THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0011 OF 2014

(Arising out of the judgment and decree of the Grade One Magistrate at Yumbe given on 26th February 2014 in C.S. No. 008 of 2013)

CHANDIRA HILLARY NSUBUGA …… APPLICANT

VERSUS

ASIKU RATIB SWALEH …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This application arises from the ex-parte judgment of His Worship Simon Toloko, Magistrate Grade One of Yumbe, in civil suit No. 8 of 2013, who on 26th February 2014, by that judgment awarded the respondent shs. 3,434,000/= (three million, four hundred thirty four thousand) as outstanding salary arrears, and costs.

The background to the impugned judgment is that on 19th June 2013, at the Grade One Magistrates' Court in Yumbe, the respondent (plaintiff), a former Head Teacher of Kings Modern College, Yumbe, filed a suit against Candia Hillary Nsubuga (proprietor of Kings Modern College, Yumbe), who was sued jointly with Delu Kassism (the Acting Chairperson of the Board of Governors, Kings Modern College, Yumbe), seeking recovery of shs. 3,434,000/= as outstanding salary arrears, general damages and interest. On 12th July 2013, the defendants filed a joint written statement of defence and counterclaim. They denied owing the plaintiff any salary arrears and instead counterclaimed for funds and various items of school property, unaccounted for by the plaintiff.

When the suit came up for scheduling on 28th August 2013, the plaintiff and his counsel were present in court and so was the second defendant. The first defendant (the applicant herein) was absent. The court adjourned the suit to "allow the second defendant to inform his colleague to be in court on the 2nd September 2013, for scheduling conference." On the 2nd September 2013, all

parties were present in court, but counsel for the plaintiff was not because he was reported to be attending a funeral. The Scheduling was adjourned to 30th September 2013. On that date, the plaintiff and his counsel were present in court and so was the second defendant. The first defendant was absent. The court adjourned the suit to 11th October 2013, on which date the plaintiff was absent when the suit was called in the morning. It was stood over until 2.00 pm. The plaintiff was present during the afternoon session and the scheduling went on inter-parties.

Towards the conclusion of the scheduling conference the applicant stated; "This matter is as if it is already concluded. I have a criminal case against the accused at the police." Counsel for the plaintiff took objection to this statement and construed as a deliberate reference to irrelevancies by the applicant and a manifestation of his unwillingness to proceed. The court then made the following direction;

> Since the conduct of the first defendant of unwillingness to proceed had touched the court, this court has no option but to transfer this matter to Arua for further advice.

In the letter forwarding the file to the Chief Magistrate at Arua, dated 2nd December 2013 (annexure "D" to the affidavit supporting the motion), the trial magistrate wrote;

> Your honour, the two suits are still at the preliminary stage.
> However in the course of trial, the first defendant became disrespectful and not concentrating (sic) on the facts of the suit. He claims to have engaged a lawyer from Alaka and Co Advocates who has never appeared in court. On record there is no instruction given from the lawyers. The defendant is trying to delay the process of trial.
> The purpose of this communication therefore is to request that the two files be handled by another magistrate.

In his reply dated 23rd January 2014, the then Chief Magistrate of Arua His Worship Angualia M. Gabriel, advised; "Just forget about what the defendant is doing, go ahead and hear the case." Apparently the case file was then returned to the Court in Yumbe.

The next time the suit came up in the court at Yumbe was on 17th February, 2014 and the court record reads as follows;

17/02/2014
Plaintiff present
1 Defendant absent
2 Defendant present
Clerk Guma Patrick Adriko
CT: The case file is back to Yumbe and the Chief Magistrate has direceted the trial proceeds from here.
Nasuru Buga. I appear for the plaintiff; the plaintiff is present in court; the second defendant cm BOG Delu Kassim of Kings Modern College is present in court; the first defendant is not in court. This matter today is coming for hearing. I pray for ex parte judgment against the first defendant under O 9 r 20 CPR to the effect that once somebody has deliberately refused to appear before the court, then this court has power to proceed that he has refused to appear in court.

Ct; Lets proceed to hear the suit against the two defendants. Ex parte judgment will be preserved after hearing the evidence of the second defendant who is in his capacity as the chairperson BOG in court and ready to proceed.

The court then proceeded to hear the testimony of PW1 after which the plaintiff closed his case. The suit was then adjourned to 20th February 2014 for hearing the second defendant in his defence. Hearing proceeded as scheduled on that date and the second defendant closed his case. The suit was then adjourned for judgment which was fixed for 26th February 2014. The judgment was duly delivered on that date, in the terms stated before.

