

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)**

**REVISION CAUSE NO. 11 OF 2019
(ARISING OUT OF LUWERO CIVIL SUIT NO. 12 OF 2016)**

1.NATUKUNDA CHARITY

2.KARUGABA COLLINS :: APPLICANTS

VERSUS

KATO SAMUEL :: RESPONDENT

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This Application was brought by Notice of Motion under Sections 83 and 98 of the Civil Procedure Act Cap 71 and Order 52 rules 1, 2, and 3 of the Civil Procedure Rules SI 71-1 seeking orders that;

- a) The proceedings and judgment in Luwero Civil Suit No. 12 of 2016 and all the orders arising therefrom be forwarded to the High Court for revision.
- b) All the proceedings in the matter and as well as all orders issued by the court be revised and set aside for being a nullity.
- c) Civil Suit No. 12 of 2016 be struck out for having been filed in a court which has no jurisdiction.
- d) The orders in Miscellaneous Application No. 32 of 2019 regarding deposit of security for costs of UGX 7,500,000/= each be revised and set aside for being illegal.
- e) Costs be in the main cause.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit sworn in support of the application by Karugaba Collins, the 2nd Applicant. Briefly, the grounds are that around November 2018, the Applicants

learnt of a case that had proceeded against them in their absence and in which a warrant of arrest had been issued against them. The Applicants applied to have the ex parte judgment set aside and to file their defence out of time. In allowing the Applicants to file a defence out of time, the trial magistrate put a condition of depositing UGX 7,500,000/= each within seven days which should be revised and set aside for being illegal. The deponent averred that the said decision was illegal because the Respondent had neither prayed for the same nor were the Applicants ever heard before the court made the said order. The deponent further stated that the proceedings and orders issued by the court ought to be revised and set aside for being a nullity considering that the magistrate's court had no jurisdiction to handle an employment and /or labour dispute. It is finally stated that unless this application is granted, the Applicants will suffer injustice as their right to be heard in court is being hindered by illegal orders.

[3] The Respondent, Kato Samuel, deposed an affidavit in reply in which he opposed the application. He stated that the application is misconceived and intended to delay the process in the main suit. The warrant of arrest was procured after a due process of law and it was on the basis of the court denying Miscellaneous Application No. 284 of 2018. The trial court had jurisdiction to handle the matter. The order for security for costs was justified and issued within the court's discretion in an application for stay of execution. It is in the interest of justice that the application for revision is rejected and the same be dismissed with costs to the Respondent.

Representation and Hearing

[4] At the hearing, the Applicants were represented by Mr. Bwesigye Enock while the Respondent was represented by Mr. Katamba Sowali. The hearing proceeded by way of written submissions which were duly filed and adopted by the Court.

Issues for Determination by the Court

[5] Two issues are up for determination by the Court, namely;

(a) Whether the Magistrate's Court had jurisdiction to entertain and handle the dispute in the main suit?

(b) Whether it was unlawful for the learned trial Magistrate to impose a condition of depositing security for costs which was not sought for and addressed by both parties before setting the condition?

Resolution of the Issues

Issue1: Whether the Magistrate's Court had jurisdiction to entertain and handle the dispute in the main suit?

Submission by the Applicants' Counsel

[6] It was submitted by Counsel for the Applicants that jurisdiction is a creature of statute and for any court to entertain any matter, it must be granted such jurisdiction by law and not by implication. Counsel relied on the case of ***Mujib Juma V Adam Musa & Others Civil Appeal No. 0053 of 2015***. Counsel went on that with the enactment of the Employment Act of 2006, jurisdiction to handle employment disputes was taken away from magistrates' courts and conferred upon the labour officers. Counsel relied on *Section 93(6) of the Employment Act 2006* and the case of ***Soroti Concern Worldwide V Kugonza HC Civil Revision No. 1 of 2013***. Counsel concluded that in the instant case, the alleged breach of contract of employment could not be heard by the magistrates' court owing to lack of jurisdiction which made the proceedings and decision a nullity. Counsel prayed that the Court sets aside all proceedings and orders of the learned trial Magistrate.

Submissions by the Respondent's Counsel

[7] In reply, Counsel for the Respondent submitted that the trial Magistrate had jurisdiction to entertain and handle the dispute in the main suit. Counsel cited *Section 93 of the Employment Act* and submitted that the provision did not oust

the jurisdiction of the Magistrate's courts in entertaining some disputes that arise between employers and employees. Counsel cited *Section 208 of the Magistrates Courts Act* and relied on the case of ***Ozoo Brothers Enterprises V Ayikoru Milka Civil Revision No. 0002 of 2016*** where Justice Mubiru discussed *Section 93 of the Employment Act* vis-a-vis the jurisdiction of magistrates' courts in relation to employment matters.

