THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF KAMPALA AT KAMPALA
(CRIMINAL DIVISION)

CRIMINAL MISC. APPL. No. 18 of 2022
(Arising From Entebbe Criminal Court Case No 392 of 2019)

1. KABUSU BENON
2. DEO MUSIITWA :::::::::::::::: APPLICANTS

Versus

DIRECTOR OF PUBLIC PROSECUTIONS :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

RULING

This application is commenced under Sections 48 and 50 (1) (b), 50 (2) and 50 (5) of **The Criminal Procedure Code Act.**

The applicants, **KABUSU BENON** and **DEO MUSIITWA**, pray for orders that:

1. A declaration that the ruling in M.A. No. 18 of 2021, delivered on the 24th of January 2022, dismissing the applicants' application for Review, to recall PW1 (Mugabe James) for cross examination, summarily before the applicants counsel closed her submissions was improper and rendered a miscarriage of justice.
2. An order calling for the examination of the record of proceedings in Entebbe Chief Magistrates Court No. 392 of 2019 for the purposes of examining the propriety of the proceedings where the accused persons indicated to court that they were unable to cross

examine PW2 because they had no legal counsel and the trial magistrate proceeded to close the evidence of PW 2 without giving the accused the right to cross examine through their counsel.

3. A declaration that the proceedings before the Entebbe Chief Magistrate Court where the trial magistrate admitted into evidence the original certificate of title even the accused persons indicated to court that they could only object to the document through their lawyer which was improper and a miscarriage of justice.
4. Any other relief that this honourable court may, in the circumstances of this case, deem fit.

The grounds on which this application is based are stated in the Notice of Motion and particularised in the attached affidavit of **Kabusu Benon**. It is stated and affirmed that the applicants were charged with two offences: Unlawful use of land without the owner's consent, and Trespass to land comprised in Busiro Block 428 Plot 76. That on the 11th of March 2020 PW 1 Mugabi James testified. That although the applicants were not legally represented on that day, the trial magistrate ordered them to cross examine the witness. That the applicants were forced to do the cross examination. Later they retained an advocate who made an oral application to recall PW 1 for cross examination. The trial magistrate ruled dismissing the application. That the original and duplicate certificate of title had been tendered through PW 1 and counsel wanted to cross examine on it. A formal application, No 18 of 2021 was filed seeking a Review of the order. The trial magistrate was filed. The trial magistrate delivered her ruling on the 24 of January 2022 dismissing the application.

Determination

Although the parties were directed to file written submissions and the applicant complied, the respondent did not file as directed. The applicants' submissions are on record but have not been reproduced here. I have nevertheless studied and referred to them in arriving at this decision.

The applicant seeks declaratory orders that the ruling of the trial magistrate ruling delivered on the 24th of January occasioned a miscarriage of justice; an order calling for the lower court record, for purposes of examination of the propriety of the proceedings; and a declaration that those proceedings occasioned a miscarriage of justice.

The ruling of the 24th of January 2022 arose out of an application to review the earlier ruling the court had made on the 8th of November 2021, declining an application to recall PW 1 on the 8th of November 2021. Both rulings were in their nature interlocutory.

What exactly is an interlocutory order? The 9th Edition of **Black's Law Dictionary** defines interlocutory as,

> '(Of an order, judgment, appeal, etc.) interim or temporary; not constituting a final resolution of the whole controversy'.

This definition is relevant to the instant case. Any ruling, such as the one delivered in the lower court on the 24th of January 2022, dismissing the application to recall a witness, does not constitute the resolution of the guilt or innocence of the applicants in their criminal case. It was limited to the determination of the question whether PW1 should be recalled to testify. Indeed the trial court went on to hear more evidence after the stated ruling. For that reason the ruling fits the definition of an interim or interlocutory order.

It is that order or ruling that the applicants seek to overturn utilising Section 48 of the Ugandan **Criminal Procedure Code Act**. The Section stipulates,

> The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.