The applicant seeks a revision of that decision on ground that in exercising his jurisdiction, the trial magistrate acted illegally or with material irregularity or injustice, thereby occasioning a grave miscarriage of justice to the applicant. In paragraphs 9 to 13 of his affidavit supporting the application, the applicant avers that the last time he obtained information regarding the suit was when he followed it up in Yumbe where at the Court Registry he received a copy of the letter transferring the file to Arua. He was advised by the registry staff that the court in Arua would notify him of the next hearing date. To his surprise, the next time he heard about the case was on 29th April 2014 when he was arrested as a judgment debtor in execution of a decree arising out of the judgment, and he was committed to civil imprisonment.

The respondent is opposed to this application. In paragraphs 5, 8 to 16, and 18 of his affidavit in reply to the application, the respondent avers that the applicant has not shown sufficient reasons for the revision of that decision since; at one point he dishonestly claimed to be represented by a firm of advocates in order to secure an adjournment, he had the habit of not appearing in court when summoned, he deliberately raised irrelevant issues concerning a criminal case and refused to be guided by court, was disrespectful of and arrogant toward the court, he engaged in delaying tactics, his affidavit contains a lot of falsehoods and he deliberately refused to come to court on 17th February, 2014 despite having been served with a hearing notice.

In her submissions supporting the motion, counsel for the applicant Ms. Daisy Patience Bandaru, argued that the applicant appeared in court on all occasions when he was personally served with a hearing notice. He did not turn up in court on 17th February, 2014 because he was not aware of that date, he not having been served with a hearing notice. The trial magistrate's assumption that the second defendant had notified the first defendant of that date was unfounded and in any case was not proper service since the second defendant is not an authorized process server. The decision to proceed ex-parte against him was therefore erroneous and constituted a material irregularity.

In response to these submissions, counsel for the respondent, Mr. Buga Mohammed Nasur, argued that the trial court was very tolerant towards the first defendant despite his habit of not turning up in court when summoned. The suit was adjourned on a number of occasions due to the absence of the first defendant. It was not the first time that service was effected on the first defendant by the second defendant since court had directed so once before on 28th August 2013 for the date of 2nd September 2013. The file was subsequently transferred to Arua because the first defendant had become hostile toward the court. When it was returned, a hearing notice was taken out for 17th February, 2014 and the first defendant was served. The decision to proceed ex-parte against him was a proper exercise of the court's discretion and in any case, if dissatisfied with that decision, the first defendant should have sought to have the ex-parte judgment set aside rather than seek revision, since the trial magistrate exercised his jurisdiction lawfully. In any case, revision of the decision would cause hardship to the respondent since the judgment has already been executed.

In reply, counsel for the applicant argued that there was no proof of service for the ex-parte hearing that took place on 17th February, 2014. The availability of the remedy of setting aside the resultant ex-parte judgment does not preclude the remedy of revision. Failure to serve the applicant with a hearing notice was a material irregularity in the proceedings that justified an application for revision. There was no proof of any hardship that would be occasioned to the respondent more especially since there was nothing on the record to show that the decretal sum had been fully recovered.

This court's power to revise decisions of magistrates' courts conferred by section 83 of the *Civil Procedure Act*, cap 71 is invoked where the magistrate's court appears to have; (a) exercised a jurisdiction not vested in it in law; (b) failed to exercise a jurisdiction so vested; or (c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, provided that no such power of revision can be exercised unless the parties have first been given the opportunity of being heard; or where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

In the matter before this court, counsel for the respondent contends that revising the decision of the magistrate's court will cause hardship to the respondent. He cited *Law Development Centre v Mugalu and another [1990-91] K.A.L.R 103*. Whether or not execution is complete and the decretal sum fully recovered is a matter of fact. I have not been presented with any evidence of recovery of the decretal sum. Such evidence is usually contained in a return of a warrant of execution filed by the bailiff instructed by court. As matters stand, there is only a statement from the bar which does not constitute proof of that fact. I am therefore unable to find any hardship on that account that is likely to be occasioned by proceeding to revise the decision.