[8] Counsel for the Respondent submitted that from the pleadings on record, nowhere did it surface that the matter was an employment dispute under *Section 93 of the Employment Act*. Counsel submitted that the matter was purely a claim for recovery of salary arrears amounting to 4,800,000/, costs incurred in looking after the Applicants' pineapple garden amounting to 5,500,000/, general damages, and costs to the suit. Counsel submitted that the said claim by the Respondent is both a right and obligation under the Employment Act and common law but not strictly under the rights envisaged under *Section 93 of the Employment Act* which meant that the trial Magistrate had jurisdiction to hear and determine the main suit on basis of the legal position pointed out above.

[9] Counsel further submitted that in the alternative, the Respondent was an independent contractor under a contract for service but not under employment or a contract of service. He relied on the case of ***Ready Mixed Concrete Ltd V Minister of Pension (1968)2 QB 497*** where the court laid out conditions necessary to establish the existence of a contract of service as distinct from a contract for services. Counsel argued that in the instant matter, although the Respondent was providing his skill and work in return for remuneration, upon entering into the arrangement with the Applicants to look after their garden however, the Applicants went missing which made the Respondent as a prudent man to purchase tools and hire casual laborers who were helping him to work in the plantations. Counsel concluded that it was apparent that the

Respondent was not under the control of the employer and that he was an independent contractor. Counsel prayed that this ground for revision ought to fail.

Determination by the Court

[10] It is trite that revision is a power granted to the High Court to re-examine or carefully review proceedings and decisions of the magistrates' courts for correction and/or improvement under specific grounds. The jurisdiction of the High Court and the conditions for revision of a record of a magistrate's court are provided for under Section 83 of the CPA as follows:

“The High Court may call for the record of any case which has been determined under this Act 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,

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

(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person”.

[11] On the case before me, it is clear that this application is not barred by virtue of any of the conditions in paragraphs (d) and (e) of the above set out provision. This application was taken out by the Applicants, the Respondent was notified and both parties have been heard. The application was brought without unreasonable delay. Therefore, no apparent hardship is likely to be occasioned to the Respondent due to the exercise by the Court of the power to revise the decision of the trial court and to make such orders as the Court may

deem fit. This application is therefore properly before the Court for consideration as to whether to revise the trial court's proceedings and orders.

[12] The ground relied upon in the present matter is that the trial court exercised jurisdiction that was not vested in it in law. It is settled law that jurisdiction is a creature of statute. A proceeding undertaken and/or an order passed by a court or tribunal without jurisdiction is a nullity. The argument by Counsel for the Applicants is that the matter before the trial court was an employment matter over which jurisdiction was removed from the magistrates' courts and vested in Labour Officers pursuant to *Section 93 of the Employment Act 2006*; which provides under sub-sections (1) and (2) thereof as follows:

(1) Except where the contrary is expressly provided for by this or any other Act, the only remedy available to a person who claims an infringement of any of the rights granted under this Act shall be by way of a complaint to a labour officer.

(2) A labour officer shall have jurisdiction to hear, and to settle by conciliation or mediation a complaint—

(a) by any person alleging an infringement of any provision of this Act; or

(b) by either party to a contract of service alleging that the other party is in breach of the obligations owed under this Act.

[13] In order to determine whether the above provision was applicable to the dispute that was before the trial court, it is necessary to establish whether the dispute was based on claims arising out of infringement of any of the rights granted under the Employment Act. The Court has to determine whether the suit was a dispute based on a contract of service (employment dispute) or based on a contract for services.

[14] There is a distinction in law between a contract of service and a contract for service. A **contract of service** is an agreement between an employer and an employee. In a **contract for service**, an independent contractor, such as a self-

employed person or vendor, is engaged for a fee to carry out an assignment or project. According to the **Black's Law Dictionary, by Henry Campbell Black, 5th Edition, Page 1227**, a contract of service connotes duty or labour to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter. "Service" and "employment" go together and generally imply that the employer, or person to whom the service is due, selects and compensates the employee, or person rendering the service. Selection is what is commonly known as recruitment. Compensation under a contract of service is by way of salary, wages, allowances or other such form of remuneration.

[15] Under *Section 2 of The Employment Act, 2006*, a contract of employment, otherwise known as a contract of service, means any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship.

