THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBALE

HCT-04-CV-CA-0130-2012
(ARISING FROM TORORO CHIEF MAGISTRATE'S SUIT NO. TOR-00LD-65/2012)

CYPRIAN OBBO
(Administrator of the Estate of the late
LEO ODOI) :::::::::::::::::: APPELLANT

VERSUS

1. **ALAFARI ONYANGO**
2. **BENEFANSIO OWINO**
3. **SALIMON OCHWO**
4. **MARIKO OWERE**
5. **ABUDON OPENDI**
6. **BENEDICTO OTHIENO**
7. **KULUBANI OBBO**
8. **YOKOLEM ONGWENI**
9. **YOKIMI OKOTH**
10. **BENEDICTO OTHIENO**
11. **SIPIRIANO OKECHI**
12. **SIRASI OCHIENG**
13. **PIUS OBOTH**
14. **EZERA ODOI**
15. **YAKOBO ORISA**
16. **ANTONIO OCHIENG**
17. **OWORI S/O OWINO**
18. **MISAKI OBOTH :::::::::::::::: RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The brief facts are that the parties are litigating arising from a 1977 matter where the late **Leo Odoi** (currently represented by **Cyprian Obbo**) filed a suit against the Respondents for vacant possession of land vide MT 21 of 1977, at the Magistrate Grade II Court at Iyolwa. The suit was found in favour of **Mr. Odoi**.

The Respondents then appealed to the Chief Magistrate Tororo, who decided the matter vide MT 4 of 1989 in favour of the Respondents and ordered for a retrial of MT 21 of 1977.

The retrial was never conducted but in 2012, there was filed a case 00 LDCS No. 65 of 2012, as a retrial of suit MT 21 of 1977. When the suit came up for trial before the Chief Magistrate Tororo, the Chief Magistrate upon preliminary objections being raised by the Respondents agreed that he lacked the jurisdiction to try the matter and hence dismissed it.

The appellant was dissatisfied with that decision and hence filed this appeal.

Appellant raised three grounds of appeal. These were that:

1. The learned trial Magistrate erred in law and fact when he dismissed the suit on grounds that the Chief Magistrate Court Tororo lacked the jurisdiction to determine the retrial since it had been ordered by the same court.
2. Learned trial Magistrate erred in law and fact when he held that the Chief Magistrate Court had no jurisdiction to try the suit.
3. The learned trial Magistrate erred in law and fact when he failed to reallocate the file to a competent Magistrate.

In his submissions Counsel for the appellant summed up the grounds into two issues as below:

1. Whether the Chief Magistrate's Court had jurisdiction to retry the case.
2. Whether the responsibility to allocate the file to a competent Magistrate lay with the Chief Magistrate.

I have examined the record and also internalised the arguments by the lawyers for each party. I now resolve the issues as herebelow.

Issue 1: Whether the Chief Magistrate has the jurisdiction to retry the case.

From the facts, as a first appellate court have the duty to re-appraise the evidence and reach my own conclusions bearing in mind that I never observed the witnesses. This is the position in the ***Uganda Revenue Authority v. Rwakasaija Azarious & 2 Ors CACA 8/2007*** (unreported) case.

I have noted from the record that, the judgment under CA MT/04/1989 the Chief Magistrate ruled that: “In the circumstances and in view of what I have outlined I allow the appeal and order a retrial before a Magistrate of competent Jurisdiction.....”

The judgment was given in the presence of all parties, and their respective Counsel on 20.12.1989.

The facts indicate that nothing was done, to follow up this order, until 2012, when TOR.00.LD.CS.065 of 2012 (formerly Appeal No. MT. 21 of 1977).

The submissions which were raised at the hearing, led the learned trial Magistrate to dismiss the suit, hence this appeal.

In law no court or person assumes jurisdiction. Jurisdiction is a creation of statute.

In Uganda, all courts derive their power from the Constitution under Article 126. The Constitution provides for the establishment of the Courts of Judicature under Article 129. Judicial Power is exercised by the courts which consist of;

a) The Supreme Court of Uganda
b) The Court of Appeal.
c) The High Court of Uganda.
d) Such subordinate courts

As Parliament may by law establish including Qhadis courts, marriage, divorce, inheritance of property and guardianship as may be prescribed by Parliament. (See Article 129 of the Constitution).

Under the subordinate courts are the following hierarchy of courts.

a) Chief Magistrate
b) Magistrate Grade I
c) Magistrate Grade II
d) Magistrate Grade III

Inspite of all courts above, jurisdiction is specifically granted each court by law. The jurisdiction for instance of the High Court is unlimited in civil matters except Constitutional matters.

However the Magistrates Courts Act makes provision for the nature of civil suits that are to be instituted in respect of a subject matter in accordance with the grade of a Magistrate.

In selecting a court with power over the type of litigation, regard must be made to the pecuniary limitation of such courts and the enabling law which empowers such court to hear such a case (see Section 4 and 12 of the Civil Procedure Act). The litigant must before choosing where to file a matter be informed by the subject matter of dispute. The question to consider before choosing the court is;

i) What is the pecuniary value of the subject matter?

ii) Which court is within the local limits where the property is situate?

The question which arises now is, if the Chief Magistrate's court, sitting as a first appellate court determines an appeal and orders for a retrial, what is it in effect meaning? Can it again sit as an ordinary court of first instance to rehear the matter it sat in appellate jurisdiction over, purporting to hold a retrial?

