The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Miscellaneous Application No. 008 of 2020

[Arising from Bukedea Civil Suit No. 016 of 2019]

[Arising from Soroti Chief Magistrate's Court Civil Appeal No. 120 of 1983]

[Arising from Soroti High Court Civil Appeal No. 032 of 2020]

[Arising from Kachumbala Court Civil Suit No. 051 of 1982]

Justine James Ocom and 33 Others :: Applicants

Versus

Jembrance Paul Erongot :: Respondent

Before: Hon Justice Dr Henry Peter Adonyo:

Ruling:

1. Background:

The Applicants are residents of North Cell, Kidongole Township village, Kidongole Sub County, Bukedea District. They belong to Ikomolo Ikweny Clan.

The suit land is said to be their ancestral land. **Civil Suit No 016 of 2018** was originally **Civil Suit No. 051 of 1982**. It was between Christopher Opolot and Paul Erongot. These were the late fathers of the current parties. The cause of action was over a nine (9) acre piece of land.

Judgment was delivered in favour of the defendant Paul Erongot and an appeal was lodged by the late Christopher Opolot in the Chief Magistrate's Court vide **Civil Appeal No. 130 of 1983**.

The appeal lasted in the court system from then till 2015 when a retrial was ordered and hence **Civil Suit No. 016 of 2018**.

By the time **Civil Appeal No. 130 of 1983**was heard by the Chief magistrate Soroti, the original parties had passed on and their children, being holders of letters of administration in the estates of the deceased fathers became parties. These are the plaintiff and defendant in the civil suit and the appellant and respondent in the civil appeal.

When a retrial was ordered by the Chief Magistrate Okwalinga Opolot Michael filed an amended plaint with the defendant Jembrance Paul Erongot filing a written statement of defence to the amended plaint in which was a counterclaim for 77 acres of land.

Judgment was delivered on 29th September,2020 by His Worship Talisuna Patrick Ngereza in favour of the defendant both in the main suit and in the counterclaim.

An appeal was lodged by the plaintiff in the High Court at Soroti vide **High Court Civil Appeal No. 032 of 2020** in which judgment was delivered on 26th November, 2021 by His Lordship Justice Tadeo Asiimwe who upheld

the decision of the trial magistrate with costs in the appeal and in the lower court granted to the respondent.

During the pendency of **Civil Appeal No. 032 of 2020**, one Ariko James, applicant herein **No. 14**, filed an application at Bukedea Magistrate's Court under Miscellaneous Application No. 005 of 2021,that is **Ariko James vs. Jembrance Paul Erongot,** for review of the trial magistrate's decision on the grounds that the judgments and orders in **Civil Suit No. 016 of 2018** giving the respondent 77 acres of land included 5 acres of land belonging to the estate of the late Moko Nathalie to which he was the administrator and yet the later was never a party to that suit. The application was dismissed with costs to the respondent therein.

After the decision of the High Court in the civil appeal, the appellant Okwalinga Opolot Michael filed a notice of appeal through M/s Alliance Advocates on 2nd December, 2021. No memorandum of appeal yet on record.

While the intended appeal was pending, a total of 36 applicants represented by M/s Alliance Advocates filed this application for the review of the decision of High Court in **High Court Civil Appeal No. 032 of 2020** per Hon. Justice Tadeo Asiimwe delivered on 26th November, 2021 challenging the basis that this Honourable Court awarded the respondent land totaling 86 acres without the applicants being heard.

The applicants are aggrieved by that decision averring that they were beneficiaries of the estate of their late father and that they are affected by the decision of this Honourable Court.

2. Representation:

M/s Alliance Advocates of Kampala represents the applicants herein while M/s Emiru Advocates & Solicitors of Kampala represent the respondent. Counsels filed final written submissions to enable the disposal of this application.

3. Issues for determination:

a) Whether the applicant has sufficient grounds for review?
b) Whether there is any remedy?

4. Resolution:

This application is brought by way of notice of motion under **Articles 28 and 42 of the Constitution of the Republic of Uganda 1995** as amended, **Section 33 of the Judicature Act, Sections 82 and 98 of the Civil Procedure Act Cap 71** and **Order 46 rules 1,2, 8 of the Civil Procedure Rules SI 71-1.**

Article 28 of the Constitution of the Republic of Uganda 1995 as amended provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

Article 42 of the Constitution provides for a right to just and fair treatment in administrative decisions. It states that any person appearing before any administrative official or body has a right to be treated justly and

fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

Section 33 of the Judicature Act of Uganda provides that the High Court shall in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

Section 82 of The Civil Procedure Act provides that 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.

