

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO. 296 OF 2014
(ARISING OUT OF MISC CAUSE NO. 08 OF 2014)**

a) **KIBUYE DENIS**
b) **NAMWESEZA FAUSTA**
c) **KYEYUNE BRUNO****APPLICANTS**
d) **NAKAZIBWE HALIMA**

VERSUS

NAKAMYA SOPHIA.....**RESPONDENT**

BEFORE LADY JUSTICE EVA K. LUSWATA

RULING IN REVISION

The applicants presented this application under Section 98 and 83 of the CPA, Section 33 of the Judicature Act and Order 52 rules 1, 2 and 3 CPR for orders that;

1. The judgment, orders and the execution of decrees of civil suit No. 85 of 2013 from Makindye Chief Magistrates Court be revised.
2. That Civil Suit No. 85 of 2013 be retried and the applicants be allowed to file their defence(s).
3. That the 1st applicant be released from civil prison.
4. That the costs of this application be provided for.

The application was supported by four affidavits of the applicants and a one Najjemba Jane an aunt to the applicants where they briefly stated that;

- a) The applicants were not served with court summons to file a defence(s) in Civil Suit No. 85 of 2013 in Makindye Chief Magistrates Court and thus denied their constitutional right to be heard.
- b) That the Chief Magistrates Court of Makindye acted in the exercise of its jurisdiction illegally with material irregularities which caused serious injustice on the applicants.
- c) That the respondent herself was a witness to the agreement when her late brother was selling the disputed land to the applicants father but because the respondent herself is an old woman and aware of this fact, it's her daughter who is moving everything without noticing this fact.
- d) That practice demands that at least a court official serves court summons but court relied on the defective affidavit of service sworn by a one Nuwamanya Alex Muhwezi an

employee of M/S Kajeke, Maguru and Co. Advocates which is the law firm that represented the respondent.

- e) That the court in reaching its judgment relied on the said affidavit of service which does not comply with the requirements and provisions of the law.
- f) That the respondent instituted the suit as Administrator of the Estate of the Late Musisi Mayanja Israel annexing the alleged will of the deceased and the Letters of Administration on the plaint but what is funny is the fact that a one Nkeeto Fred and Nabuma Josephine mentioned in the Letters of Administration as son and daughter of the Late Musisi Mayanja Israel and yet in the alleged will they are not mentioned anywhere amongst the said children of the deceased.
- g) That the Honorable Court based on the evidence of the mere will of the deceased which was not interpreted in the language of the court and or proved by court to find that the disputed premises belong to the plaintiff and her late father.
- h) That the judgment of court does not order, direct or provide for any demolition of the applicants houses on the disputed land but the plaintiff went ahead to demolish and destroy all the 20 rental houses and the applicants butchers which had been there for over 20 years and it is where the 2nd applicant and other young brothers and sisters of the applicants used to stay.
- i) That the applicants were never served with any notice of the intended eviction or demolition at which stage the applicants could have known about the existence of the suit against them but rather shackled by demolition of their homes were they have stayed with their late father since they were born.
- j) That the alleged late father of the respondent appears to have bequeathed in the alleged will the suit rental rooms and premises to his children and therefore there is no way such property could form part of intestate property.
- k) That the applicants filed MA No. 1 MA No.2 of 2013 and MA No. 3 of 2013 in the Chief Magistrates Court of Makindye to stay execution and be allowed to be heard in defence, to have the 1st defendant released from civil prison and set aside the **ex parte** judgment but all were denied and dismissed.

- 1) That it is in the interest of justice that this application be allowed by court since the applicants are merely seeking a right to be heard and defend themselves on a matter for which they have a good defence and evidence.

The application was opposed by the respondent in an affidavit in reply where in brief she stated that the applicants were duly served with summons as evidenced by the area LC1 Chairman. That the applicants were ordered to pay costs and general damages which they refused to do hence execution which has since taken place. That the applicants have no interest in the suit premises and Annexures A and B to the application are after thoughts. Further that the application is incurable, defective and an abuse of court process since the chief magistrate exercised a jurisdiction vested in her. That since the applicants applications were dismissed in the Makindye Court, the applicants reasonable course of action should have been to appeal against the said orders of the Chief Magistrate.