Counsel for the respondent further contended that O 19 r 12 or r 27 of *The Civil Procedure Rules*, provides a specific remedy where an e-parte judgment is entered on account of an alleged lack of service or ineffective service of summons or hearing notice. While I agree that this is a specific remedy that the applicant could have pursued, and that usually an application for revision will not be entertained if another remedy is open to the applicant, the existence of an alternative remedy is not a bar to the exercise powers of revision under section 83 of the *Civil*

Procedure Act. It has been decided before that the High Court may revise an order which would otherwise have been appealed (see *Kyeswa v Sebunya [1993] II K.A.L.R. 26*). In any case, it is now settled that the existence of a specific procedure, provision, or remedy cannot operate to restrict or exclude the courts inherent jurisdiction under S.98 of the *Civil Procedure Act* which gives undue residual powers to the court to prevent or correct any injustice (see *Standard Chartered Bank of Uganda v Ben Kavuya and Barclays Bank [2006] 1 HCB 134*).

Having dealt with the preliminary issues, it is now necessary to determine whether on the facts of this case, the trial court acted in the exercise of its jurisdiction illegally or with material irregularity or injustice as contended by the applicant. The application for revision of the magistrate's Court record is preferred in this case on account of a claimed material error on the face of the record which is incorrect, illegal or inappropriate and involves injustice. An irregularity is material when it is shown to have been essential or influential in procuring the impugned decision, not being merely abstract, theoretical, formal in character or of a technical nature, which is practically not injurious to the party assigning it. It is one which must be shown to have affected, or may possibly seriously affect, the rights of the party assigning it.

The irregularity singled out by the applicant is that he was not served with a hearing notice and court was therefore wrong to proceed ex-parte on 17th February, 2014, when there was no proof of service on record. It is a cardinal principle of fairness that both parties should be given an opportunity to be heard before court pronounces itself on the matters in controversy between the parties. It is for that reason that an ex-parte judgment will be set aside if there is no proper service (see *Okello v Mudukanya [1993] I K.A.L.R. 110*).

Examination of the record of the court below did not disclose any copy of a hearing notice that was issued for service on the applicant in respect of the hearing that was fixed for 17th February, 2014. There is no affidavit of service on record as well. At the hearing, counsel for the respondent was asked to produce his file copy of such affidavit and he did not have any. A court would be justified to proceed ex-parte in the circumstances it did only after satisfying itself that the applicant had been duly notified of the date and had no explanation for his absence. An

affidavit of service must be on record before ex-parte proceedings are allowed (see *Kitumba v Kiryabwire [1981] H.C.B. 71*).

The record of proceedings of that day indicates that counsel for the respondent did not seek to proceed ex-parte but rather sought an ex parte judgment against the first defendant under O 9 r 20 of the *Civil Procedure Rules*, on ground that the applicant had; "deliberately refused to appear before the court." Counsel did not offer any proof of service and neither did court advert to any before deciding to proceed in the absence of the applicant. As matters stand, on record there is no indication as to how the service was effected, i.e. by whom it was effected, the day of the week on which it was effected, the place at which it was effected, the time of service and the mode of service. Such detail is usually contained in an affidavit of service and helps court to determine whether or not service was effective.

Effective service of court process requires the person serving to provide the recipient a copy of the process and immediately thereafter to return to the issuing court the original process duly endorsed with what he or she has done concerning it. Such service is proved by an affidavit of the person effecting service in which he or she identifies himself or herself, states that he or she is authorized under the law to serve process or documents therein, and that the process or document in question has been served as required by the law, and sets forth the manner and the date of such service. The procedures of service are so exacting to the extent that the requirement that a duplicate be delivered or tendered is mandatory and if not complied with, the service is bad (see *Erukana Kavuma v Metha [1960] E.A. 305*). It is for that reason that courts have time and again emphasized the need to file an affidavit of service after effecting service (see *Tindarwesire v Kabale Municipal Council [1980] H.C.B. 33; Edison Kanyabwera v Pastori Tumwebaze SCCA No. 2 of 2004 (unreported*); *Kanji Naran v Velji Ramji (1954) 21 E.A.C.A. 20*). Failure to file one in these proceedings has not been adequately explained.

Instead, counsel for the respondent argued that since the applicant had been notified by the second defendant once before on 28th August 2013 for the date of 2nd September 2013, in the same manner since the first defendant was in court on 17th February, 2014, the court proceeded on the assumption that the second defendant had duly notified the applicant as he had done once

before. First of all there is no evidence on record that the second defendant indeed notified the applicant. Secondly, even if he had, the second defendant was not a person competent to receive service on the applicant's behalf because he is not a recognized agent of the applicant. Service on a person who is not a "recognized agent" of the person to be served is not effective service even though the court process actually reaches that person (see *Narbheram Chakubhai v Patel (1946) 6 U.L.R 211*). It is worse if it is shown, like in this case, that the service did not lead to the defendant becoming aware of the process. In such cases, the service is not effective (see *Geoffrey Gatete v William Kyobe [2007] I H.C.B. 54*).

