THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

REVISION MISC. CAUSE NO. 01 OF 2023

(ARISING FROM CIVIL SUIT NO. 029 OF 2020, NWOYA CHIEF MAGISTRATES COURT)

MILDRED AKULLU OWOT.....APPLICANT

VERSUS

LAKONY SAMUEL.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

Background facts

The Applicant seeks the exercise of this Court's revisionary powers. By Motion launched under sections 83 and 98 of the Civil Procedure Act Cap.71, and Order 52 of the Civil Procedure Rules, S.I 71-1, the Applicant prays that the Judgment given by the Magistrate Grade 1 of Nwoya Chief Magistrates Court, Her Worship Anyeko Susan, in Civil Suit No. 029 of 2020 be revised, annulled, and set aside, with costs.

The facts, as discernible from the Motion, the affidavits on record, and the attachments thereto, are as follows:

The Applicant and others who are not parties to this proceeding, were sued in the trial court by the Respondent over a piece of land said to be measuring approximately 150 acres, located in Okwoto Village, Bungu Parish, Lii Sub County, Nwoya District. The Respondent claimed he and other beneficiaries own the suit land. It was alleged that the suit land forms part of the estate of the Respondent's late father, a one Ocen Alfred. The Respondent, therefore, alleged acts of trespass on the part of the Applicant and others. He, *inter alia,* sought a declaratory order to that effect. The Applicant and her co-defendants denied the Respondent's claim. The co-defendants who were eighteen in number were alleged to have wrongly purchased part of the suit land from the Applicant. That allegation was of course not entirely correct because, as subsequent evidence showed, two of the co-defendants were a son and mother of the Applicant who could not and in fact evidence proved, did not buy from the Applicant. Therefore, whereas the Applicant admitted selling part of the suit land to some of her co-defendants, she denied selling to others.

The Applicant and the co-defendants filed joint defence in which they counterclaimed. They averred that the suit land measures approximately 400 acres. On her part, the Applicant averred she acquired the suit land through inheritance from her late husband in the year 2009, on his demise. It was averred that the deceased had acquired the land in the year

1989 when it was vacant. The rest of the counterclaimants, except the Applicant's son and mother, claimed as beneficiaries of a valid sale.

Prior to the hearing, a partial consent settlement was executed by the parties, except six Defendants. That was on 12th April, 2021. The parties agreed that the Plaintiff (the present Respondent) would relinquish claim over portion of the land laying/ situate to the **South** of the road to Okwoto-Mile 22 Junction, in occupation of the 1st Defendant (the current Applicant) and ten others. It was also agreed that the Plaintiff had no claim over a portion of the suit land occupied by two specific Defendants. At the end of the partial settlement, thirteen Defendants/ Counter-Claimants had resolved the suit amicably. Pursuant to the consent, the Plaintiff also agreed not to disturb the consenting Defendants/Counterclaimants over their respective portions of land which they were in occupation of. Thus a permanent injunction was issued to that effect, as against the Plaintiff. Each party was to bear its own costs.

The consenting parties confirmed the terms of the consent during court appearance on 12th April, 2021. The trial court endorsed the consent. Despite the settlement, the case still proceeded against the Applicant, for it appears she had some subsisting claim to a portion of the suit land which was not affected by the terms of the consent settlement order. The

disputed portion was thus described by the trial court as situate in the **north** of the road from Okwoto trading centre, 22 miles to Adebuk.

In its judgment, the trial court noted that the suit had continued as against the Applicant and five other Defendants/ Counterclaimants. The five persons were not parties to the consent but the Applicant. Whereas the Applicant's son, Komakech Francis (who was listed as the 8th Defendant) was not a party to the consent, the trial court, with respect, was silent on whether or not the suit had continued against him. Be that as it may, the trial court conducted scheduling conference, as the parties had filed a joint scheduling memorandum on 27th September, 2021. Three issues were framed for resolution, namely; *who is the rightful owner of the suit land? Whether the Defendants trespassed on the suit land?* And *what remedies are available to the parties?*

The matter was tried with the Respondent (Plaintiff) and the Applicant (Defendant) testifying, and each calling witnesses. The other co-defendants/ Counterclaimants against whom the suit had continued, did not testify and did not call witnesses. At the close of the defence case, the trial court visited the *locus in quo* on 09th December, 2022. Court then delivered Judgment on 24th January, 2023. It allowed the Respondent's suit, with costs, declaring him the lawful owner of the suit land and ordering vacant possession by the Applicant and the other co-defendants.

Court also issued a permanent injunction and awarded general damages of shs. 5,000,000 to the Respondent. It dismissed the Counterclaim but, with respect, was silent on costs of the counterclaim.

The present Application was lodged on 07th February, 2023, fourteen days after the Judgment of the trial court. No appeal to the High Court was preferred by any of the unsuccessful party.