The parties were ordered to file written submissions which were complied with.

Before delving into the merits of the application I first need to address my mind to an objection raised by the respondent that prior to this application, the applicant had through Applications Nos. 1, 2 and 3/2013 applied to court to set aside the *ex parte* judgment and decree and stay execution which was denied and in any case, execution had been completed by the 1st applicant who was serving a civil sentence. Therefore that the applicant's reasonable course of action would have been to appeal against the orders of the Chief Magistrate in those three applications. The applicant did not deny that fact and they themselves mentioned those proceedings in the present application.

A similar objection was considered by Justice Irene Mulyagonja Kakooza in the case of **Twine Amos Vs Tamusuzza James HC Civil revision No. 1 of 2009** where after analyzing provisions for revision in the Indian Code of Civil Procedure held that "*this (the High court) can revise a decision under Section 83 CPA even where an appeal would lie.*" She went on to find that failure to appeal the decision refusing to set aside an interlocutory judgment which would also permit a party leave to file a WSD in order to defend the suit, would not in any way bar a party from seeking remedy under Section 83 CPA. I also note that there appears to be no restriction

(for one to seek an order of revision) under Section 83 CPA against a party who would otherwise have a right of appeal as would be the case for review in Section 82 CPA. I therefore agree with my sister Judge that this matter albeit its history, can proceed by review and as such find no merit in the objection raised by respondent's counsel. The first issue is in favour of the applicants.

Section 83 of the Civil Procedure Act grants revisional powers to the High Court in respect of proceedings from any Magistrate's courts in case they appear to have:

- a) *Exercised a jurisdiction not vested in it in law; or*
- b) *Failed to exercise a jurisdiction so vested; or*
- c) *Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice.*

Counsel for the applicants submitted that there was no service upon the applicants of court summons to file a defence. That what was alleged to be served, was a hearing notice and it appears there is no evidence of service of summons and the plaint as **Order 5 rule 1 (2) CPR** requires. The summons of the Chief Magistrates Court was signed by court on 26/6/2013 and yet the only affidavit of service on record refers to hearing notices. They went on to argue that **Order 5 rule 9 CPR** was not fulfilled as each of the defendants in the suit were not served individually and personally. Relying on **Y. Katukulu Vs Transocean Uganda Ltd. HCCS 1284 of 1973 and Bitaitana Vs Emmanuel Kananura HCCA No.47 of 1977**, they concluded that service of summons upon the applicants were not proper and in accordance with the law and that the affidavit of service does not comply with the law on service of summons and court process.

Counsel submitted that the trial magistrate erred in law and procedure when she allowed both counsel to submit on two applications jointly i.e. MA No. 2 and MA NO. 3 at the same time which were separate applications seeking different remedies. Counsel also submitted that the trial magistrate relied on the sole evidence of a will admitted as Exhibit P2 to prove that the disputed land belongs to the plaintiff as administrator and, forming part of the estate of the Late Mayanja Musisi Israel contrary to **Sections 67 and 68 of the Evidence Act** and **Section 50 (3) of the Succession Act**. Counsel also highlighted discrepancies in the will and Letters of Administration

with regard to beneficiaries as well as inconsistencies in the other evidence adduced at the *ex parte* trial. They also raised issue with the manner in which execution was done, complaining that although only vacant possession was granted, the concerned bailiff proceeded to demolish the structures on the suit land which was contrary to the decree.

In reply, counsel for the respondent contended that none of the applicants has denied knowledge of the Area LC1 Chairman and none had adduced evidence to show that they were not residents on the suit premises at the time the service of the summons was effected on them. Additionally the trial magistrate visited the locus and the area LC1 Chairman gave evidence at the locus. If indeed the applicants had not been served with summons as alleged, then the visit at the locus would have raised suspicion among the applicants and or their agents. Counsel also noted that the application is an abuse of court process and would not warrant a revision order as in his view, an erroneous decision is not by itself a ground for revision. In this, he relied on Saied J (as he then was) in **Elizabeth Bamako Vs. Dodoviko Nviiri Civil Revision No. 1 of 1973**. Counsel also contended that the orders and decree which the applicants are seeking to have set aside, were executed as per the return on the court record.

