THE REPUBLIC OF UGANDA AT KAMPALA

IN THE HIGH COURT OF UGANDA

CIVIL REVISION NO. 32 OF 2019

(ARISING OUT OF MISC. APPLICATION NO. 648 OF 2019 OF THE CHIEF MAGISTRATES' COURT OF KAMPALA HOLDEN AT MENGO)

(ALL ARISING FROM MENGO MISC. CAUSE NO. 0174 OF 2019)

1. **HAJJI TWAHA GWAIVU**
2. **AZEDI GWAIVU GYAGENDA** ::::::::::::::::::::::::::: **APPLICANTS**
3. **YAHAYA GWAIVU BATAGEMYE**

VERSUS

ALI RAZA t/a PAK KOR ELECTRONIC LTD ::::::::::::::::::::::::::: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

BACKGROUND

The applicant filed this application against the respondent under the provisions of section 33 of the Judicature Act, section 83 of the Civil Procedure Act and O. 52, R.1 and 2 of the Civil Procedure Rules for orders that the ruling and the orders of the trial court at the Chief Magistrate's Court of Kampala at Mengo in Miscellaneous Applic. No. 648 of 2019 be revised and set aside, an order for stay of execution arising from Miscellaneous Application No. 648 of 2019 issues against the respondent and costs of the application be provided for.

The applicants were the registered proprietors and owners of LRV 190 Folio 4 Plot 55 land located in Kampala. The respondent was a tenant of the applicants

renting one of the shops located in Kampala. The respondent was paying rent of USD 5,000 per month. The respondent defaulted in payment of rent from the month of June, July, August and September 2019 leading to unpaid rent of a total of USD 20,000. Despite several demands, the rent remained unpaid pursuant to which the applicants applied for a distress for rent order from the Chief Magistrate's court of Mengo which was duly issued. Execution of the said order was later carried out at the shop of the respondent in his presence. Being dissatisfied with the orders granted, the respondent applied for review of the said orders which was heard by another magistrate who unlawfully granted the same which is the subject of this application for revision.

The respondent avers that he fully paid off his rent up to the end of November 2019. He stated that during the pendency of the said tenancy, the 2nd applicant entered into a sale agreement dated 15th June 2018 with the respondent in respect of the 2nd applicant's share in the suit land. The agreed consideration was UGX. 430,000,000/= out of which the respondent paid to the 2nd applicant UGX. 257,000,000/=. The respondent avers that the 2nd applicant having received part payment of the consideration, together with the 1st and 3rd applicant sold off the suit property comprised in LRV 190 Folio 4 Plot 55 Kampala road to a one Zirimenya Joseph.

The respondent avers that by the time the applicants herein filed an application for distress against his goods in the lower court, there was no landlord tenant relationship as the applicant herein had purportedly sold their interests to Zirimenya Joseph who was never a party to all proceeding in the lower court but a defendant in the suit pending in the commercial court and at the same time the

2nd applicant had already sold off his interest in the suit land plus the commercial building thereon to the respondent.

Each of the parties proposed a number of issues for determination by this court.

The Applicants;

1. ***Whether the presiding magistrate had powers to hear and determine an application for review of an order determined by another magistrate.***
2. ***Whether in handling a complaint of bias against the former magistrate, the chief magistrate followed the right procedure and followed the laid out procedure.***
3. ***Whether the applicants were ever accorded a right to a fair hearing in the course of reviewing the decision of the former magistrate.***
4. ***Whether the presiding magistrate before reaching her decision in review considered all the material evidence.***

The respondent;

1. ***Whether the trial court/ magistrate acted illegally in entertaining and granting an application for distress when there is a pending suit in the commercial court involving some of the parties.***
2. ***Whether there was a landlord tenant relationship at the time the distress application was determined.***
3. ***Whether the distress was done in accordance with the law.***
4. ***Whether the respondent herein was accorded the right to fair hearing during the hearing and determination of the distress application.***

5. ***Whether the trial magistrate in an application for distress had jurisdiction to hear a matter that originates from Kampala central***
6. ***Whether the subsequent magistrate acted within her powers in reviewing an application for distress plus all the order earlier granted***
7. ***Whether the above orders fall within the revision powers of this honorable court.***

This court is given the power under **Order 15, Rule 5 of the Civil Procedure Rules SI.71-1** to amend and strike out issues at any time before passing a decree as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the interest of adequate discussion of the legal issues at hand, the court rephrases the issues for determination to reflect as;

1. ***Whether the magistrate exercised jurisdiction not vested in her thereby acting illegally and with material irregularity in Misc. Applic. No. 648 of 2019.***
2. ***What remedies are available to the parties?***

In the interest of time, the respective counsels were directed to make written submissions and I have considered the respective submissions.

