

5

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT GULU
MISCELLANEOUS APPLICATION NO. 030 OF 2022**

10

(ARISING FROM CIVIL APPEAL NO. 061 OF 2017, ITSELF ARISING
FROM C.S NO. 105 OF 2012, GULU CHIEF MAGISTRATES COURT)

OCHWA OLANYA CHARLES.....APPLICANT

15

VERSUS

1. OCHAYA SANTO

2. ACAYO LUDINA.....RESPONDENTS

20

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

25

This is an Application brought under section 98 of the Civil Procedure Act, Cap.71 (CPA), section 33 of the Judicature Act, Cap. 13, and Order 52 rules 1 and 3 of the Civil Procedure Rules, S.I 71-1 (CPR). The Applicant seeks for consequential order, restoring and maintaining the statusquo of the parties as at the time before Civil Suit No. 105 of 2012 was filed in the trial Court. The Applicant also seeks for consequential order of eviction of the Respondent from the Applicant’s land or home

30

Hhadu

5 where the Applicant lived before he lodged the aforementioned civil suit. The Applicant also prays for costs of the Application.

The background facts giving rise to this matter is quite involved. The Applicant sued the Respondent in the Chief Magistrates
10 Court of Gulu, *vide* Civil Suit No. 105 of 2012. He sought to be declared lawful owner of land measuring approximately 200 acres, situate in Gwengdiya village, Pageya parish, Awach Sub-County, Gulu District. The Applicant's contention was that he had inherited the suit land from his late father. In their Defence,
15 the Respondents averred that the land they occupy is approximately 900x 400 metres, and situate in Lacir/ Buchoro villages (not Gwengdiya), Boo Coro Sub-Ward, Awach Sub-County, Gulu District. The Respondents at the time contended that they inherited the same from the 1st Respondent's
20 grandfather. Court notes that the 2nd Respondent was the 1st Respondent's mother and at the time of the trial, was already deceased. I shall therefore take it that there is only one Respondent, for the purposes of this Ruling. This Court thus holds that references to the 2nd Respondent (thus the descriptor
25 'Respondents') in this proceedings is misconceived given that no one applied to continue the defense on behalf of the 2nd Respondent, following her demise. Impleading the 2nd Respondent in this Application was therefore legally flawed. Exercising my powers, I would strike out the name of the
30 deceased 2nd Respondent.

5 The Applicant contended in the trial Court that the Respondent first trespassed on 30 acres of the suit land and subsequently claimed to own the entire 200 acres. The Applicant alleged that he was at the material time (of suing in 2012) only using five (05) acres out of the 200 acres of the suit land. He averred that
10 the dispute started in the year 2009 when he and others returned from Internally Displaced Persons Camps (IDPs), after the end of an insurgency in Acholi sub-region caused by Alice Lakwena's (so called Holy War). On his part, the Respondent alleged that the area in dispute is approximately 30 acres which
15 he claimed to have inherited. The Respondent contended that the boundary between the parties' respective pieces of land, are mark stones planted in 1983, three Kakoro Dong trees and an anthill. The Respondent contended that his father was using the land before the insurgency. He contended that it was wrong for
20 the Appellant to claim land beyond the mark stones. The trial court noted during the *locus* visit the presence of newly constructed huts on part of the suit land, said to be the Applicant's. Court also noted mark stones. A sketch map of the *locus in quo* was drawn by the trial Court. In conclusion, the
25 trial Court found for the Respondent, declaring that he owns the suit land. The Court then ordered the Applicant's eviction; issued a permanent injunction; and awarded general damages of Ugx 5,000,000, plus costs of the suit.

H. H. H.

5 On Appeal to the High Court, one of the issues was whether the
trial court erred in law and fact in failing to describe and
demarcate the 30 acres claimed by the Respondent out of the
200 acres of land. The other ground related to the affirmative
awards made in favour of the Respondent when he had not
10 counterclaimed. During the appeal hearing, it was argued for
the Respondent, *inter alia*, that the land acreage claimed by the
parties and found by the trial court, were mere estimates, be it
the 200 or 30 acres, given that the land was not surveyed. The
Respondent also contended that the delineation of the area in
15 dispute was not necessary because the Appellant's claim was
based on the land which had been inspected and confirmed by
planted mark stones. It was also argued that the disputed area
was clearly indicated in the sketch map prepared at the *locus in*
quo. It was further argued that the disputed land was in the
20 shape of an airfield.

This Court (Stephen Mubiru, J.) reappraised the evidence and
held that the basis upon which the Applicant had founded his
claim was fundamentally flawed. This was because the
25 Applicant's uncle (a one Okello Raymond) who had applied for
the leasing of the suit land in 1983 which was approved for
leasing on 29th April 1985, purported to do so on behalf of the
Applicant's father who was said to be of unsound mind, in the
absence of a Court order appointing the said uncle as Manager
30 of the estate of a person of unsound mind.