The law regarding retrials was discussed at length in the court of appeal decision of ***Vicent Ntambi v. Uganda Cr. Appeal 0078/2012*** (unreported) where, the Court referred to its own earlier decision of ***Uganda v. Kato Kajubi Godfrey CA CA 39/2010***, and advised thus;

> "*A retrial involves the recalling of witnesses some of whom may have died and others may not be easily traceable. The memory of those witnesses may have lapsed and others may have lost interest in the matter. Exhibits may have been tampered with, lost or misplaced. Retrials also increase case backlog in courts. A retrial therefore ought to be ordered only in compelling circumstances*."

A retrial from the above discussion envisages placing the parties back to the same court which first handled their case so that everything is done from there with the fresh mandate of <u>another Judicial Officer.</u> It involves recalling witnesses, rehearing them, revisiting the locus. From the view point of another Magistrate or Judge. What changes is the officer conducting the trial. Not the territorial or pecuniary jurisdiction of the court handling the matter.

This position was considered again in the ***Uganda v. Kato Kajubi Godfrey*** (supra), where court went at length to weigh the effect of a retrial in view of the need to balance justice and impunity and had this to say.

> "*In light of this finding we have considered whether we should order the Respondent to be put on his defence before the trial Judge or before another judge we have rejected the first option as not being feasible. We do not think it is fair to the parties and to the trial Judge to order him to continue with the trial. <u>He seems to have taken certain fundamental positions on various matters</u> in the trial that may be too late to revise now. We do understand the awkward situation he may find himself in being human.... We do not consider it feasible either to order that the trial continues before another Judge. It is not practicable to expect another Judge to continue a case of this magnitude on the evidence of 22 witnesses he/she neither saw nor heard in the witness box in court...*"

Clearly from the above case it is to be noted that whenever a court orders a <u>retrial</u>. It has taken into consideration the fact that parties are likely to be inconvenienced and it is therefore <u>never</u> the intention of court to give parties a chance to " re-invent the wheel of justice" by choosing to present themselves to another court, which never heard the matter originally.

Am aware of the provisions of the decisions in ***David Kabungu v. Zikarenga High Court Misc. App. 36 of 1995 [1995] 3 KALR*** that as a general rule a plaintiff has a right to choose his/her court.

I however find that Plaintiff exercised this right by going to the Grade 2 Court of Iyolwa under original case MT.21/1977 when this matter went on appeal under CA MT/21/1977 it retained its root to MT/21/1977 (as the original file and court). therefore a retrial meant that parties present themselves at the Iyolwa Magistrate Grade 2 Court before another Magistrate competent to hear the matter and have MT/21/1977 retried.

All that had remained to be done was for the Chief Magistrate once contacted to allocate a competent Magistrate to rehear the matter. The way the plaintiff chose to proceed by sitting for all the time between 1989 to 2012, and again refile the suit before the Chief Magistrate for retrial before the Chief Magistrate was irregular and erroneous. The Chief Had no jurisdiction to hear that suit.

It is trite law that if a court has no jurisdiction its decision is a nullity. Jurisdiction cannot be conferred on court by consent of the parties. A court cannot give itself jurisdiction in a case otherwise outside its jurisdiction on the ground that it would be for the convenience of the parties and witnesses. Therefore in case the provisions of Section 208 of the MCA which require; "a suit to be instituted in the lower grade of court competent to try and determine it." Combined with section 4 and 12 of the CPA, requiring suits to follow subject matter in terms of pecuniary and territorial jurisdiction all dictated the fact that the Chief Magistrates Courts was the wrong court for the retrial.

The case could only be retried at Iyolwa Grade II Court, which was the court of first instance, and had heard, the matters before the Chief Magistrate, that gave raise for the retrial. This ground therefore fails.

Issue 2: Whether the duty to allocate the file to a competent Magistrate lay with the Chief Magistrate

Appellant referred to Section 221 MCA and argued that the Chief Magistrate ought to have reallocated the suit to a competent Magistrate within his own area of jurisdiction if he found that he had no jurisdiction.

The Respondent argues that Section 221 was not applicable to the facts before court because the retrial was meant to go to the court from which it originally came from. He argues that the Chief Magistrate had no power to reallocate a file from his court to another court, as it is specifically provided under Section 217 and 21 of the MCA. He could only supervise, the lower courts as a Chief Magistrate, The Power to transfer cases being a preserve of the High Court.

From all arguments above, the position of the law is that as presented by the Respondents. A subordinate court cannot on its own initiative transfer a case to another subordinate court, or try a case which is not within its territorial or magisterial area.

In the case of ***David Kabungu v. Zikarenge High Court Misc. App. 36 of 1995 [1995] 3 KALR 48***- it was held;

> "*A subordinate court has no jurisdiction to transfer a suit. On the other hand a subordinate court to which a suit is purportedly transferred by another subordinate court, if he hears the case and decides it, takes the case without jurisdiction as the case was not filed in that court nor transferred to it by the order of the High Court.*"

Also in ***Kigenyi v. Musiramo (1968) EA 43*** it was held that an order for transfer of a suit cannot be made unless the suit had in the first instance been brought to a court which has jurisdiction to try it.

From the positions of the law above, it was clearly right for the learned trial Magistrate to decline the option to transfer the suit since he had no jurisdiction to try the matter, and has no jurisdiction to transfer the same. The suit was filed in a wrong court and could not be heard by the Chief Magistrate, neither could it survive to be transferred. It is natural fate was to be dismissed.
I therefore find no merit in this ground of appeal as well. It fails.

In the final result, I do not find merit in the appeal. It is dismissed with costs to the Respondents. I so order.

Henry I. Kawesa
JUDGE
3.3.2017