The applicant was represented by *Mr. Gimanga Sam* and *Mr. Isabirye Derek* whereas the respondent was represented by *Mr. David Mukiibi* and *Ms. Tumuhaise Christine*.

DETERMINATION OF ISSUES

Whether the subsequent magistrate exercised jurisdiction vested in her illegally and with material irregularity in reviewing Misc. Applic. No. 648 of 2019.

Counsel for the applicant submitted that this application of revision stems from section 83 (c) of the Civil Procedure Act and section 33 of Judicature Act where this court has power to grant any remedy where it appears that it is in the interest of justice and for the ends of justice.

Counsel defined revision as a re-examination or careful review for correction or improvement or an altered version of work. (***Refer; Black's Law Dictionary (9th Edition)***. He stated that revisionary jurisdiction entails examination by the court of the record of any proceedings before the High court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings before the High court ***(see; Mabalaganya v Ssanga (2005) E.A 152).***

Counsel submitted that as referred to under paragraph 11 of the 1st applicant's affidavit in support of the application, on the 22nd of November, 2019, the presiding magistrate determined an application for review in Miscellaneous Application No. 648 of 2019 having not been the trial magistrate in the main application vide Misc. Cause No. 174 of 2019 thereby exercising a jurisdiction not so vested in her and thereby acting illegally and with material irregularity and injustice or without jurisdiction.

Counsel stated that the law governing review being section 82 of the Civil Procedure Act is to the effect that an aggrieved may apply for review of judgement or order to a court that passed a decree or order. He stated that court held that an application for review of a decree or order ought to be made to a judge who made it, except where the judge is no longer a member of the bench in which case review could be made by another judge ***(see; Attorney Genneral & Anor v James Mark Kamoga & Anor SCCA No. 8 of 2004)***.

Counsel submitted that the magistrate who heard and determined this matter at the 1st instance was still a member of the bench of the Chief Magistrate's court of Mengo. However, the chief magistrate acted with great irregularities thereby transferring the matter for review to another magistrate without following the proper procedure in the law as review is only entertained by a judge or magistrate who granted the same.

It was submitted for the applicant that it is trite law that parties or advocates cannot consent to an illegality and enforceable as it cannot be done outside the law as provided. He stated that a court of law can never enforce an illegal consent as parties can never consent to an illegality ***(see; Attorney General & Anor v James Mark Kamoga & Anor (supra)).***

He submitted that the hearing and determination of the application for review was conducted in contravention of the established law governing review applications and it follows therefore that the same is illegal and ought to be set aside.

He therefore submitted that the matter for review was to be heard and determined by the same magistrate who initially heard it and any hearings by another magistrate were exercised by a magistrate without jurisdiction and so she acted illegally and with material irregularity. He also submitted that even if the respondent was to go under O.46 of the Civil Procedure Rules, there was no such other circumstance that could warrant the transferring of the file to another magistrate since the one that determined it was still on the bench.

He therefore prayed that the orders of the presiding magistrate be set aside and revised by this court in the interest of justice and the respondent be ordered and directed to pay the outstanding rent arrears as per the application for distress for rent.

It was also submitted for the applicants under paragraph 12 of the affidavit in support of the application that when the matter came up before the presiding magistrate for hearing on the 22nd day of November, 2019, only the respondent's lawyer was heard and the magistrate made her decision. It is submitted that she never gave audience to the lawyers for the applicants herein to be heard.

Counsel submitted that it is a basic principle of natural justice enshrined in the Constitution of the Republic of Uganda 1995, Article 28 that requires any hearing in a civil or criminal proceeding to be fair, speedy and public hearing. He submitted that the hearing of the application for review could not meet the standard of fairness as only one party was heard and not the other.

The applicant therefore submitted that failure by the presiding magistrate to accord them an opportunity to be heard in the application for review by the

respondent was unjust and an abuse of the applicants' right to be heard leading to a miscarriage of justice.

For the respondent, counsel submitted that the main contention by the applicants is that the subsequent magistrate who reviewed the earlier orders of court did not have the jurisdiction to do the same. In this respect, counsel submitted that under Order 46, Rule 2 CPR, an application for review of a decree or order of a court upon some ground other than the discovery of the new and important matter or evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed.

Counsel states that a close scrutiny of the following rule leads to one conclusion being that another magistrate can actually review an order of court despite the fact that she didn't in the first place determine the application from which the review arises. Counsel therefore submitted that the subsequent magistrate properly exercised the review jurisdiction vested in her for the errors such as non- existence of the land lord- tenant relationship, the illegalities involved in the entire distress process such as the process being executed by a bailiff whose license had been suspended were clear and apparent on the face of the record.

He submitted that since the jurisdiction exercised by the subsequent magistrate in review falls squarely within the provisions of Order 46, Rule 2 of the Civil Procedure Rules, this application by the applicants has no legal basis.