Thirdly, it is not shown that the second defendant was a competent process server so appointed by court. Counsel for the respondent argued that under O 5 r 7 (a) of the Procedure Rules, where the court has issued a summons to a defendant, it may be delivered for service to any person for the time being duly authorised by the court, and that in this case the second defendant was such a person duly authorized by the court. I respectfully disagree with this argument. There is no evidence on record to indicate that the second defendant was a person generally authorized to effect service of court process or specifically authorized to so for purposes of the hearing which took place on 17th February, 2014. In any event, whereas court may indeed authorize any person to serve its process, considering that it is the duty of the person serving a process or document to explain the nature and contents thereof to the person upon whom service is being effected, and to state in his or her return that he or she has done so, such person should be an adult who has no interest in the cause and is able to explain its nature and contents to the recipient. For reasons of conflict of interest, a co-defendant, being a person interested in the cause, is not a suitable process server who may be duly authorized to do so under the provisions cited.

This being the case I am of the view that there was no proper service insofar as the applicant is concerned. The result is that the court proceeded with hearing the suit in absence of the applicant without first satisfying itself that there had been proper and effective service of the hearing notice. This was an error. It is a material error because it resulted in the applicant being denied his right to be heard on that day.

The misdirection appears to have arisen from the manner in which the trial magistrate handled the applicant as an unrepresented litigant. The *Uganda Code of Judicial Conduct, 2003* requires judicial officers to remain fair and impartial and to maintain the appearance of fairness and impartiality, but provides little direct guidance as to how active or passive a judicial officer should be in handling cases involving unrepresented litigants. Be that as it may, in my view, it is not a violation of this principle for a judicial officer to make reasonable accommodations to ensure that unrepresented litigants secure the opportunity to have their matters fairly heard. The trial magistrate appears to have made such an effort. In this regard, the relevant part of the court record reads as follows;

> Scheduling conference.
> The agreed facts
> 1. The plaintiff was employed by King's College.
> 2. The court has jurisdiction over thematter.
>
> Issues.
> 1. Whether the contract was breached
> 2. Whether the plaintiff is entitled to the remedies sought.
>
> Witness: Plaintiff Asiku Ratib Swale.
> Documents: The appointment letter dated 9/09/2011.
> School identity card King's college modern letter dated 3rd 03.2013 calling for BOG meeting over unpaid salary.
> List of authority (sic); as to the plaint.
> D1: this matter is as if it is already concluded. I have a criminal case against the accused at the police.
> CT: you do not need to need to deviate from own (sic) pleadings filed in court concentrate on the WSD.
> Buga, counsel for the plaintiff; the behavior of the 1st defendant of not willingly (sic) to proceed and talking about irrelevant things is in a condition that intending (sic) to delay and I limit (sic) this court to consider his conduct of ruling (sic) and filing many excuses……
> CT: since the conduct of the first defendant of unwillingness to proceed has touched court, this court has no option but to transfer this matter to Arua for further advice.

From the above extract, it is clear that after realizing that the applicant was delving into irrelevancies in the course of the scheduling conference, the court attempted to guide him by advising him not to deviate from his own pleadings filed in court but rather to concentrate on the content of his written statement of defence. What is not clear though is the conduct court considered to constitute his perceived unwillingness to proceed and how it "touched court". There appears to have been a breakdown in communication between the magistrate and the

applicant. In absence of objective facts or observations drawn from the record of proceedings of that day, the decision to transfer the file to Arua may easily be construed as constituting demeaning and harsh treatment being meted out to the unrepresented applicant appearing in court that day.

Notwithstanding that a judicial officer's decision to disqualify or not to disqualify himself or herself from a case is rarely subject to review by other judicial officers, the circumstances of this case call for a comment. The occurrences in the court below created a situation in which the trial magistrate's impartiality was called into question.

A fair trial by a fair tribunal is a basic requirement of justice. The judicial officer's impartiality is one of the essential requirements for conducting a fair trial. Impartiality implies freedom from bias, prejudice, and interest. All litigants are entitled to objective impartiality from the judiciary. It is for that reason that Principle 2.4 of the *Uganda Code of Judicial Conduct, 2003* requires a judicial officer to "refrain from participating in any proceedings in which the impartiality of the Judicial Officer might reasonably be questioned, including but not limited to…," two specific examples are then listed. This provision is a catch-all, and disqualification is not limited to the situations given as examples. Under this provision, a mere appearance of impropriety to an objective observer is enough to trigger disqualification because justice must satisfy the appearance of justice. The phrase "might reasonably be questioned" embodies a shade of doubt or a lesser degree of possibility, which suggests an objective standard requiring disqualification even if there is no actual bias. It reflects an emphasis on objective standards requiring disqualification even when the judicial officer lacks actual bias.