The objections of the applicants appear not to be against the jurisdiction of the trial magistrate but that, she exercised her jurisdiction illegally or with material irregularity or injustice.

Summing up their counsel's submissions, these would include:-

1. Lack of evidence of service of summons and the plaint.
2. The affidavit of service did not comply with the law on service of summons and court process.
3. Trial magistrate wrongfully allowed the two counsel to submit on two different applications concurrently in an omnibus manner.
4. The will was tendered into court in its vernacular form which is not the language of court.
5. The will was allowed to be adduced before it was proved and as the only piece of evidence contrary to the succession Act.
6. Inconsistencies in the respondent's evidence at the trial.
7. Wrongful or excessive execution of the decree by the designated court bailiff.

In this application revision is sought of the judgment and order in Land Civil Suit No.85/13 and its execution and for its retrial. As a result of that **exparte** judgment, the applicants had also filed MA. Nos. 1, 2 and 3 of 2014 in the same court. I note that in MA No.2/2014, the trial magistrate declined to release the 1st applicant from civil prison because she was satisfied that the respondents were served with summons but exempted themselves from the proceedings. In the same ruling she dismissed MA No.3/2014 on the grounds that it could not be handled omnibus together with MA.No.2/2014. In her judgment in Land suit No.85/13, the trial Magistrate took issue with the applicants who did not file a defence or appear to defend the case, yet in her belief and estimation; they were served with court summons. She believed the uncontroverted evidence of the respondent that she was a beneficiary in the will of her late father, Musisi Mayanja Israel and that the suit land at Juuko Zone, Makindye was her property in which the applicants have no claim. The applicants apparently failed to fulfill part of the judgment; they were evicted from the suit land and the 1st applicant thrown into civil prison for failing to satisfy the decree. According to the applicant's counsel, the applicant subsistently was released soon after this application was filed.

In making my decision, I take caution that Section 83 applies to complaints or objections against jurisdiction alone, and in this case, it will be irregular exercise or illegal assumption of it. As was held by Mustafa J in **Matemba Vs Uamulinga (1968) EA 643** where he cited the decision of the Privy Council in **Balkrishna Vs Vasudeva (1917) 44 1. 261** that, *"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved"*. Further the same Privy Council in **Amir Hassan Khan Vs Sheo Baksh Singh (1885), 11 1A.237** (quoted in a Handbook of Magistrates Rev. Ed.2004 at page 23) settled it that; *"... where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even law"*.

Therefore, stemming from the authorities above, I cannot fault the magistrate on any of her decisions on questions of fact or law. I can only interfere if I find that she exercised her jurisdiction illegally, with material irregularity or in a manner that lead to injustice. It is my view therefore, that the only matters that can be questioned is whether the magistrate rightly

acted on the issues dealing with service of summons, allowing the hearing of omnibus applications and tendering of court documents at the hearing.

According to the proceedings before the trial magistrate, on 17/9/13 when the suit came up for hearing, counsel for the plaintiff/respondent moved court to be allowed to proceed *ex parte* claiming that the defendants/applicants were served and there was a return of service by hearing notices on court record. The trial magistrate found that “*upon perusal of the court record and upon listening to the submission ... it is my belief that the defendants were all properly served as stated in the affidavit in the presence of the Chairman LC1 who stamped on the returned summons as proof that he witnessed service*”. She then proceeded to allow the matter to proceed *ex parte*.