Grounds of the Application

The gravamen of the complaint is that the learned Magistrate Grade 1 was not vested with the requisite pecuniary jurisdiction to entertain the suit. It was averred that the value of the suit land was way above Ugx.20, 000,000, which is the upper limit of the pecuniary jurisdiction of a Magistrate Grade 1. The Other grounds, which I think, were pleaded in the alternative, although the Motion does not expressly indicate so, are: the trial court acted illegally by entertaining a suit in trespass which was time barred. It was also averred that, by the time the suit was filed in the trial court, the same subject-matter had allegedly already been entertained by the Chief Magistrates Court of Gulu, sitting in Gulu, *vide* Civil Suit No. 35 of 2013: Lakony Samuel and another Vs. Akullu Mwiduren & 7 others. Thus, the subsequent civil suit no.029 of 2020 (giving rise to the impugned judgment) was contended, constituted an abuse of court process, and, therefore, an illegality. The Applicant averred that the trial court was

functus officio as at the time it rendered judgment in civil suit no. 029 of 2020 (because arguably she had already entered a partial consent judgment in it). The Applicant also contended that the illegalities and or irregularities are apparent on the face of the record. The Applicant also claimed that, through mistake, inadvertence and negligence of her then counsel, she submitted to a non-existing jurisdiction of the trial court. Concluding her averments, the Applicant stated she is greatly aggrieved by the impugned judgment. She invited this Court to apply the principles of equity and justice, to revise the impugned Judgment, by annulling and setting it aside. The Applicant swore an affidavit in support of her Motion.

Affidavit in support

In her affidavit, the applicant relies on the pleadings lodged in civil suit no. 35 of 2013 (*supra*) and deposed that, the land in issue in the impugned Judgment was already subject of an earlier suit and its value had been estimated to be between Ugx 25,000,000 and Ugx 30,000,000. The Applicant thus relies on the existence of the earlier suit to contend that, there was an illegality and abuse of the court process by the Respondent lodging another suit in 2020 in Nwoya Chief Magistrates Court. The Applicant deposes that, as at the year 2020, the value of the suit land was approximately Ugx 4,000,000 per acre, thus, the aggregate value of 150 acres was Ugx 600,000,000. She also claims that the suit land comprises of open fields, crop and animal farms, rural residential homes, both

permanent and semi-permanent, thus of high value. The Applicant deposes that at all material times to civil suit no. 029 of 2020, it was obvious and notorious on the face of the record that, the value of the suit land was way above the pecuniary jurisdiction of the Grade 1 Magistrate. She asserts that the Respondent illegally and capriciously refused to plead the monetary value of the suit land so as to mislead the trial court on the question of its pecuniary jurisdiction, and to avoid paying court fees. There are a litany of other depositions which this court will take into account in this Ruling, without reproducing them, for brevity.

Opposing affidavit

In his rather technical response, the Respondent deposed that the application for revision is an abuse of the court process, speculative, frivolous and vexatious, and does not meet the preconditions for its grant. He deposes further that, the application is a waste of time, and filed without justification.

On factual matters, the Respondent deposed that, the Applicant's depositions are deliberate falsehoods, which court ought to ignore. Regarding the value of the subject matter which he had pleaded in the earlier civil suit, the Respondent deposed that, the value was a mere estimation, and was neither accurate nor factual, being the handiwork of former counsel. Regarding the claim that civil suit no. 35 of 2013 over the

same subject matter had been entertained by Gulu Chief Magistrate's Court, the Respondent deposed that, there is no final determination of civil suit no. 35 of 2013 by the Chief Magistrates Court Gulu. He added that, the impugned suit was legally handled by the Magistrates Court of Nwoya, which had jurisdiction. The Respondent explained that he did not indicate the value of the suit land in the impugned suit, because, the suit land has no title, it is unsurveyed and so, the Respondent couldn't estimate its value.

The Respondent also deposed that, the Applicant had by a Counterclaim in civil suit no. 29 of 2020, accepted that the suit land is customary land. The Respondent added that, *vide* the Counterclaim, the Applicant similarly did not plead the value of the subject matter but supported the trial court's jurisdiction. The Respondent deposed that, no issue was raised at the scheduling conference regarding the jurisdiction of the trial court, because, the court was seized of jurisdiction. He also deposed that, the Applicant should have appealed, if at all she was aggrieved with the trial court's decision. The Respondent wound his deposition, stating that, civil suit no. 029 of 2020 was not stale, being a suit in trespass, and, therefore, a continuing tort. He denied that the *functus officio* rule apply. He prays that court dismisses the revision application for lack of merit and for constituting an abuse of the court process.

Representation

Learned Counsel Mr. Bernard Banturaki represented the Applicant while Learned Counsel Mr. Brian Watmon appeared for the Respondent. Both parties were present in court during the hearing. Parties requested and court allowed them to file written submissions. I have considered the submissions and I am grateful.

Issues

Having perused the Motion and the affidavits on record, as well as submissions, two issues arise for resolution, namely;

i) Whether the case is proper for revision?

ii) What remedies are available to the parties?

Resolution

The issues shall be resolved together.

Section 83 of the Civil Procedure Act Cap 71 (hereafter, CPA) provides for the revisionary powers of the High Court. Under the section, the High Court may call for the record of any case which has been determined under the Civil Procedure Act by any Magistrates Court and may revise it, and may make such order as it thinks fit. The High Court may, therefore, exercise its revisionary powers only in any of the three circumstances, namely:

i) If it appears that the Magistrate's Court has exercised a jurisdiction not vested in it in law;

ii) Failed to exercise a jurisdiction so vested;

iii) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.