The test to be used in matters of perceived or apparent bias was explained in *R. v. Gough [1993] A.C. 646 at 670* as being whether there is in the view of the court "a real danger" that the judge was biased. In the case before me, the trial magistrate was faced with what he considered to be discourteous conduct by the applicant. He considered the applicant as being "disrespectful." He submitted the file to the chief magistrate because the applicant's "unwillingness to proceed had touched the court." What the magistrate meant by the applicant's unwillingness to proceed "touching the court" is not clear. However, the language he used in the communication to the Chief Magistrate conveys a sense of indignation inconsistent with a detached approach and

suggestive of personal embroilment with the applicant. His engagement in a personal embroilment with the applicant created self doubt about his ability to continue with the trial of the suit, which in turn prompted his referral of the file to the Chief magistrate in Arua. These circumstances might reasonably cause an objective observer to question the trial magistrate's impartiality in trying a person he considered to be disrespectful of the court, after the file was referred back to him for trial. The question then is, was there "a real danger" that the magistrate would be biased by his perception of the applicant as a disrespectful litigant?

What occurred in this case during the scheduling conference presented a temptation for the magistrate not to remain impartial, and therefore created a serious risk of actual bias. Even then, actual bias need not exist for a procedure to violate the tenets of a fair trial. The probability or appearance of partiality, based on objective and reasonable perceptions, is enough. The conclusion that the previous personal embroilment with the applicant coloured the trial magistrate's judgment in the subsequent proceedings and created an impermissible probability or appearance of partiality, is inescapable. In my view, based on objective and reasonable perceptions, there was "a real danger" that the magistrate would be biased by the applicant's perceived previous disrespectful conduct. The trial magistrate then ought to have disqualified himself on grounds that a fair-minded, informed, reasonable and prudent person or observer, knowing these objective facts, would harbour doubts about the magistrate's ability to be fair and impartial. The magistrate himself had expressed that self doubt in his communication to the Chief Magistrate. The procedure adopted by the trial magistrate after the file was returned to him was probably a manifestation of this inability to remain impartial.

The maxim that "justice must not only be done but be seen to be done" is concerned with preserving public confidence in the integrity of the administration of justice. The judiciary derives its authority solely from the public's perception of its legitimacy. It is important therefore that proceedings manifesting injustice to a litigant should not be allowed to stand.

In the result, I find that the court below proceeded with material irregularity in the suit when on 17th February, 2014 it heard evidence ex-parte against the applicant without any proof of service of a hearing notice on the applicant. The proceedings at the scheduling conference and thereafter

further present apparent unfairness by the trial magistrate in dealing with the applicant to a degree that falls short of the requirement of the appearance of justice in judicial proceedings. These irregularities have occasioned a miscarriage of justice to the applicant. On that ground, I find that the applicant has made out a proper case requiring this court to exercise its powers of revision. I therefore hereby set aside the proceedings and orders of the court below.

Counsel for the applicant in her submissions prayed that in the event of the proceedings of the lower court being revised, this court should order a retrial. Counsel for the respondent opposed this and argued that it was not among the reliefs sought in the application, as filed in this court.

In exercise of its power of revision, the High Court is empowered to "make such order in it as it thinks fit" provided the parties are first given the opportunity of being heard. This power is not constrained by the reliefs sought by the parties in their pleadings. However, the court is mindful of the fact that a re-trial involves the re-calling of witnesses some of whom may have died and others may not be easily traceable. The memory of those witnesses may have lapsed and other may have lost interest in the matter. The exhibits may have been tempered with, lost or misplaced and that re-trials also increase case back log in courts. A re-trial therefore ought to be ordered only in compelling circumstances. In this case, the applicant was denied a hearing and from the nature of the subject matter of the suit, substantially a claim for arrears of salary and other matters relating to employment, I have not been presented with any material to suggest that a re-trial would occasion any serious hardship of the nature alluded to above.

I therefore allow the application, revise the proceedings, judgment, decree and other orders of the court below made in the suit by setting all of them aside and directing a re-trial of the suit by another magistrate of competent jurisdiction. The costs of this revision shall abide the result of that suit. I so order.

Dated at Arua this 14th day of July, 2016.

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Stephen Mubiru
Judge.