014 was closed by dismissal and a bill of costs taxed and Revision Cause No. 13/2014 referred to different parties (Nabamba Robert Vrs Nansubuga Aisha). She prayed that in case it was confirmed that R/C 13/14 existed, the present action be stayed in favour of hearing it or consolidating the two.

In rejoinder, counsel Bugembe explained that both previous actions actually existed although the pleadings applicant's counsel filed on 30/9/15 and served on 1/10/15, depicted it as Rev Cause 13/2014. He deemed the sequence of actions raising the same issues to be an abuse of court process. He insisted that the present action be dismissed and court proceeds with hearing R/C 13/2015 which has never been disposed of.

Before giving my decision, I noted that although the motion refers to Mwanje Semujju John Felix as the respondent, the affidavit in support sworn by Msgr. Kayondo Richard, instead refers to M/s Chevas Agro Tourism and Care Limited as the respondent which is not the case. This may have been an inadvertent mistake missed by both counsel and can be corrected under Order 1 rr 10 (2). Thus, I exercise my discretion to strike out the present respondent and in their place substitute that of Mwanje Semujju John Felix, the correct respondent.

It is provided in Section 6 CPA that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed”

A perusal of the court register and physical files confirmed the following:

There is no record of an action between the existing parties under Revision Cause No. 13/2014. That cause exists but between one Nabamba Robert and Nansubuga Aisha. It is matter now under the jurisdiction of the Mukono High Court. Further, Revision Cause Nos. 13 and 20 of 2015 were by leave of Court withdrawn by the applicants on 16/11/2016. The respondent's counsel filed bills of costs in both actions which were taxed and executed by an order of garnishee against the applicant's account at the Centenary Bank.

My discoveries above would confirm submissions made for the applicant and the objection raised would therefore, have no merit. Respondent's counsel who was present when the withdrawals were made and even pursued taxation should have been aware of those facts. Mr. Bugembe is accordingly personally condemned in costs resulting from my dismissal of his objection.

I can now turn to the merits of the application

Background

Msgr. Kayondo Richard, the Vicar General of Lugazi Diocese filed an affidavit in support of the application. In brief he stated that St Joseph College Namagunga, (hereinafter the College) the applicant's predecessor, was before May 2015 the property of M/s Lugazi Catholic Development Association Ltd (hereinafter the Company) and incurred the liability which is the subject of the main suit, before it became the property of the applicant. Further that when the applicant acquired the legal interest in the College from the Company) (then in receivership), they specifically did not inherit any of her existing liabilities and as such, the applicant was wrongly sued in the first place and thereafter, judgment was entered in error against them. He added that a preliminary objection was raised in respect of the latter fact and was wrongly overruled and in addition, the applicant was precluded from calling evidence at the trial.

Mwanje Semujju John Felix, the respondent's Managing Director, filed an affidavit in reply. In brief he deposed that he was the plaintiff and the applicants were the defendants in C/s 43/2010

in the Lugazi Magistrate's Court. That on 2/6/14, owing to the absence of the defendants and their counsel, the Magistrate allowed the suit to proceed *ex parte* and judgment reserved for 2/7/14. Before Judgment could be delivered, the defendants filed an application for leave to adduce evidence in the suit which was heard interparties and then dismissed. Judgment was delivered in the matter on 10/11/2015 and no appeal was preferred against both that judgment or the earlier order dismissing the defendant's application. He categorically denied the submission that any preliminary objection was ever raised by the defendants during the trial to the effect that a wrong party was sued. That upon the advise of his lawyers, no act of gross irregularity can be attributed to the trial Magistrate.

Semuju further denied the allegation that the applicant did not own the College at the material time or that the company ever went into receivership, and argued that even then, those facts should have been presented at the trial, of which opportunity was given. From his knowledge, the applicant changed their name from St Joseph College Namagunga to St Joseph's High School Namagunga in order to defraud their numerous creditors and the application is intended to frustrate the execution process. He concluded that no sufficient reasons had been advanced that warranted issuance of a revision order.

I agree with respondent counsel's submission that the applicant's written submissions were filed late on 15/02/2017, infact, well after the court scheduled date of 1/12/16 and after the respondent's counsel had filed their submissions on 23/12/16. For that reason, those submissions cannot be considered in view of the fact of an earlier filing by the respondent. Allowing the submissions would offend my order given on 16/11/2016 and generally the provisions of Order 18 rr.2 CPR. At the very best, the applicant could only have filed a rejoinder or at least, sought leave to have filing of submissions rescheduled. They did neither and their submissions would thus be an abuse of court process, and they are accordingly expunged and will not be considered.

Since the applicant filed an affidavit in support of the application, what is deposed there will be the basis of my ruling.

The law

The revision powers of the High Court are contained in Section 83 CPA. The record of a Magistrate's Court can be called up for revision by the High Court there it 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

Where the application is made without inordinate delay and the High Court finds justification to make a revision order, she has quite wide powers to make orders to revise the lower court's decision to replace them with orders that she deems fit in the circumstances

My decision

In his affidavit, Msgr. Kayondo Richard appeared not to have any contest against the jurisdiction of the trial Magistrate to hear the suit and the applications made under it. Instead, his contentions are six fold, that:-

- i. The trial magistrate wrongly overruled the applicant's objection that the claim was made against the wrong party
- ii. The trial Magistrate made a wrong decision when she passed the *ex parte* judgment against the applicant even when she was aware that the applicant was the wrong party being sued and the respondent did not have a cause of action against the applicant
- iii. The trial Magistrate wrongly heard the matter *ex parte* and denied the applicant the right to adduce evidence even where good reason was given for the absence of their counsel at some hearings.
- iv. Even after hearing M/A.75/2014, and alluding to the reasons for the absence of the applicant and their advocate at the trial hearings, she failed to accord the applicant an opportunity to be heard
- v. It would be incorrect in law for the applicant to file submissions as per Court's directions where no evidence was led for them.