This court has, before, held that section 83 of the CPA applies to jurisdiction alone. That is, the irregular exercise of, or non-exercise of it, or the illegal assumption of it. See: ***Matemba Vs. Yamulinga [1968] EA 643***; ***Bongozana Alex t/a Express Integrity Auctioneers & Court Bailiffs Vs. Oryem Auric, Misc. Civil Revision No. 002 of 2020 (Stephen Mubiru, J.)***

In the present matter, the main contention, as I noted, is rooted on section 83 (a) of the CPA, that, the Learned Magistrate Grade 1 exercised a jurisdiction not vested in it in law. The Applicant's submission quotes section 83 (a) of the CPA. Therefore, whereas the body of the Motion, and the affidavit and submission also canvass matters connected to irregular and illegal exercise of jurisdiction, thus within the purview of section 83 (c) of the CPA, the Applicant, with respect, didn't purport to tread that road in the alternative. The gist of her complaint seems to me, to be an alleged lack of pecuniary jurisdiction. In her submissions, it seems to me the

Applicant wanted to cast the net wide just in case this court were to find that the trial court was seized with jurisdiction. The Applicant thus seeks to argue also that, the court exercised its jurisdiction irregularly. That argument, in my view, can only be pressed where jurisdiction exists but is irregularly or illegally exercised. I think this practice of pleading, in a revision motion, with respect, ought to be discouraged. An Applicant pursuing a revision application must be sure about its case. One cannot argue lack of jurisdiction and at the same time argue that, jurisdiction existed but was exercised illegally or irregularly, unless argued in the alternative. In this case, the grounds were not pleaded in the alternative. Even so, arguing the grounds in the alternative projects a serious lack of belief in one's ground of complaint. Be that as it may, this court holds no prejudice against the Applicant and proceeds to consider the merit of the claim, noting that, the alleged want of jurisdiction goes to the root of any exercise of powers and grant of reliefs by a court. Lack of jurisdiction nullifies everything done in purported exercise of powers which didn't in the first place exist.

The Applicant strenuously argued that the trial court had no pecuniary jurisdiction to entertain the suit at all. She asserted that, this is because the value of the suit land is estimated to be Uganda Shillings Six Hundred Million (Ugx 600,000,000. The Respondent did not agree.

To resolve the controversy, it is apposite to consider the relevant statutory enactments. The first law that comes to mind is the provision of section 4 of the CPA. It provides,

"Except in so far as is otherwise expressly provided, nothing in this Act shall operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction." (Underlining is for emphasis.)

The above provision limits the jurisdiction of courts to their pecuniary limits, unless expressly provided. The pecuniary jurisdiction of course does not apply to the High Court, because, the High Court enjoys unlimited original jurisdiction in all matters, unless provided otherwise by the Constitution of the Republic of Uganda, 1995. See Article 139 (1). See also section 14 (1) of the Judicature Act Cap 13. Such exceptions in the case of the High Court, are, for instance, in tax matters, where the High Court enjoys only appellate jurisdiction, under the Tax Appeals Tribunals Act (as amended). The exception is also with regard to interpretation of the Constitution which is the preserve of the Constitutional Court, and challenging the election of the President, in which the Supreme Court has exclusive original jurisdiction. See: ***Habre International Co. Ltd Vs. Ebrahim Alarakia Kassam & others, Civil Appeal No. 04 of 1999 (per Mulenga, JSC) (RIP)***; ***Uganda Revenue Authority Vs. Rabbo Enterprises***

(U) Ltd & Mt. Elgon Hardware Ltd, Civil Appeal No.12 of 2004 (SCU) (per Prof. Lillian Tibatemwa Ekirikubinza, JSC).

The power of the High Court to entertain all civil suits, unless provided otherwise, is further buttressed by section 11(1) of the CPA. However, to avoid overwhelming the High Court with matters, and to decongest it, and for effective administration of justice, among other reasons, the Magistrates Courts are clothed with jurisdiction to try civil suits falling within their jurisdiction, under section 207 of the Magistrates Courts Act, Cap. 16 (hereafter, MCA). Civil suits must, therefore, be lodged in the Magistrate's Court of the lowest grade, so long as the court is competent to try it. See section 208 of the MCA. The Magistrates Courts Act, therefore, provide an exception to the direct access to the High Court in civil suits, where the Magistrates Courts are seized with jurisdiction.

Regarding suits for recovery of immovable property or for the determination of right to or interest therein, to which the present matter belong, section 12 of the CPA provides that such suit shall, subject to the pecuniary or other limitations prescribed by law, be instituted in the court within the local limits of whose jurisdiction the property is situate. This again brings into play section 207 of the MCA. There is thus a need to plead the value of the subject matter, for jurisdictional reasons, and for purposes of assessment of proper court fees. Thus section 11 (2) of the

CPA provides that, whenever for the purposes of jurisdiction it necessary to estimate the value of the subject matter of a suit capable of a money valuation, the plaintiff shall, in the plaint, subject to any rules of court, fix the amount at which he or she values the subject matter of the suit. However, where the court thinks the relief sought is wrongly valued, the court must fix the value and return the plaint to the plaintiff for amendment. See also section 207 (3) of the MCA, which is worded in identical terms as section 11 (2) of the CPA.