5 This Court also found that at the *locus in quo*, the limits of the
land the Applicant's uncle had applied for had been shown by
mark stones. This Court therefore noted that the Applicant was
claiming for land beyond the marked boundary. Court therefore
held that since the land applied for was clearly demarcated and
10 the Respondent had not trespassed thereon, delineating the
land in dispute was not necessary and its size ceased to be
relevant. This Court therefore found that the Applicant had
failed to prove his claim to the 200 acres of land. Court
concluded that the particular ground of Appeal lacked merit and
15 dismissed it.

Regarding the issue of remedies awarded by the trial Court, this
Court held that since the Respondent had not counterclaimed
in the trial Court, he was not entitled to the remedies awarded
20 by the Court below. This Court set aside the order of declaration
that the Respondent was the lawful owner of the suit land; set
aside the permanent injunction; set aside the eviction order and
general damages, holding that those affirmative awards were
misconceived. This Court also observed that the proper order
25 the trial Court should have given was an order dismissing the
suit for lack of proof, with costs. This Court accordingly set
aside the Judgment of the trial Court and substituted it with an
Order dismissing the suit with costs. Court noted that the
Appeal had succeeded in part but for other reasons. This Court
30 accordingly awarded half costs of the Appeal to the Applicant.

5 **Grounds of the Application**

The Applicant averred that the orders sought flow naturally from the Judgment and orders of this Court and that the purpose of the Application is to give effect to the Judgment of this Court. In his supporting affidavit, the Applicant gives
10 detailed history of his claim, some of which are embedded in the summarized background facts. In addition, the Applicant deposed that while the Appeal was pending hearing in this Court, the Respondent executed the decree of the trial court. That, the Respondent demolished and destroyed the Applicant's
15 home and properties. The Respondent is also alleged to have evicted the Applicant from the entire 200 acres of land.

The Applicant deposed that no notice to show cause had been served on him. He also deposed that the execution of the lower
20 Court decree was done in his absence, contrary to the Police Guidelines for carrying out execution. The Applicant asserted that upon this Court's delivery of its Judgment, the Applicant returned to his former homestead and land but was denied access by the Respondent. The Applicant asserted that the
25 Respondent is in possession of the land where the Applicant's former home was situate, following the execution process. The Applicant deposed that wherever he tries to return to his former home/ land, the Respondent destroys the Applicant's properties, assaults the Applicant and/ or his family members,
30 and causes the Applicant's arrest and detention.

5 The Applicant further deposed that he engaged various administrative bodies and offices to help him return to his land or home but in vain. That, he then decided to lodge an Application seeking to execute the decree of this Court by way of eviction of the Respondent but it was dismissed by the Deputy
10 Registrar of Court, because the Judgment of this Court did not order for eviction of the Respondent. The Applicant attaches several supporting documents to his affidavit which Court has considered.

15 **Opposing affidavit**

In his reply the Respondent (the only competent Respondent) swore an affidavit. He deposed that he was advised by his lawyers, M/s Odongo & Co. Advocates that the pictures attached to the Application are illegal and should be struck out.
20 The Respondent also deposed that the Application is illegal, an abuse of Court process, speculative, incompetent, marred with deliberate falsehoods, frivolous and vexatious and should be dismissed with costs.

25 The Respondent further deposed that he was sued by the Applicant in the trial Court, for declaration of ownership of land comprised in **Bucoro** village, Gwengdiya Parish, Awach Sub-County, Gulu District, measuring approximately 200 acres. The Respondent deposed that he filed his Defence. The Respondent

5 further deposed to facts of what transpired in the trial court and the High Court.

As to who won in the High Court, the Respondent asserted that the High Court passed Judgment against the Applicant and
10 dismissed the suit with costs. The Respondent also deposed to the fact of the Applicant's attempt to evict him following the High Court Judgment. The Respondent asserted that the attempt failed as the Deputy Registrar of Court dismissed the execution application (the Order irregularly stated that "a Notice
15 to show cause had been dismissed"). The Respondent also deposed that the attempted eviction was targeting to throw him out of his residence and customary land.

The Respondent further deposed that it was three years since
20 the delivery of the High Court Judgment on 30th May, 2019, without the Applicant appealing the decision of the Court to the Court of Appeal, if at all he was dissatisfied with it. He asserted that, litigation must come to an end.