- vi. The decision of the trial Magistrate was unfair and occasioned grave injustice upon the applicant who is entitled to be heard

I have perused the record of the lower Court and would agree with respondent's counsel that there is nothing to show on the record of the trial Court that a preliminary objection was ever raised by the applicant that there were wrongly sued, and overruled. There is also no record that the applicant was denied the opportunity to present a witness Matovu Fahad to testify on their behalf. Indeed, inspite of his well detailed affidavit, Msgr. Kayondo was not clear on which date that objection was raised and the record indicates that on 16/5/13, the Court was set to deliver a ruling on an objection raised by counsel Bugembe which never happened. Thus paragraphs 12 and 13 as well as paragraphs 17-19 of his affidavit would be false.

Respondent's counsel deemed that false statement to taint the entire affidavit and prayed for it to be struck off the record which would leave the application unsupported. That would be too severe a step especially where recent decisions of the Supreme Court have advised severance of parts of affidavits that are false or offended the rules of procedure. I would therefore take the more liberal approach to sever paragraphs 12, 13, 17, 18 and 19 of Msgr. Kayondo's affidavit and leave the rest of it intact, as evidence under consideration in support of the application.

It is now settled that the High Court's powers in revision are limited to issues of jurisdiction alone. The Court in **Matembe Vrs Vamulinga (1968)EA 643** following the decision in **Balakrishna Vs Vasudeva (1917) 44 I.A. 261** was succinct. During revision proceedings, the High Court is empowered only to confirm whether the requirements of the law have been duly and properly obeyed by the court whose order is subject to revision. It was stated further 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 law or fact in which the question of jurisdiction is not involved'.

The same Court added that where a Court has jurisdiction to determine a question and it determines that question, it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision of a question of fact or law.

The record indicates that on 12/06/12, scheduling of the matter was concluded and the trial Court made the decision to proceed *ex parte* against the applicant. That notwithstanding, on 26/02/2013, counsel Songon Watuwa appeared for the applicant and was allowed to contest counsel Bugembe's attempt to have the written statement of defence struck out for offending the provisions of Order 6 rr. 30 CPR. The Magistrate reserved her ruling for 16/05/2013, and it was read on 31/10/2013 by her successor. In that ruling, the Magistrate overruled counsel Bugembe's objection and the matter was allowed to proceed interparties even though no specific order was made to reverse the previous order for *ex parte* proceedings. Again on 2/6/14, the applicant and their advocate were absent in Court with no reason and a fresh order for *ex parte* proceedings was allowed. On that same day, the respondent and Fr. Lubega Godfrey presented their evidence and the matter was reserved for judgment on 2/7/2014.

I see nothing to support the argument that by proceeding *ex parte*, the trial Magistrate failed to exercise her jurisdiction or applied it in an irregular or illegal manner. It was within her power to allow *ex parte* proceedings when the applicant or their advocate failed to appear without valid reason.

Also, as rightly put by respondent's counsel, there is no entry on the record that applicant's counsel ever attempted to present one Matovu Fahad a lawyer with M/s Muganwa Nanteza & Co., Advocates as a witness and as I have already held, that ground of objection would thus be redundant.

That said, I would agree with applicant's arguments that since the proceedings were *ex parte* following the Magistrate's order of 2/6/2014, the applicant would have no obligation even where directed to file final written submissions. Indeed, no such order was ever made by the Magistrate on 2/6/14 the date she reserved her judgment. That objection would thus also be redundant.

I found no Misc Application No. 029/14 filed under the main action. Instead, the applicant filed M/A 75/2014 on 30/7/14 seeking orders for the applicant to be permitted to adduce his evidence. The same arguments as above could be advanced for the outcome of M/A 75/2014. The reasons advanced were that applicant's counsel, one Sangon was absent when the main suit was called to hearing on 2/6/14 owing to another engagement in the High Court Execution Division. In addition, a detailed exposition was made of the evidence that the applicant wished to adduce. That application was heard interparties and rejected. Having followed the correct procedure and applying the correct law, that decision, if considered erroneous by the applicant, cannot be the subject of revision but appeal.

Although a matter of law, Msgr Kayondo deponed that it was an error for the trial Magistrate to have passed an *ex parte* judgment against the applicant even when aware that the applicant was wrongly sued and the respondent had no cause of action against the applicant.

The record indicates that by their written statement of defence (paragraphs 6-10) the applicants exonerated themselves from liability or indebtedness to the respondent because they came into existence after the company which owned the college, (the latter who was the true debtor) had gone into receivership. In my view, those were facts presented for the applicants in their pleadings and were subject to proof by presenting evidence. The applicants were given ample opportunity to present that evidence but failed to appear in Court to do so. The trial Magistrate would be justified not to consider the facts related in that pleading alone, and make a decision *ex parte*. That again would not be a matter of revision but appeal, or an application to set aside the *ex parte* judgment.

In summary, I find no merit in the application. No proof was ever laid before the trial Court that the suit was brought against the wrong party or, that the respondent had no cause of action against the applicant. There would be no justification for the applicant to argue that in the decision of the trial Magistrate exercised her jurisdiction with illegality or material irregularity.

I thereby move to dismiss this application with costs to the respondent.

I so order.

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EVA K. LUSWATA
JUDGE
DATED: 10/05/18