Where however it is not possible to estimate the monetary value of the subject matter, where a declaration of ownership is made, a decree cannot be issued for an amount on the claim, exceeding the pecuniary limits of the ordinary jurisdiction of the court passing the decree. This covers, for example, award of compensation/damages. However, the pecuniary jurisdiction of court does not affect the amount of costs that the court can award after taxing the bill of costs, as it is now trite law that a court can award taxed costs more than its pecuniary jurisdiction, provided it was incurred in litigation. See: ***National Medical Stores Vs. Penguins Ltd, HC Civil Appeal No. 29 of 2010 (Geoffrey Kiryabwire, J., as he then was); Ernest Atto Vs. Tom Alwala, [1986] HCB 65***.

Jurisdiction is therefore the power of court to hear and entertain an action or proceedings. It is the extent of the authority of Court to administer

justice not only with reference to the subject matter of the suit but also the local or pecuniary limits of its jurisdiction. See: ***Kaggwa Michael Vs. Apire John, High Court Misc. Application No. 01 of 2023***; ***Mukasa Vs. Muwanga, HCMA No. 31 of 1994***; ***Sir Dinshah Fardunji Mulla, The Code of Civil Procedure, Vol. 1, 17th Edn, Lexis Nexis, 409***. Jurisdiction of Court is therefore not a matter of inference but of law and must be prescribed by law. A decision of a Court without jurisdiction is a nullity because no court can confer jurisdiction upon itself. Lack of jurisdiction, therefore, goes far beyond any "error, omission, or irregularity" nor can it be regarded as a mere technicality. See: ***Desai Vs. Warsama (1967) EA 351.*** Pecuniary jurisdiction of court entails the exercise of the power of court to decide a case and issue a decree or order over subject matter, of a monetary value, over which court is allowed to exercise its power. A court purporting to act without jurisdiction, acts in vain. If a court lacks jurisdiction, it must down its tools. See: ***"Lillian S" Vs. Caltex Oil (Kenya) Ltd, [1989] LLR 1653 (CAK)***; ***Matiba Vs. Moi [1990-1994] 1 E.A 322 (CAK).***

The MCA, as noted, provides for civil jurisdiction of Magistrates. And as is relevant in this proceeding, section 207 (1) (b) limits the civil jurisdiction of a Magistrate Grade 1 to matters whose subject matter value does not exceed twenty million shillings. However, both the Magistrate Grade 1 and the Chief Magistrate enjoy unlimited jurisdiction under section 207 (2) of

the MCA, in a matter or cause of a civil nature which is governed only by civil customary law. I will revert shortly to analyze the provision of section 207 (2) MCA which is of profound importance in this matter. I will, however, first consider the rule regarding the need to plead the jurisdiction of court. I will also canvass how jurisdiction ought to be challenged.

Given that the Civil Procedure Rules (hereafter, CPR) regulates the procedure of the High Court, the Chief Magistrate and a Magistrate Grade 1 Court (as per section 219 MCA), every plaint lodged in those courts must plead facts showing that the court has jurisdiction. See Order 7 rule 1 (f) of the CPR. Thus pleas such as *'this court has jurisdiction'*, in my view, on its own, does not satisfy the requirement of the rule. Facts must show that a court is seized with the requisite jurisdiction. Therefore, a defendant who wishes to dispute the jurisdiction of Court must do so in the trial court. This is because Appellate Courts frown upon trial court's jurisdictional objections being raised on appeal for the first time, and will ordinarily decline such objection to the jurisdiction where it was not taken in the trial court, unless there has been a consequent failure of justice. The appellate court may, however, grant leave, to have the objection to trial court's jurisdiction argued on appeal. See section 16 of the CPA, and section 216 of the MCA. Since lack of jurisdiction borders on illegality, courts, in practice, appear to be more willing to entertain the issue of lack of jurisdiction even on appeal where it was not argued in the trial court. In

the present case, the objection that the trial court lacks jurisdiction was not taken in the trial court. The instant proceedings of course is not an appeal, thus the point of seeking leave does not arise. The Applicant is therefore, asserting the issue of jurisdiction as of right, by invoking this court's revisionary powers under section 83 of the CPA. This court's powers under section 83 of the CPA is however exercised discretionarily. That is, according to the rules of reason and justice, in the context of revision proceedings, not according to private opinion, humour, and not arbitrarily, or in a vague or fanciful manner, but according to the law. See: ***Sharp Vs. Wakefield, [1891] A.C 173***; ***R Vs. Woodhouse [1906] 2 K.B 501***. This Court's revisionary power is also invoked, not as a substitute for an appeal. See: ***Okana David Vs. Ocaya Robert, Civil Revision Cause No.05 of 2022 (Okello, J).*** In revision, Court gives a hearing to all parties, but must also consider any hardship that might be suffered by any person, by exercise of its revisionary power.

The rules of this Court provide for the manner of objecting to the jurisdiction of the High Court or the Magistrate Grade 1 or a Chief Magistrate. Order 9 rule 3 of the CPR provides for how to object to court's jurisdiction. Objection to jurisdiction could be on the basis of procedural irregularity mentioned in Order 9 rule 2 of the CPR or on any other ground, other than those covered under rule 2.