Section 98 of The Civil Procedure Act provides that nothing in this Act shall be deemed to limit or otherwise affect the inherent power 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.

After having given the background of this application and taking into account the pleadings, the affidavits in support of it and against it, the submissions

by counsels for the parties and the law in respect of this application, I will now turn to considering and resolving this application accordingly.

5. <u>The grounds for this application</u>:

The grounds of this application are that;

a) The applicants herein are the owners of the suit land as customary owners of the suit land and some of the applicants are purchasers of part of the suit.

b) The respondent only litigated with only a one Okwalinga Opolot Micheal, a member of the Ikomolo Ikweny clan who is just one of the several beneficial owners of the suit land.

c) The applicants are in physical occupation of the suit land which they have been cultivating from time immemorial having inherited it as their customary land from their fore fathers' members of the Ikomolo Ikwenyi clan.

d) The respondent, a son to the late Paulo Erongot who was a sub county chief of Kidongole sub county, has only has a valid claim in respect of a house on approximately 3 acres of land that his late father had purchased from British Cotton Growing Association and not the approximately 86 acres of land belonging to the Ikomolo Ikweny clan of North cell Kidongole Township village, Kidongole sub county.

e) The judgement and orders in the original suit *vide* **Bukedea Civil Suit No. 16 of 2018- Okwalinga Opolot Micheal vs Jembrance Paul Erongot** are a nullity because the Bukedea Magistrate Court did not have jurisdiction to entertain the main claim and counter claim for approximately 86 acres of land whose value has been put at Ug. Shs. 160,000,000/=.

f) The applicants were not parties to the Bukedea Magistrates court retrial nor the resultant appeal before this honourable court.

g) That the applicants only became aware that their land had been taken away recently after the appeal in this court by Okwalinga Opolot Micheal was dismissed and the respondent started asserting claim over their land.

h) That this is a proper case for court to review the judgement in ***Soroti High Court Appeal No. 032 of 2020 of Okwalinga Opolot Micheal versus Jembrance Paul Erongot.***

6. Orders sought by the Applicants:

a) The applicant by this application seek a review of this orders in **Civil Appeal No. 022 of 2020** (**Arising from Bukedea Civil Suit No. 16 of 2018** of Okwalinga Opolot Micheal vs Jembrance Paul Erongot) which upheld the decision of the Bukedea Magistrates court awarding the respondent approximately 86 acres of land belonging to the Applicants herein.

b) That the said court Orders be set aside on review by this honorable court

c) Costs be provided for.

7. Resolution of this application:

a. Issue 1:

Whether the applicants have sufficient grounds for review?

The applicants in their written submissions aver that they are aggrieved with the decision of this Honourable and so they fall under **section 82 of the Civil Procedure Act which defines an aggrieved person as;**

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. one who is entitled to seek for review.

In reinforcing their status as aggrieved persons, the applicants cited the case of ***Re Nakivubo Chemists Ltd [1979] HCB 12*** wherein it was held that an aggrieved person is one who has suffered a legal grievance and that such person was entitled to apply for review.

> ***"For an application for review to succeed, the party applying for review must show that he/she suffered a legal grievance and that the decision pronounced against him/her by court has wrongfully deprived him/her of something or wrongfully affected his title to something"***

See: ***Busoga Growers Cooperation Unions Ltd vs Nsamba & Son Ltd, HC (Commercial court) Misc. Application No. 123 of 2000.***

In making their case for review, the applicants aver that they are the rightful owners of the suit land by virtue of inheritance as customary owners with some of them purchasers of value of part of the suit and that the respondent only litigated with a one Okwalinga Opolot Micheal only who is a member of

the Ikomolo Ikweny clan and who is just one of the several beneficial owners of the suit land.

Therefore, they being third parties affected by the decision made by this honourable court review order should be made for justice not only to be done but to be seen to be done.

In a manner of speaking, the word review, which is a noun, means a formal assessment of something with the intention of instituting change if necessary. The said word is synonymous with analysis, evaluation, assessment, appraisal and examination. See: **Oxford Online Dictionary.**

As already stated above, **Section 82 of the Civil Procedure Act** is the proper provision of the law in situation where one is aggrieved with the decision of a court and seeks a review.

For one to seek and be granted a review of a court decision, such a party must fulfil conditions which were laid out in ***FX Mubuuke vs UEB High court Misc. Application No. 98 of 2005*** and these are;

a. That there is a mistake or manifest mistake or error apparent on the face of the record.
b. That there is discovery of new and important evidence which after exercise of due diligence was not within the applicants' knowledge or could not be produced by him or her at the time when the decree was passed or the order made
c. That any other sufficient reason exists.