25 The Respondent also asserted that the Judgment of the High Court never declared the Applicant as being the lawful owner of the suit land and therefore, the Applicant cannot take possession thereof. The Respondent contended that there was no error in the Judgment of the High Court and that, that is
30 why the Applicant neither appealed nor applied for review. The

5 Respondent also asserted that the orders sought in the
Application have the effect of declaring the Applicant as the
lawful owner of the suit land and that such a declaration can
only be made by the Court of Appeal. The Respondent also
deposed that the Applicant has committed several criminal
10 offences against the Respondent and his relatives, which were
reported to Police. That such cases are several counts of, theft,
malicious damage of property and threatening violence.

The Respondent prayed that the Application be dismissed and
15 in the alternative strangely prayed that since he is in absolute
possession of the suit land, the Applicant having been found not
to own it and since there is no third party claim, the Respondent
should now be declared to be the lawful owner of the suit land.
The Respondent also strangely sought for a permanent
20 injunction against the Applicant, to bring litigation to an end.

Representation

At the hearing, the Applicant was represented by Learned
Counsel Mr. Kilama Calvin who held brief for Counsel
25 Komakech Alex. The Respondent was represented by Learned
Counsel Mr. Louis Odongo who held brief for Counsel Watmon
Brian. Both counsel filed written submissions which I have
considered.

5 **Issues**

Having perused the Motion and the supporting affidavits, the Application raises two issues, namely,

1. Whether the Application is competent before Court?
2. What remedies are available to the parties?

10

Determination

The contestations by the parties, as I understand it, with respect, spring from poor case preparation by both sides right from the trial Court. The Applicant failed to prove his case in
15 the trial Court and in this Court. He could not demonstrate how he came to claim ownership of the 200 acres of land. The Respondent also failed to lodge a counterclaim, to make a case for declaration of ownership of the 200 acres in his favour. The Respondent's default rendered the affirmative orders given by
20 the trial Court misconceived, as found by this Court.

The state of affairs was worsened by the fact that the Applicant did not obtain an order of stay of execution of the trial Court decree, pending the appeal hearing in this Court, under O.43
25 rule 4 (1) and (2) of the CPR. See: **Muriisa Nicholas Vs. Attorney General, HCMA No. 35 of 2012**, which propounded the principle that an appeal does not act as a stay of execution.

As day follow night, the Respondent executed the trial Court's
30 Decree, rightly, in my view, in the absence of a Court Order

5 staying execution. Therefore, by the time this Court sitting on
appeal, issued orders setting aside the orders of eviction, among
others, the eviction had already taken place. The statusquo
before the eviction cannot, in my view, be reinstated by this
Court, without the said eviction first being declared illegal by a
10 competent Court in a proper proceeding. It has not been shown
that the execution was illegal. The execution happened before
the Judgment of this Court, way back in early 2018. Although
the exact date of the eviction is not stated, documents adduced
by the Applicant show that the Police Authorization was given
15 in February, 2018. The Applicant cannot therefore be put back
on to the suit land without an affirmative declaration by a
competent Court that the Applicant indeed owns the suit land.

In my view, the whole situation was aggravated by the
20 reluctance of either party to appeal part or the whole of this
Court's Judgment, if at all they were aggrieved. They now wish
to argue in this application that they are both aggrieved. That
may well be true, but this is a wrong forum.

25 Whereas the Applicant seeks to be placed back on the suit land,
the Respondent seems to have also recognized the difficult legal
situation he and the estate of the deceased mother found
themselves in, following the Judgment and orders of this Court.
It is common ground that this Court did not declare the
30 Respondent as the owner of the 200 acres of land, since the

5 Respondent had not counterclaimed. This Court upset the
declaratory order of the trial Court, among others. Thus, the
alternative prayer by the Respondent that this Court declares
him to be the lawful owner of the suit land because there is no
third party claim to it, with respect, is not available from this
10 Court. That prayer cannot be fronted in an application of this
nature, more so in a matter where the Respondent is not the
Applicant. Importantly, the prayer would tantamount to asking
this Court to overrule itself. This Court lacks powers to sit on
appeal against itself.

15

I quite understand the dilemma both parties have found
themselves in. The finding of this Court, with respect, leaves the
Respondent's legal position shaky, as his claim to the 200 acres
of land is not grounded on any judicial declaration, although he
20 won. For the Applicant, whereas he secured reversal of the lower
court's affirmative orders, save for the dismissal of the suit and
costs, yet he was not able to escape the eviction because the
High Court Judgment and decree came much later when he had
already suffered an eviction.

25

The situation now becomes more complex when the time for
appealing the Judgment and orders of this Court has long
passed, given that the Judgment was delivered on 30th May,
2019. As to whether either party could seek enlargement of time
30 to lodge a Notice of Appeal and Memorandum of Appeal, that is

5 not a matter for this Court. It suffices that, the decision of this Court stands.