In the present case, the concern is not with the procedural irregularity but that the trial court lacked pecuniary jurisdiction. That objection was capable of being raised formally in the trial court, under Order 9 rule 3 (1) (g) of the CPR. The alleged want of pecuniary jurisdiction translates to the contention that the court has no jurisdiction over the Defendant in respect of the subject matter of the claim, because, the subject matter value was over the pecuniary limit of the Magistrate Grade 1. Thus, a person objecting to jurisdiction of the trial court has to do two things, namely;

i) Give notice of the intention to defend the proceedings.

ii) Thereafter, apply within the time limited for service of a defence (15 days from the service of summons and plaint on defendant), by summons in chambers.

In this case, the Applicant could have applied for a declaration that, in the circumstances of the case, the court had no pecuniary jurisdiction. The Applicant did not pursue this course, for unknown reasons. See: ***Mark Graves Vs. Balton (U) Ltd, HCMA No. 158 of 2008 (Per Lameck Mukasa, J.)***

The Application under Order 9 rule 3 of the CPR must be supported by an affidavit verifying the facts on which the application is grounded. It must be served on the Respondent (Plaintiff). The court must then hear the application. Court may dispose it of as a preliminary issue or otherwise as

it thinks appropriate. A court may decide that the issue of jurisdiction be framed and resolved alongside other issues at the end of the trial on receiving evidence. A defendant who lodges Chamber Summons under the rule, disputing the jurisdiction of court, is not treated as having submitted to the jurisdiction of the court simply because he/she filed a written statement of defence. (Order 9 rule 3 (5). However, if court makes no order on the application or dismisses it, the Defendant's notice of intention to defend the proceedings will have no legal effect and it shall be deemed that he/she never disputed the court's jurisdiction, unless the defence is withdrawn with leave of court pursuant to Order 25 rule 1 (3) of the CPR, in which case, a defendant shall be treated as having not submitted to court's jurisdiction. Thus, a defendant who makes no application disputing the jurisdiction of court, on specified or any grounds, as stated in rule 3 of Order 9 CPR, but files a defence, and does not withdraw it afterward with leave, is treated as having submitted to the court's jurisdiction.

See generally Order 9 rule 3 (1-6) of the CPR which support the above position.

In this matter, the Plaint shows that the Respondent who was the Plaintiff, did not plead the value of the suit land. He explains that it was because the land was unsurveyed and untitled. The Respondent pleaded the

incidents of customary ownership, apparently, to show that the trial court was seized with unlimited jurisdiction in the matter. He asserted in paragraph 4 of the Plaint that, his father acquired a virgin land in 1979, following a brother, Oyugi Mark Game (a game ranger in the area) who helped in the acquisition process. Of course, this court notes that the process of acquisition remained cryptic in the Plaint. The Respondent/ Plaintiff further asserted that, the plaintiff's father and his children settled on the land and started cultivating and rearing animals without any problem. The Plaintiff also averred that the Defendant (the present Applicant) and others started trespassing on the suit land in the year 2013.

From the Respondent's pleading, I am able to discern that, whereas the value of the suit land was not pleaded, that to my mind, could have only affected the court filing fees. It is apparent that the Respondent paid fees chargeable and payable on general Plaint, applicable to suits where the subject matter value is not pleaded. In this case, no one, not even the Applicant, complained that less court fees was paid by the Respondent/ Plaintiff. In my view, the Respondent clearly pleaded the incidents of customary land tenure *albeit* in a summary fashion, without necessarily using the nomenclature "customary land" in his pleading. By his pleading, the Respondent, in my view, brought the subject matter within the purview

of section 207 (2) of the MCA, where the jurisdiction of a Magistrate Grade 1 is unlimited. Section 207 (2) of the MCA provides,

"Notwithstanding subsection (1), where the cause or matter of a civil nature is governed only by civil customary law, the jurisdiction of a chief magistrate and a magistrate grade 1 shall be unlimited." (Underlining is supplied.)

Although the words *'civil customary law'* is defined in the MCA, the words "govern" and "only" are not. In this regard, Dictionaries should come to aid. Thus *'to govern'* as per several online dictionaries, means: *"to exercise authority, control, to manage, to influence, to rule, to lead."* On the other hand the term *'only'* is used both as an adverb and an adjective to denote a limiting effect. It means *'solely', 'nothing more besides', 'alone of its or their kind', 'single or solitary'*. It also means *'there is only one or very few of something or that there are no others'*. It further means *'something is limited to something'*, etc.

'Civil Customary law', as noted, is defined in section 1 (a) of the MCA to mean, the *rules of conduct which govern legal relationships as established by custom and usage and not forming part of the common law nor formally enacted by parliament.*

It is not in dispute that the matter before the trial court was of a civil nature. It related to ownership of customary land, with each side calling the other *'trespasser'*. It was not shown by either party that the suit land was held under other form of land tenure system. The trespass claim, in my view, was secondary to the ownership claim, because, both parties were in possession of some portion of the suit land. Thus the suit, in substance, involved the determination of who the rightful owner of the suit land was. I also think the issue framed regarding trespass was to guide court on any consequential relief the court might issue, after deciding the issue of ownership. Naturally, court would consequently declare one of the parties a trespasser on the suit land.