In this application, the applicants aver that they learnt of the award of their customary land to the respondent after the respondents' victory over one Okwalinga Opolot Mike in an appeal before this Honorable Court for which

they were never parties yet are customary owners of the suit land and have evidence to that effect and that others among them either purchased or acquired portions of the suit land.

That they were not given a chance to participate in the locus visit and court was misled to award their land to the respondent which act has resulted in their being unlawfully deprived of property.

In reply to this assertion, Counsel for the respondent stated that under paragraph 8 of the affidavit of the 1st applicant and paragraph 7, 8, and 9 of the affidavits of the 2nd applicant, it is stated that the clan of Ikomolo Ikweny chose Okwalinga Opolot Mike to represent their interest in court meaning he was acting on their behalf and he was at all times aware of the counterclaim and since he was the clan representative then and he has not sworn an affidavit to the contrary, then such an averment that he was not representing then should be rejected.

That the failure of Okwalinga Opolot from disclosing all the relevant details of the case to the persons he was representing in court cannot be faulted on the respondent, the appellate court or the trial court.

The law relating to representation in court is found under **Order 3 of the Civil Procedure Rules** provides for recognised agents and advocates.

Order 3 rule 1 provides that appearances may be in person by recognised agent or advocate. It states:

> **Any application to or appearance or act in any court required or authorised by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the**

party in person, or by his or her recognised agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person.

Order 3 rule 2 provides for recognised agents. It states:

The recognised agents of parties by whom such appearances, applications

and acts may be made or done are—

(a) persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties; and

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.

Accordingly, therefore for one to represent a party in court one must fall within the provisions of the law above.

In this application, the applicants contend that they are third parties who are aggrieved with the decision of this court yet they were never given opportunity to be heard.

On the other hand, the respondent state that by virtue of averments in the affidavit of the 1st applicant in paragraph 7, 8, and 9 of the affidavits and those of the 2nd applicant, it is stated that the clan of Ikomolo Ikweny chose Okwalinga Opolot Mike to represent their interest in court.

That could be true, however, that presentation must fulfill the provisions of Order 3 above especially rule 2 (a) which provides for such representation to be by virtue of a power of attorney which I do not see on record.

The mere averment in one's affidavit that one is representing another, unless such a person is an advocate, does not cloth one with the authority to represent another's interest in court.

I would thus not agree with counsel for the respondent that since the 1st and 2nd applicant aver in their affidavit that Okwalinga Opolot Mike was chosen to represent the Ikomolo Ikweny clan, then that was sufficient representation.

I would beg to differ. The provision of the law in this aspect is strictly either by counsel or a person who has a power of attorney as provided for by the law.

I would find that since no power of attorney was bestowed onto Okwalinga Opolot Mike by Ikomolo Ikweny clan, then he cannot be said to have had the authority to represent that clan interests in court even if he is a member of that clan.

With regards to the applicants not being given an opportunity to participate in locus, this takes us back to the importance of visiting locus. In the case of ***De-Souza vs Uganda [196]) EA 78,*** court observed that the purpose of

visiting *locus in quo* is to check on evidence given by the witnesses in court but not to fill in gaps to bolster the party's case.

Eventually in this case what the learned trial magistrate called evidence of the ***"whole village"***, ***"evidence of all neighbors"*** etc. was never part of evidence before him in open court.

Therefore, the evidence of whoever who never testified in court was irrelevant at the time of locus and the trial magistrate was right not to give them a chance to participate during locus.

The applicants further state that there was an error made by the magistrate court when it handled matters beyond its jurisdiction.

Counsel for the applicant cited the case of ***FX Mubuuke versus UCB; HCB, MA NO. 98 of 2005*** where it was held that;

> ***"for review to succeed on the ground of an error on the face of the record, the error must be so manifest and clear that no court would permit such error to remain on the record"***

Also in the case of ***Edison Kanyabwera vs Pastor Tumwebaze, supreme court Civil Appeal No. 6 of 2004***, it was held that,

> ***"In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and***

clear that no court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law".

The applicants aver that the magistrates court did not have jurisdiction to entertain the main claim and counterclaim of approximately 86 acres as the value is 160,000,000/= (one hundred sixty million shillings) which is beyond courts powers as its pecuniary jurisdiction is 20,000,000/= (twenty million shillings).

Counsel for the respondent cited **Section 207(2) Of The Magistrates' Courts Act Cap 16,** as amended which states that where the matter of a civil nature is governed only by civil customary law, the jurisdiction of the chief magistrate's court and magistrate grade one shall be unlimited.