[16] A contract of employment exists where three conditions are fulfilled, namely; (i) the servant agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for his or her master; (ii) he or she agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with its being a contract of service. See ***Waga B. Francis versus The Chief Administrative Officer Maracha District & Anor, HC Civil Suit No. 005 of 2016*** [Mubiru J.] and ***Ready Mixed Concrete Southeast Ltd v. Minister of Pensions and National Insurance, [1968] 2 QB 497, [1968] 1 All ER 433.***

[17] The difference between the two concepts was more succinctly put by **Shantimal Jain**, in a text titled: **Contract of Service and Contract for**

Service, published in the Journal, **The Practical Lawyer**, cited as **(2003) 8 SCC (Journal) 2**, wherein the author states:

A contract of service is different from a contract for service. In a contract of service, the employer normally enjoys the power of control over the work of the servant and the servant is bound to obey the orders or instructions of the master. An independent contractor, on the other hand, undertakes to produce the required result, but in the actual execution of the job to produce the result, he is not under the order or control of the person for whom he executes that work. He is free to use his discretion. The line of demarcation between an independent contractor and an employee is very thin and the two concepts sometimes overlap. In such a situation, the question about the relationship of employer and employee needs to be determined with reference to the facts and circumstances of each case as to who are the parties to the contract, who pays the wages, who has the power to dismiss, what is the nature of the job, and the place of executing the job; all have to be kept in mind. Out of so many tests, the vastly important test which till now held ground was the element of control and supervision of work. [Emphasis added]

[18] In the present case, the facts are that the Respondent (Plaintiff in the suit) was employed by the Applicants (Defendants) to look after their 10 acres of pine apple garden at an agreed pay of UGX 200,000/= per month for two years until the pine apples matured. The Respondent had the responsibility and discretion to get the labour but the Applicants were to meet the cost of the labour and incidental costs. In due process, the Respondent was to record the expenses in a book which would be reconciled when the Applicants visited the garden. It was stated that after some time, the Applicants stopped visiting the plantation but the Respondent continued working and incurred costs to the tune of UGX 5,500,000/=. When the Applicants eventually appeared, they took

over management of the plantation and instead caused the arrest and detention of the Respondent at Kikyusa Police Post. They then confiscated the book in which he was recording the expenses. The Respondent however retained a copy. It is the above facts that led to the suit in the magistrate's court wherein the Respondent claimed for unpaid arrears of UGX 4,800,000/= being salary for two years, UGX 5,500,000/= being the expenses incurred in running the plantation, general and exemplary damages, and costs of the suit.

[19] It should be noted that the agreement between the parties was not in writing. There was however ample evidence before the court of existence of the contract. Indeed, the existence or not of a valid contract is not one of the issues in contention between the parties. Given that the contract was not in writing, in my view, the use of the words "employment" and "salary" in the Plaintiff's pleadings and evidence before the lower court is not the defining characteristic of the contract in issue. In my view, the defining characteristics are to be found in the nature of the relationship between the parties to the contract. The defining characteristic herein revolves around the element of control and supervision of work.

[20] It is clear from the material on record that apart from effecting monthly payments and verifying costs incurred in labour and incidentals, the Applicants had no direct control and supervision over how the Respondent was doing his work. All the Applicants were concerned with was whether the crops had been well attended to and that the costs incurred were genuine. The Respondent retained the responsibility and discretion to engage and supervise labourers. He also retained the responsibility to ensure the quality of work. The Respondent was not working as the Applicants' manager. He was working as an independent contractor whose services and expenses were to be paid for by the Applicants. There was, definitely, no contract of service in existence. Rather there was a contract for services.

[21] In view of the above finding, such a relationship is not governed by the provisions under the Employment Act 2006. The subject matter of the suit being enforcement of a contract for services, the trial court was, therefore seized with jurisdiction to entertain and determine the matter. The first issue is, therefore, answered in the affirmative to the effect that the trial magistrate had jurisdiction to handle the matter in issue. The first ground for revision therefore fails.

Issue 2: Whether it was unlawful for the learned trial Magistrate to impose a condition of depositing security for costs which was not sought for and addressed by both parties before setting the condition?

Submission by the Applicants' Counsel

[22] It was submitted by Counsel for the Applicants that an order must be sought or prayed for and addressed to the trial magistrate during submissions. Counsel also argued that before an adverse order can be issued against a party, that party must be given a right to a fair hearing provided for under Article 28 and 44(c) of the Constitution of the Republic of Uganda, 1995; which right is non-derogable. Counsel relied on the case of ***Akugizibwe Francis and Another V Nyamahunge Kotido, High Court Civil Appeal No. 0032 of 2016*** to support his submission. Counsel prayed that the Court sets aside all orders which were issued by the learned trial Magistrate.