The matter before the trial court, in my view, was also regulated by customs, traditions, usage and practices, as well as local rules or regulations that are generally accepted as applicable and binding to the specific area of situation of the suit land, and the specific community where the parties belong. I note that customary land holdings may be by an individual, household or community, and is held in perpetuity. However, given that customary law is neither written nor enacted by Parliament because of impossibility as there is no uniformity across the nation, whoever, therefore, wishes to rely on any particular custom must plead and prove, unless it is so notorious that court can take judicial notice of. See section 46 of the Evidence Act; ***Ramji Dewji Vs. Ali Bin Hassan,***

[1958] 1 E.A 297 (HCZ) (Law, Ag. CJ); Kampala District Land Board & George Mitala Vs. Venasio Babweyaka & 2 others, Civil Appeal No. 2 of 2007 (SCU) (per Odoki, C.J).

As observed, the nature of the land tenure in the instant case was not controversial. The Applicant admitted by her pleading (Written Statement of Defence and Counterclaim) that, the suit land was held under customary tenure and measures approximately 400 acres. That averment is in paragraphs 4, 6 and 28 of her pleading. In the Counterclaim, the Applicant also did not deem it necessary to plead the value of the suit land, for the purposes of the trial court's jurisdiction. I think, this was because both parties had conceded to the trial court's jurisdiction. That concession of course did not stop the trial court from making sure it had the requisite jurisdiction before entertaining the matter, as concession by the parties are of no consequence. Because, as noted, once a court lacks jurisdiction it downs its tools. Parties cannot agree to confer jurisdiction on a court which lacks it. On the facts and circumstances of this case, however, I think the trial court was satisfied that it had the requisite jurisdiction since the subject matter of the dispute was customary land. In the circumstances, the Applicant cannot, therefore, be heard to claim in the present proceedings, that the trial court lacked jurisdiction. Her conduct seems, to me, an afterthought because in her Counterclaim, she acceded to the trial court's jurisdiction. This court of course is still duty bound to

assess whether or not the trial court had jurisdiction since the issue is raised in the present proceedings.

In this case, I have already noted that the Applicant lodged a Counterclaim. In my view, a Counterclaim can only be lodged if the court has jurisdiction to entertain the subject matter of the Counterclaim. In her Counterclaim, the Applicant sued for more acreage of land, that is, 400 acres, way beyond the 150 acres pleaded by the Respondent/ Plaintiff. In the circumstances, the Applicant found the issue of value of the suit land immaterial. It also was certain about the trial court's unlimited jurisdiction, the suit land being customary land. I think the current plea that the value of the suit land has all of a sudden shot to approximately Ugx 600,000,000, is an afterthought, and at best, designed to bring the revision application within the provision of section 83 (a) of the CPA. This, I must say, and with respect, it is a bad practice. It borders the abuse of the justice system by a party who lost the battle in the trial court. I think courts should also be circumspect in guarding against such practices, in the guise of revision. Issues of jurisdiction can, understandably be raised at any point, but the extent to which such can be done, must depend on the facts and circumstances of each case, lest courts are turned into theatres and taken for a ride.

Given my finding that the suit land was governed only by civil customary law, within the meaning of section 207 (2) of the MCA, I need to consider the import of the law, for completeness.

Customary land adjudication requires an appreciation of the customary practices regulating the particular land in issue. In my view, when a court is called upon to construe and apply section 207 (2) MCA, thus "*where the cause or matter of a civil nature is governed only by civil customary law*", it ought to do so liberally, in order to confer and not to take away the jurisdiction otherwise conferred on Magistrates Courts to adjudicate customary land disputes. The application of the section should of course depend on the facts and circumstances of each case. I think the section, properly construed, does not mean that, in adjudication of customary land disputes, the court should not at all defer to statute or common law principles, where applicable in a particular proceeding. This is because, whereas the substance of the dispute may be purely customary land, which is undoubtedly regulated by customary law of the area and the community, which is unwritten, yet recent developments in Uganda's legal regime have resulted in the aspects of customary land featuring in the written laws of Uganda. This is the case under article 237 (3) (a) and (4) (a) (b) of the Constitution of Uganda, 1995 and section 1 (l), section 2 (a), section 3 (1), sections 4-9 of the Land Act, 1998 (Cap 227). With these legal developments, which I think are post the enactment of section 207 (2) of

the MCA, whose wording seems not to have changed since 1970 (save the replacement of Magistrate Grade two, with a Magistrate Grade 1), the strict construction of section 207 (2) of the MCA by courts, in customary land cases, would, with respect, stifle than strengthen the jurisdiction of these courts, with absurd results. It is thus fair to postulate that, at the time section 207 (2) of the MCA was enacted, the legislature could not have contemplated the future legal developments in the customary land tenure regime. Thus, interpreting the words "***where the cause or matter of a civil nature is governed only by civil customary law***" to deny the Magistrates court's jurisdiction to adjudicate customary land disputes, merely because customary land matters now feature in the written law, would, in my view, be unreasonable, and would not accord with the presumed intention of Parliament. I am of the humble view that, by enacting section 207 (2) of the MCA, the intention of Parliament was to confer jurisdiction on a Chief Magistrate and Magistrate Grade 1, to adjudicate all customary land disputes, which traditionally, was exclusively governed by civil customary law, and not any written law. I am of course aware that there used to be Public Lands Act which recognized customary land but the legislature still deemed it proper that customary land disputes be regulated by civil customary law only. That to my mind, was in recognition of the fact that custom and customary law cannot be enacted. And in my view, the recognition of customary law regulating land by our written Constitution and the Land Act, does not, and should not

detract from the understanding that custom and customary law is not enacted. Since customary law remains unwritten, it is my view that the courts mentioned in section 207 (2) of the MCA should continue and should be supported to enjoy unlimited jurisdiction in all customary land disputes, notwithstanding that in a particular adjudication, the court may defer to other written and common law principles, such as that regulating the court procedure, and substantive issues such as matters of evidence, limitation, and remedies, among others. I think it is only where customary land is titled, within the provision of the Land Act, in which case the Magistrate Court should not exercise jurisdiction. Such a suit should be lodged direct in the High Court for jurisdictional reasons, especially where an issue of cancellation of customary land title may arise.