On 12/11/2013 when the court visited locus it was observed by the trial magistrate in the proceedings that the defendants were absent. However the trial magistrate in her judgment of 13/12/2013 held that: -“*The defendants were served with the plaint. They did not file their written statement of defence in court. So the case was heard ex parte...When court visited locus they were present at the locus but were not bothered. They were identified to court by the LC 1 Chairman who was at locus...*”

Under Order 5 Rule 1-5 it is the summons and not a hearing notice that are issued by court and served upon the defendants to alert them of a pending suit and inviting them to respond to it by filing a written statement of defence. Under rule 8, service is effected only of a duplicate endorsed by court. Under rule 9, where there is more than one defendant, then service would be on each one of them and in every case, where practicable, service must be on the person or agent of the defendant(s). Further, according to Rule 14, the person served must endorse acknowledgement of service on the original summons, but if the court is satisfied that they refused to endorse acknowledgment, it shall declare the service to have been duly effected. A template of summons is provided as Form 1 in Appendix A of the CPR and cannot be equated or mistaken with a hearing notice.

In his affidavit of service made on 3/9/14, Nuwamanya Alex Muhwezi stated that he obtained copies of hearing notices from the court for service upon the defendants. That all four defendants declined service of the hearing notices at the place he found them and instead, he secured the signature and stamp of the area LC1 chairperson. Attached to his affidavit is a hearing notice for 17/9/13 which was the apparent hearing date for the suit. It was in the discretion of the Magistrate and within her jurisdiction to believe or not to believe that oath. In my view, she exercised her jurisdiction with material illegality and irregularity.

Firstly, it was clear on the face of the record that it was a hearing notice and not summons being served, yet it was not in dispute that the applicants were being summoned to court for the first time to file their written statements of defence and not merely to appear for an adjourned hearing. The argument by the respondent that the LC1 chairman witnessed the service of the hearing notice and appended his signature thereon would not suffice since it was never indicated that he was the applicants' designated agent (and in fact could not have been). More important, it was procedurally wrong in the first place to have served a hearing notice and not summons and a plaint. In such circumstances, no summons were ever issued or served upon the applicants. Therefore the ensuing *exparte* proceedings were irregular and an illegality. The case of **Makula International Ltd Vs His eminence Cardinal Nsubuga & Anor (supra)** is very alive in such instances for it was held that *"a court of law cannot sanction what is illegal and on illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made thereon"*.

Further, this was only the first attempt to effect a service which was in fact not made on any of the defendants personally. The magistrate could have done more to ensure that service was effectively executed. Further, the contradiction in her judgment with respect to the presence or non presence of the defendants during the locus visit cannot be ignored. Even with the evidence of the applicants (that came in at the point of the applications) that they did not reside at the suit land and that they were never served, she declined to give them the benefit of doubt which resulted in my view a grave injustice of refusing them a chance to be heard in defence of the claim, which is their constitutional right.

I noted that the deceased's will was admitted in evidence as Exhibit P2. However it is not clear from the record provided whether it was the vernacular or English version. Further, I believe irregular or wrong execution of the decree cannot be attributed to the trial magistrate and I thus decline to make a finding on those two complaints. Also, the magistrate did acknowledge the fact that an omnibus argument of two applications was not tenable and dismissed one application (MA.3/14). I do not find this irregular and even if I did, it is a question of interpretation of the law which I cannot in this application interfere with.

In summary therefore I find that the trial magistrate acted irregularly and illegally when she made the decision to allow the respondent to proceed *ex parte* against the applicants on apparent facts that a hearing notice and not a summons were issued by court for service upon the applicants, and when personal service upon on the four applicants was not proved. I accordingly proceed to allow the application with the following orders:-

1. The judgment and orders in Civil Suit 85 of 2013 of the Magistrate's Court of Makindye be revised and are set aside.
2. Execution of the Decree in Civil suit No. 85 of 2013 of the Magistrate's court of Makindye is set aside.
3. Civil suit No.85 of 2013 be re-heard in the Chief Magistrate's court of Makindye.
4. The applicants be permitted to file their written statements of defence within 15 days of the file being received by the Chief Magistrate of Makindye.
5. The applicants are awarded costs of this application.

I so order.

EVA K. LUSWATA
JUDGE
10th October 2014