The applicants claim to have inherited the suit land from their fore fathers and so did the respondent hence making the matter a civil matter governed by customary law which means that the magistrate courts had jurisdiction to handle the matter.

On the ground that the applicants were deprived of their land unheard as the respondent only litigated with only one Okwalinga Opolot Michael and the rest of the applicants were not heard which was against their right to a fair hearing as enshrined under **Article 28 and 42 of the Constitution of Uganda**, I note that the respondent broke down the several applicants into four groups who claim to have interest in the property;

Group One is said to comprise the 4th, 5th, 8th and 11th defendant, with the 4th and 5th being wives to Christopher Opolot and the 8th and 11th defendant

being his sons who were allegedly represented by Okwalinga Opolot Michael, who is the holder of the letters of administration of the estate of his late father and the respondent won the case against him.

Group Two comprises of persons who claim interest from Moko Nasanairi who is said to have lost Kachumbala Civil Suit No. 34 of 1970 to the father of the respondent. Moko Nasanairi, therefore, would by the decision in that suit cease to have interest in the property and therefore his beneficiaries equally have no interest in the suit land as the land does not form part of his estate. Under the law of succession, one cannot bequeath what does not belong to him.

Group Three as they are clan mates of Okwalinga and they are stated to have chosen him to represent their interest in court but which I have already discounted above as there is no power of attorney to that effect on record.

Group Four is comprised of persons who purchased property from Okwalinga during the pendency of the suit land. Given the fact that the original suit took too long to be completed and after being filed in 1982, after such a lapse of time , it was imperative that when the suit thus was allowed to be retried on the basis that the appeal to the Chief Magistrate had taken too long and as such a retrial was ordered , all interests should have been taken into account and as such I would agree with the applicants that given the fact that the original cause of action being 9 acres of land was allowed in the retried case to expand to 86 acres off land, then all proper parties should have been sued or be sued for justice to not only be done but be seen to be done as the interests of the applicants either as beneficiaries or purchasers should have been taken into account such that all matters relating to the dispute at hand is exhausted at once so as to avoid multitudes of other suits

based on the same cause of action. given the fact that the judgement delivered against Okwalinga Opolot in respect of the property affects them as a whole yet the suit property did not belong to him at the very first place and therefore, they did not acquire a good title in respect of the land.

The evidence of the applicants clearly establishes that they are aggrieved for even the dispute between Christopher Opolot and Paulo Erongot which was inherited by their respective sons Okwalinga Opolot Mike and Jembrance Paul Erongot in Bukedea Magistrate's Court which was ordered retried was a dispute over only 9 acres of land.

Further Paulo Erongot, the then sub county chief of Kidongole in the 1960's as indicated in the affidavits of parties herein bought only a residential house and a small plot from the British Cotton Growing Association and he even took residence on the said land instead of his official residence at the sub county.

The applicants further show by their affidavits that they learnt of the award of their customary land to the respondent after the respondent's victory over Okwalinga Opolot Mike in the appeal before this Honourable Court *vide* the decision of Hon Justice Tadeo Asiimwe which was given contrary to the position during locus visit in the retrial where only 9 acres of land, which were the subject of the original dispute, was shown to the lower trial court by the respondent and this fact was confirmed by persons like Ezekiel Ogasi and Richard Opolot who are some of applicants herein who were present during the locus visit, yet other people like Ojelel Abraham and Nathan Omoko who were absent had their land were given away in their absent.

There are strong assertions by the applicants that the suit land belongs to them and their clan and that the suit land which is approximately 86 acres is theirs.

This is the same suit land which was counterclaimed by the respondent herein during the retrial of **Civil Suit No. 016 of 2018** in which there was an escalation of original claim from 9 acres to 86 acres by the respondent which escalation engulfed land being claimed by the applicant herein who asserts that yet they were never sued as defendants in the counter claim and that as a result the decision to deprive them of the land they claim theirs occasioned an injustice as they were condemned unheard.

Further, there are also 12 persons who are now part of the applicants who now are claiming to have purchased portions of the suit land and aver that most of them had since then commenced developments on their portions and were in physical possession.

They aver that their portions were also given away without according them a hearing.

These persons include Ernest Owalam, Simon Peter Oita, Florence Amuge, Hassan Akorikin, Enock Odeke, Apunyo Paul Okiria, Omunga Moses, Odeke Michael, Mohammed Angura, Stephen Kakungulu, John Vincent Okiria and Okia Mandela.

All these persons swore affidavits in respect of this application and are seeking for a review of the decision of this court. They even attached sale agreements showing ownership of the purchased portions.