In the case of ***Kabaka's Government Vs. Musa NSW Kitonto, [1965] 1 E.A 278 (CAN)***, the then East African Court of Appeal held that if the language of a statute admits of two constructions, the court ought to adopt that construction that is reasonable and more in accord with the presumed intention of the legislature. Writing about the need to uphold jurisdiction of court, Mulenga, JSC (RIP) stated in ***Habre International Company Ltd Vs. Kassam & others [1999] 1 E.A 125*** as follows:

"I would caution against the tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily.

Unless the legal provision in question is straightforward and clear, it would be better, in my view, to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard. The jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly. The interests of justice and the rule of law demand this."

In my view, section 207 (2) MCA should be construed in such a manner that preserves the jurisdiction of the Magistrates Court to entertain customary land disputes, and not to take it away. This court notes the current jurisprudence of this court on the application of section 207 (2) of the MCA. See: ***Koboko District Local Government Vs. Okujjo Swali, Misc. Civil Application No. 01of 2016*** where (Mubiru, J., held that the subject-matter was governed not only by customary law but contract law, and principles of common law as tort of trespass was involved, and thus fell beyond the scope of section 207 (2) of the MCA.

In the case of ***Akuku Ebifana (Administrator of the Estate of the Late Vuraa Kajoale Vs. Victoria Munia & Registered Trustees of Arua Diocese, Civil Appeal No. 0027 of 2016, at page 15 Mubiru, J.***, noted that, the parties claimed the suit land as customary owners, and for that reason, the jurisdiction of a Magistrate Grade 1 was not limited by the

value of the land in dispute. The Court concluded that, the trial court was a court of competent jurisdiction.

From the authorities, the application of section 207 (2) of the MCA, therefore, should depend on the facts and circumstances of each case. I however think the section is capable of two meanings. It could be argued that, matters governed exclusively by civil customary law, are matters where advertence to any statute or principles of common law are not permissible. In my view, this view would be extreme and absurd. I think the section, properly construed, should be restricted to the legal substance and thus the nature of the dispute being regulated exclusively by civil customary law, even if other laws could be invoked in the course of the particular adjudication, as pointed out herein. It is common knowledge that, while adjudicating customary land disputes, a court may defer to the Constitution of Uganda, the Land Act, and other laws. This should not be interpreted to mean the jurisdiction of the court conferred by section 207 (2) MCA is thereby lost. A strict application of section 207 (2) MCA should not cause absurdity and injustice in our civil justice system by denying disputants in a customary land matters, access to Magistrates Courts, when the High Court continues to choke with case backlog. A contrary interpretation and application of the section would be inimical to the intention of the legislature, in conferring unlimited jurisdiction on

Magistrate Grade 1 and Chief Magistrate, in all disputes governed by civil customary law, where customary land ideally falls.

I have noted that, the particular Magistrates are also allowed by section 9 of the MCA in adjudication, to apply laws which are applicable to the High Court by virtue of section 14 (2) (a), (b) and (c) of the Judicature Act Cap.13. It is, therefore, my humble view that, applying other laws alongside the civil customary law, which itself is envisaged under section 10 of the MCA, does not result in the Chief Magistrate or a Magistrate Grade 1 acting outside its unlimited jurisdiction conferred by section 207 (2) of the MCA. Otherwise, a strict construction of section 207(2) MCA would mean, Magistrates could apprehend citing written laws or principles of common law in customary land adjudication whose values are way higher, lest they are charged with having acted outside their jurisdiction. I also think a court should never adjudicate under fear.

I have perused a some-what similar provision of the Local Council Courts Act, 2006, that is, section 10 (2) (b) and found that, indeed, unlimited jurisdiction to adjudicate customary land disputes is also expressly conferred by Parliament on Local Council Courts by section 10 (2) (b) and the Third Schedule to that Act. Thus, if Local Council Courts enjoy unlimited jurisdiction to adjudicate customary land disputes of any pecuniary value, why should a Chief Magistrate and a Magistrate Grade 1

be limited by strict interpretation and application of section 207 (2) of the MCA, moreover in the clearest of customary land disputes?. To my mind, and with respect, it would be anomalous to interpret section 207 (2) MCA to deny a Chief Magistrate or a Magistrate Grade 1 jurisdiction to try customary land disputes, simply because, aspects of customary land tenure now feature in some of our written laws. In my view, a court lower than the Magistrate Court, which Local Council Courts are, would be enjoying unlimited powers more than the Court which supervises it (in this case, the Chief Magistrate) under section 40 of the Local Council Courts Act, if a strict interpretation of section 207 (2) of the MCA were to be adopted.