Section 50 (1) on the other hand, broadly lays down the orders that the court may make in Revision. It states as follows,

> In the case of any proceedings in a magistrate's court the record of which has been called for or which has been reported for orders, or which otherwise comes to its

knowledge, when it appears that in those proceedings an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 34 and 41 and may enhance the sentence;

(b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

For clarity Section 50 (5), which the applicant has invoked is reproduced here,

Any person aggrieved by any finding, sentence or order made or imposed by a magistrate's court may petition the High Court to exercise its powers of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

A look at Section 50 of the **CPCA,** in its entirety, clearly shows that the court is meant to examine the record of proceedings where final orders have been made. It may reverse a conviction or acquittal or other order of that nature. Clearly the Court will only act where the applicant who could have appealed has not done so.

The sum of it is that a Revision is only meant for the examination (and possible alteration) of final orders. That position of the law has been properly stated and followed by Courts before.

In a **Guide To Criminal Procedure In Uganda** by B.J. Odoki 3rd Edition *Law Africa* pg 270 it was observed that,

Like appeals, revision can only be founded on a final order or judgement of the court. It cannot be made against a preliminary or interlocutory order or ruling which does not determine the case.

Therefore even where the applicant seeks Courts intervention under Section 50 (5) of the CPC as has happened here, the above position holds. The revision can only be applied to final orders.

The above is a position that has long been held by the Courts in Uganda. I will cite two decisions of the High Court that highlight this.

In **Uganda v Dalal [1970] 1 EA 355**

> It is obvious, as Jones, J., remarked in Cr. Rev. 81/63, *Geresomu Musoke v. Uganda* (unreported), on reading ss. 339 to 341 of the Criminal Procedure Code only a final order can be the subject of a revisional order of this court. At the moment no such order is on the lower court's record. If this were not the case all sorts of magistrates' rulings would be finding their way to this court and I can well imagine a clever accused who likes to avoid a prosecution to conviction delaying such prosecution by making a series of objections, on which a trial magistrate would be compelled to rule and thereafter appeal to this court time and again.

The other decision is **Semuyaga v Uganda [1975] 1 EA 186** where the court held,

> *Uganda v. Dalal*, [1970] E.A. 355 and *Hassan Yusufu v. Uganda* Cr. App. 36/74 (unreported). In those cases it was held that interlocutory decisions made in the course of a trial in a magistrate's court could not be challenged in revisional proceedings; only a final order can be the subject of such proceedings. We do not doubt the validity of those authorities…

By proceeding to make the prayers in this manner, the applicant is asking this court to exercise a jurisdiction that it does not have. The law does not grant this court the jurisdiction or mandate to make an order interfering with an interlocutory order entered by a magistrates court during the pendency of the trial.

By extension, when a dispute is presented to the court for determination, that court is under duty to evaluate whether it is seized of the jurisdiction to handle the matter. As has been stated before, jurisdiction is fundamental and everything to the validity of proceedings.

The question of Jurisdiction was considered in the case **Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B"** [2008) 1 EA 367

> The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The above is a Kenyan decision in a civil case. I find however that it is persuasive and applicable to the instant case. The instant application was commenced by way of Revision. The High Court has no Revisional powers to overturn the decision of the trial magistrate to decline the grant of an adjournment. It means this court has no jurisdiction to entertain the matter and will not take no farther step in it. Any order it makes would be null and void. I reminded farther that a court finding it has no jurisdiction cannot confer the requisite jurisdiction on itself. That settles the matter regarding Revision.

There is a second matter of procedural significance. This application was commenced against the DPP. It is styled in the form **Kabusu Benon and Anor vs DPP**. The purport is that the applicants have brought these proceedings against the person or office of the Director of Public Prosecutions. The DPP is not the right party to proceed against in criminal matters of whatever description or however instituted. All criminal proceedings are instituted by or against 'Uganda' (see **Uganda v Santina Lakot [1986] HCB 28).**

That is a principle which flows from the common law and has been adopted in this country. It was stated in the following terms in **The Municipal Council of Dar-es-Salaam v AB De P Almeida and three others [1957] 1 EA 244,**

> When any prosecution is brought whether by a public or a private prosecutor the proceedings are in fact brought on behalf of and in the name of the Crown and as the case is then in effect prosecuted at the instance and on behalf of the Crown ...

In this holding, wherever crown appears it can properly be substituted by the state of Uganda. Therefore position in Uganda therefore is that all prosecutions are instituted by and on behalf of the people of Uganda. In light of the highlighted position, it was improper for the applicant to bring this application against the DPP instead of the State of Uganda.

In the result, I find the application was incompetent and dismiss it.

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Michael Elubu

Judge

3.6.2022