Given the above analysis, I am of the considered view that this Court is unable to invoke its inherent powers under section 98
10 of the CPA, to do justice. On the contrary, to do so would be an abuse of this Court's powers.

This Court has had the opportunity of considering the applicability of section 98 CPA in the case of **Obote David Vs. Odora Yasoni, Misc. Application No.50 of 2022**. There, court
15 adverted to the view that where there is no specific provision in the Civil Procedure Rules dealing with a particular subject matter of litigation, this Court could act according to justice, equity and good conscience. Citing section 98 of the CPA, Court
20 noted that the powers exercisable under section 98 of the CPA ought to be exercised with great caution, especially if to do so would be inconsistent with any of the powers expressly or by implication, conferred by any other provisions of any law. For other authorities which considered circumstances under which
25 this Court could invoke its inherent powers, see: **Ayub Suleiman Vs. Salim Kabambalo, Civil Appeal No. 32 of 1995 (SCU)**. There, the Supreme Court held that it is settled law that the existence of a specific procedure, provision or remedy cannot operate to restrict or exclude the Court's inherent
30 jurisdiction under section 98 of the CPA (at the time, s.101). The

5 Supreme Court followed its earlier precedents in **National Union of Clerical Commercial Professional and Technical Employees Vs. National Insurance Corporation, Civil Appeal No. 17 of 1993**. See also **Rawal Vs. Mombasa Hardware Ltd (1968)**, and **Adonia Vs. Mutekanga (1970) E.A 429**.

10

Therefore, my considered view is that, whether or not a Court should exercise its inherent powers in a given case is a matter for the Court's discretion which should be exercised judicially.

15 In the instant matter, I find that a purported invocation of this Court's inherent powers, if allowed, would run counter to the laws, especially that barring the Court from purporting to sit on appeal against itself. It would also violate the *functus officio* rule. See **Goodman Agencies Ltd Vs. AG& another, Const. Pet. No. 03 of 2008 (Const. Court)**; **Paul Nyamarere Vs. UEB (in liquidation), Civil Appeal No. 55 of 2008 (CoA)**.

Moreover, the present matter is not brought under the slip rule provision of section 99 of the CPA. Of course the prayers sought
25 herein, in my view, would not be tenable under the slip rule either. Putting the Applicant back to his former homestead would require evicting the Respondent first. Similarly declaring the Respondent as the lawful owner of the 200 acres of land would require overturning the decision of this Court first, which
30 held that the absence of a counterclaim was fatal.

5 For the foregoing reasons, the Application is misconceived and
is dismissed. Given the difficult legal position of the parties, it
is only fair that I do not add to any party's burden by imposing
costs of one party against the other. In the circumstances, each
party shall bear its own costs.

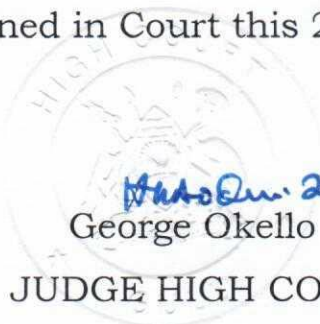
10

Before I take leave of this matter, I must confess my empathy
with the parties who seem not to have been ably guided on the
proper course to take upon the pronouncement of this Court
sitting as the appellate Court. It appears they were momentarily
15 satisfied with the Court orders, in that each won in some way.
The Applicant was relieved of the costs burdens of the Appeal,
general damages and the favourable declaratory order in favour
of the Respondent. But the eviction order, which had been set
aside, was too late. The order setting aside the eviction order
20 was, with respect, moot. It is possible this Court was not
informed about the statusquo on the land at the time. Since
neither party was able to secure a declaration of ownership of
the suit land in his favour, this Court, with respect, is presented
with a classic case of Pyrrhic victory in litigation.

25

Delivered, dated and signed in Court this 27th February, 2023

30

The seal of the High Court of Uganda is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text 'HIGH COURT OF UGANDA'.

George Okello 27/2/2023
George Okello
JUDGE HIGH COURT

5 Ruling read in Court in the presence of;

10:20am

27th February, 2023

10 Ms. Avola Grace, Court Clerk.

The Applicant is absent.

Mr. Brian Watmon, Counsel for the Respondent

The 1st Respondent is in Court.

The 2nd Respondent is long deceased.

15 Mr. Lobo-Akera Stephen, is holding brief for Calvin Kilama.

Mr. Watmon: The matter is for Ruling and we are ready to receive it.

20 **Mr. Lobo-Akera:** I am ready to receive the Ruling on behalf of Mr. Calvin Kilama.

Court: Ruling delivered in open Court.

25



NhooDun 27/2/2023
George Okello

JUDGE HIGH COURT