In the above regard, I, therefore, share the wisdom of Hon Lady Justice Irene K. Mulyagonja, J., (as she then was) where similar sentiments were voiced, regarding the then jurisdiction of Magistrate Grade II Court, to entertain customary land matters, just like Local Council courts. I note that at the time, Her Ladyship was considering the provision of the Executive Committee (Judicial Powers) Act, which does not differ much from the current Local Council Courts Act, 2006, in as far as the present matter is concerned. See: ***Munobwa Muhamed Vs. Uganda Muslim Supreme Council, Civil Revision No. 001 of 2006***.

It is for the above reasons that I do not agree with the Applicant that the trial court lacked jurisdiction in the matter. I find the arguments advanced for the Applicant not compelling. The Applicant, with respect, appears to blow hot and cold, having rightly, in my view, accepted and submitted to the trial court's jurisdiction by her Counterclaim, and having not raised any issue about it. The Applicant's allusion to the pleadings in an entirely different civil suit, to press the argument that, the trial court lacked pecuniary jurisdiction, is, with respect, misconceived. In my view, the pecuniary amount was erroneously pleaded in that other suit, perhaps for court fees purposes, but not for jurisdictional reasons, given the unlimited jurisdiction of that court in entertaining customary land disputes. The subject matter in civil suit of 2013 was expressly pleaded as being customary land. That suit cannot therefore be used as a basis for concluding that, the trial court in the latter suit, lacked pecuniary jurisdiction in the matter. Whereas it appears the subject matter in the earlier suit and the latter suit are identical, the parties were not entirely the same. The sameness of the subject-matter, being customary land, defeats the Applicant's jurisdictional challenge in the instant proceeding. Furthermore, whereas the filing of another suit in another territorial jurisdiction, in respect of the same subject matter, when already lodged in a competent court, portend abuse of court process, the point was not raised in the trial court. The Applicant has not told this court why she acquiesced to the apparent abuse of the judicial process. I think, with

respect, the Applicant could not complain because, the latter suit gave her an opportunity to counterclaim, something she had not done in the earlier suit where she was one of the Defendants. I do not think the Applicant would have complained, had she succeeded on the counterclaim. Be that as it may, the arguments canvassed now, cannot certainly be argued as a ground for revision, which is only concerned with jurisdiction of the Magistrates court. Thus by canvassing the issue of limitation and *functus officio* rule, I understand the Applicant to be suggesting that, the trial court exercised its jurisdiction illegally or with material irregularity, in entertaining the suit. In my view, given that the issue of limitation and *functus officio* were neither pleaded nor raised before the trial court, raising them now is misplaced. This Court wonders how the suit could be said to have been time-barred when it was lodged in 2020, questioning the Applicant's taking of possession which was averred to have happened in 2013. Certainly the twelve years' limitation period was still running by the time the suit was lodged. Trespass had also been pleaded, which this court understands, is a continuing tort. See: ***Justine E.M.N Lutaya Vs. Stirling Civil Engineering Co. Ltd, Civil Appeal No. 11 of 2002 (SCU).***

On the allegation of the breach of the *functus officio* rule, no law was cited which prohibits a court which has endorsed a partial consent settlement/ Judgment, from proceeding to adjudicate the remainder issues in the suit. In the circumstances, the powers of the court cannot be said to have been

fully exhausted. I think, therefore, if considered in a proper proceeding, the complaints raised, on their face, are devoid of merit.

In ***Wadri Mathias & 4 others Vs.Dranilla Angella, Civil Revision No.0007 of 2019***, Justice Bashaija K. Andrew, with whom I respectfully agree, held that, limitation is a defence that need to be pleaded by the defendant and acts as a shield to the person pleading it. Court held that, having not been pleaded, a court is not enjoined to look at such issues of evidence because issues of revision are jurisdictional. It concluded, issues relating to conclusions of the law by Magistrates Court cannot constitute matters for revision but appeal.

In the present case, I have already found that the issue of limitation is wrongly featuring in the revision proceedings, and so is the doctrine of *functus officio*, which should fail. I am, also a little puzzled that, the Applicant who was well within her right and within the time for appealing, under section 79 of the CPA, choose not to prefer an appeal yet she claims to be aggrieved.

In conclusion, I hold that the Learned Magistrate Grade 1 had jurisdiction in the matter. Issue 1 is accordingly resolved.

Issue 2: Remedies

Having carefully perused and examined the entire record of the trial court, I have found nothing to warrant the exercise of my revisionary discretion, as there is nothing to correct or improve, from the record. On the contrary I find the proceedings of the trial court regular, legal and correct. The Judgment and the Decree was rendered in the exercise of the court's jurisdiction which the learned trial Magistrate Grade 1 had. Consequently, the Application stands dismissed, with costs to the Respondent.

I so order.

Delivered, dated and signed in Court this 13th July, 2023.

13/7/2023

George Okello
JUDGE HIGH COURT

Ruling read in Court

3:45pm

13th July, 2023

Attendance

Ms. Grace Avola, Court Clerk.

Mr. Akena Kenneth Fred, Counsel for the Respondent.

Mr. Tumusiime Kakuru, holding brief for Mr. Bernard Banturaki, for the Applicant.

The parties in Court.

13/7/2023

George Okello
JUDGE HIGH COURT