Submission by the Respondent's Counsel

[23] In reply, it was submitted by Counsel for the Respondent that after the passing of an ex parte judgment against the Applicants, their Counsel successfully filed an application in the Chief Magistrates Court at Luwero for orders that execution of the decree be stayed, leave to file a defence out of time be granted, execution of decree be stayed and costs of the application. Counsel submitted that all parties were heard and the learned trial Magistrate granted orders that the ex parte decree and judgment be set aside and execution be

stayed. Counsel submitted that leave was granted to file a defence out of time on condition that each applicant first deposited 7,500,000/= in court as security for costs within 7 days. Counsel argued that this was in line with *Order 43 rules 2 and 3 of the Civil Procedure Rules*. Counsel also cited *Section 98 of the Civil Procedure Act* which provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Counsel prayed that this application is rejected and dismissed with costs.

Determination by the Court

[24] The ex parte judgment in the subject suit was entered by the lower court pursuant to the failure by the defendants to file written statements of defence after being served with summons in the suit. As such, an order to proceed ex parte was entered under Order 9 rule 10 of the CPR and the suit was set down for hearing. The court heard the plaintiff's case and passed judgment. Such an ex parte judgment may be set aside either under Order 9 rule 12 CPR or under Order 9 rule 27 CPR or by a combination of both rules. I will examine these provisions.

[25] Order 9 rule 12 of the CPR provides –

“Setting aside ex parte judgment.

Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.”

[26] Order 9 rule 27 of the CPR provides –

“Setting aside decree ex parte against defendant.

In any case in which a decree is passed ex parte against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside; and if he or she satisfies the court that the summons was not

duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; except that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.”

[27] The application to set aside the ex parte judgment and decree in the subject suit ought to have been brought under either or both rules above. From the record, the Applicants cited the provisions under Sections 98 and 96 of the CPA. Both provisions were inapplicable; first, in the sense that where an express provision granting a remedy exists under the law, relying on Section 98 of the CPA is unacceptable and redundant. Secondly, Section 96 of the CPA applies to enlargement of time set by the court not by the Act or the rules. The trial magistrate chose, and rightly so, to ignore the citation of the wrong law and proceeded to consider the application on its merits. She then granted the application on such terms as she deemed fit.

[28] It is clear to me that in considering and determining the said application, the trial magistrate was alive to the power and discretion given to the court under rules 12 and 27 of Order 9 of the CPR. Under both rules, the court setting aside an ex parte judgment and decree has discretion to do so upon such terms as it thinks fit and as may be just. Specifically, under rule 27 thereof, if the applicant satisfies the court that *“the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him or her upon such terms as to costs, payment into court, or otherwise as it thinks fit ...”*

[29] Clearly, therefore, the court has the power and discretion to set any such terms as it thinks fit in the interest of justice. The power is granted by the law. The magistrate exercised the power within the law and her discretion judicially. Contrary to the submission by the Applicants' Counsel, the magistrate did not have to hear the parties on the terms she was setting. She only needed to give reasons for her decision, which she did.

[30] Counsel for the Applicants cited the decisions in ***Akugizibwe Francis and Another V Nyamahunge Kotido, High Court Civil Appeal No. 0032 of 2016; Fangamin vs Belex Tours and Travel Ltd, SCCA No. 10 of 2014***, among others, to support the submission that a court of law has no power to award remedies not sought for by a party and over which the parties have had no opportunity to address the court. The cases cited by the Applicants' Counsel set out the correct principles of the law but are wholly inapplicable to the present case. While it is true that a court ought not to grant remedies that are not pleaded by the claimant and litigated by the parties, such a position does not apply to terms in which the court grants orders. It is not correct to think that before the court sets the particular terms of its order, it needs to be moved by any party upon those particular terms or that the parties must be given a hearing over such terms. The law gives the court discretion to make orders on such terms as the court thinks fit. As such, the cases cited by Counsel for the Applicants apply in the context of remedies or reliefs sought by a party and not the terms within which the court grants such reliefs.

[31] In the circumstances, upon setting aside the ex parte judgment and decree, and staying execution, the trial magistrate acted within the law when he granted conditional leave to the Applicants to defend the suit out of time. As such, it has not been established that the magistrate acted without jurisdiction or that she exercised her jurisdiction illegally or with material irregularity or injustice.

[32] In all, therefore, both grounds of the application for revision have failed. The application is accordingly dismissed with costs to be paid to the Respondent. The order of the trial Magistrate shall be enforced. Since the Applicants could not comply with the order during the pendency of these proceedings, it is ordered that the seven days set by the trial magistrate shall run from the date of this ruling. In case the Applicants do not satisfy the set condition, the judgment and decree of the lower court shall be enforced against them.

It is so ordered.

Dated, signed and delivered by email this 29th day of September, 2022

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala
JUDGE