According to counsel for the respondent, these purchasers had no legal rights allegedly on the basis that they derived the said purchase a decision

had already been delivered in ***Civil Suit No. 34 of 1970, Moko Nasanairi vs. Paul Erongot*** , the father of the respondent herein with Moko losing and thus ceasing to have any interests on the suit land and therefore the land ceased to be part of his estate and as such the applicants could not have been deprived of property not belonging to the estate of a person under whom they claim and as such they were not aggrieved persons.

While it may be true that the dispute over the suit land started in 1970, with several suits filed by the same related parties, at different times, it was imperative, in my considered view, that the real dispute between the parties be heard inter parties such that proper judicial decision is made.

While it is also true that litigation must end, litigation can only end where proper parties are involved and proper cause action identified and adjudicated upon appropriately.

In this instance, I am satisfied that though the matter was apparently concluded, the end result has raised more issues than ever for there are a number of persons who claim to have been affected by the decision of this Honourable Court and who claim that they were not privy to the court process and thus assert that their legal rights were affected as they were condemned without being heard.

That being the case, I would agree with the applicants that since they aver that they lost land in a matter which they were not parties and were not heard, then such condemnation of them without being heard contravenes **Articles 28 and 42 of the Constitution** which guarantees the right to a fair hearing and the right to be heard.

Invariably, I would find that the applicants are aggrieved persons.

On whether this application raises a substantial ground for review, the argument raised by the applicants are that they are claimants as customary owners with others as bonafide purchasers of the suit land as against the respondent, which had been decreed to the respondent, yet they were not given the opportunity to defend themselves or be heard.

From the affidavit averments which are on record, it is clear to me that there are claims of deprivation of the right to be heard and property belonging to the applicants given to the respondent. This is the core of this application.

The instant dispute was apparently resolved as customary one in nature yet there is an allegation by the respondent that his late father lost the suit land to the then Buganda led administration previously but was given back the same in 1966 and thereafter his late father even began process of survey of the suit land but was apparently stopped by Christopher Opolot, whose son Okwalinga Opolot Mike ultimately forcefully entered the suit land and even distributed it.

This was the cause of the respondent making the counterclaim which was tried by a magistrate Grade One at Bukedea. Given this fact, I would find that since the process of registration of the land had begun, the suit land partly court be one under customary tenure and partly brought under the operations of the Registration of Titles Act. This dual nature took away the jurisdiction of the magistrate's court to try the same and so this Honourable Court could not equally confirm the decision of the lower court based on that complexity as the trial by the lower trial court was a nullity *ab initio* due to lack of jurisdiction.

Arising from the above finding, I would conclude that there are indeed substantial grounds of dispute ranging from ownership, jurisdiction,

purchase *et al* which are raised by this application which would call for a review of the decision of this court accordingly.

Then lastly there is the issue of remedies. The claim herein by the applicants is that land of 86 acres constituting the suit land which was awarded to the respondent could not have been claimed from Okwalinga Opolot Mike in the case which was before the lower trial court at Bukedea wholly as other interested parties such as the Ikomolo Ikweny clan and purchasers of the same were never parties in the suit / counterclaim before that court. I agree wholly for as I have already made findings earlier, the interested parties never issued to Okwalinga Opolot Mike any of their power of attorney to represent them. Also the original claim was for 9 acres of land which was cascaded by the counterclaim to 86. The applicant herein claim that said land. They also aver they were never given opportunity to be heard yet their right to property was violated through a court process which was not alive to their interests and thus was an illegality which wrongfully deprived them of their rights. Those are triable issues in my considered view. Therefore, I would conclude that the remedy to the parties herein is to have tried all issues surrounding the 86 acres inter parties with the court coming to a just conclusion.

8. Conclusion:

Arising from the above, I am satisfied that this is a case which is a proper one for review of this Honourable Court's decision in High Court Civil Appeal No. 032 of 2020. It is thus reviewed accordingly with orders as below.

9. Orders:

a. This application is found to have merits and it is thus allowed.

b. The orders of this Honourable Court in High Court Civil Appeal No. 032 of arising from Bukedea Civil Suit No. 16 of 2018 Okwalinga Opolot Michael and Jembrance Paul Erongot which upheld the decision of Bukedea Magistrate's Court awarding the respondent approximately 86 acres of land is hereby reviewed and set aside.

c. It is hereby ordered that a retrial in relations to the approximately 86 acres of land be instituted at the High Court of Uganda by virtue of **Article 139 (1) of the Constitution of Uganda.**

d. The costs of this application to be in the cause.

I so order.

Hon. Justice Dr Henry Peter Adonyo

Judge

20th June 2022