Counsel also submitted that if court was to hold that the magistrate did not properly exercise the jurisdiction vested in her, granting the present application would be sanctioning and affirming the illegalities committed by the applicants, their lawyers, bailiff and the trial magistrate during the distress process.

He stated that court has held that an illegality ounce brought to the attention of court overrides all questions of pleading including admissions ***(see; Johnson Katebalirwe v Senoga Godwin Revision Cause No. 012 of 2017, Makula International Ltd v His Eminence Cardinal Nsubaga (1982) HCB 11)***

Counsel therefore submitted that since there was an illegality committed by the trial magistrate in the first place when hearing the distress application which the subsequent magistrate set aside and set the record straight. This court cannot fold its hands towards the illegalities committed by the trial magistrate.

Determination

Revisionary powers of this court are derived from **section 83 of The Civil Procedure Act.** Under that law, the His court may revise a case and make such order in it if the trial court appears to have;

1. Exercised a jurisdiction not vested in it in law;
2. Failed to exercise a jurisdiction so vested; or
3. Acted in exercise of its jurisdiction illegally or with material irregularity or injustice.

This entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court after satisfying oneself as to the correctness,

legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court.

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, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

The applicants' case arises from the order that was passed by the subsequent magistrate that heard the application for review. The applicant alleges that the subsequent magistrate exercised her jurisdiction illegally and irregularly since her court did not hear the trial case from which the reviewed order was made.

The general rule is that a court has no power to set aside or vary a final judgment or order granted in finality of any matter which has been passed and entered, because of the public interest in the finality of litigation **(see *DJL v Central Authority, (2000) 170 ALR 659; State Rail Authority of NSW v Codelfa Construction Pty Ltd (1982) 150 CLR 29 at 38, 45-6;* and *Autodesk (1992) 176 CLR 300 at 302, 310, 317*).** Finality of judicial decisions is important so that litigants are afforded the certainty they require to operate effectively.

The ability to revisit and change decisions could easily disrupt the lives litigants affected by the decisions, and cause them hardship and loss. The rule is premised on the idea that, overall, the advantages of avoiding uncertainty (and its consequences) outweigh the reasons a court might have for wanting to change a decision in a particular case. Once a validly-made final decision has been issued

by court, the court becomes powerless to change it, other than to correct obvious technical or clerical errors, or unless specifically authorized to do so by statute or regulations.

Once a magistrate's court has determined a suit, it has no residual jurisdiction to reopen the case. However, this can only be done by a review or appeal.

A review of a decision is a correction of errors apparent on the face of the record. This is done by the same court that gave the earlier judgment.

Section 82 of the Civil Procedure Act provides:-

"Any person considering himself or herself aggrieved:-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit."

Order 46, Rule 1 of the CPR reiterates the above provision but adds a condition to the effect that applicant's desire to apply for review is upon:-

a. Discovery of new and important matters of evidence previously overlooked by excusable misfortune.
b. Some mistake or error apparent on the face of the record.

c. For any other sufficient reason but the expression "sufficient" should be read as meaning sufficiently of a kind analogous to (a) and (b) above. ***(see; Re Nakivubo Chemists (U) Ltd (1979) HCB 12)***

It has long been settled that review is a matter of discretion which must be exercised judiciously.

Turning to the matter at hand, the respondent being dissatisfied with the decision of the trial magistrate sought to have the decision reviewed. However, the review was done by another magistrate that had not heard the matter on the first instance.

The circumstance behind the change of magistrates was premised on the administrative powers of the chief magistrate who reallocated the file to another magistrate. This was proper since it was done in interest of justice to protect the sanctity of court.

The challenges to the administrative decisions made by a Chief magistrate should have been handled administratively and not through an application for revision. This court cannot hear matters on revision of Chief Magistrate supervisory powers or powers on allocation of files in a magisterial area.

The Chief magistrate has supervisory powers under section 221 of the Magistrates' Courts Act which provides;

A chief magistrate shall exercise general powers of supervision over all Magistrates court within the area of his or her jurisdiction.

In addition, the order of the court was revised on grounds of the court bailiff who had carried out the distress for rent-Kyenda Godfrey was not authorized to carry out any bailiff's work owing to a revocation of his licence. This was an illegality which would override any pleading in this matter. The court would even on its own motion and licensing authority move itself without a revision to set aside the proceedings illegally carried out. ***Johnson Katebalirwe v Senoga Godwin Revision Cause No. 012 of 2017, Makula International Ltd v His Eminence Cardinal Nsubaga (1982) HCB 11)***

The review application was an exercise within the jurisdiction and there is nothing irregular or illegal in the circumstances.

Issue 1 is resolved in the negative.

This application fails and dismissed with costs

I so order.

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

SSEKAANA MUSA
JUDGE