THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL REVISION NO. 33 OF 2018

(Arising out of Civil Suit No.7 of 2017- In The Chief Magistrate's Court of Nabweru).

OPEDO PATRICK & 16 OTHERS:: APPLICANTS

VERSUS

KICONCO MEDARD:::RESPONDENT

BEFORE: HON. MR. JUSTICE JOHN EUDES KEITIRIMA.

RULING

This file was referred to me by the Hon. Principal Judge basing on the reports from the Assistant Registrar Inspector of Courts dated 29th October 2018 and the Trial Magistrate's response dated 30th October 2018. The reports arose out of a case that was decided by the Trial Chief Magistrate vide **Land Civil Suit No. 007 /2017, Kiconco Medard versus Opedo Patrick and 16 others** in the Chief Magistrates Court of Nabweru at Nabweru.

This court was requested basing on the said reports to study them and the file of the Trial Court for possible revision orders and appropriate action.

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Section 83 of the Civil Procedure Act Cap 71 provides that ***"The High Court may call for the record of any case which has been determined under this Act by any magistrate's court, and if that 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,

the High Court may revise the case and make such order in it as it thinks fit, but no such power of revision shall be exercised-

(d) unless the parties shall first be given the opportunity of being heard; or

(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

BACKGROUND

The Respondent in this case had filed the said suit at the Chief Magistrate's Court of Nabweru on the 13th January 2017, claiming that he was the Registered Proprietor /Owner of land comprised in **Kyadondo Block 206 Plot 671 at Mpererwe measuring approximately 3.89 Hectares**. The Respondent had also claimed that he was the owner of the adjoining and neighboring **Plot 177** in respect of which he claimed he had obtained planning permission and approval from Kampala Capital City Authority and had approved plans.

The Respondent claimed that the Applicants jointly and severally and without colour of right nor consent or approval from the Respondent or

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City Planning Authority, constructed illegal structures on the suit land which were not legally authorized and were therefore a nuisance to the Respondent.

The Respondent sought for the following remedies in the trial Court:

1. An order for abatement of a nuisance;
2. An order of demolition of the Applicants structures under the Physical Planning Act, 2010;
3. Delivery of vacant possession;
4. A permanent injunction restraining the Applicants and prohibiting them or their agents from continuing to degrade the suit land and alter its layout or continuing with the said nuisance or further construction thereon.
5. Damages for loss and suffering.
6. Costs of the suit.

The record of the trial court shows that summons to file defences were issued and service was effected by a one Wamala Wycliffe Richard, a clerk employed by Nyanzi, Kiboneka & Mbabazi Advocates as per his affidavit of service dated 03/02/2017. His affidavit of service indicated that the summons were effected on a one Sejjembba Henry the LC One Chairperson of Ssekanyonyi Zone who advised the Process server that for the Process Server's safety and security, he(the said LC1 Chairman) would personally effect the service of the Court documents on the respective defendants.

The Process server stated that he picked the served copies of the summons from the said Chairman and the copies of the summons indicated that the 1st , 2nd , 3rd , 6th , 7th , 8th , 9th , 10th , 14th , 15th , 16th , and 19th defendants had accepted service but the rest of the defendants i.e the 4th, 5th ,11th 12th

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and 13th defendants had declined service but retained the copies of the summons.

Service was also effected on the Applicants by a one Jacob Jabero a Court process server of Nabweru court on the 12th May 2017 and he deposed several affidavits of service to that effect.

Apparently no defences were filed by the said Applicants and basing on the said affidavits of service, the matter proceeded exparte in the trial court against all of the defendants/applicants.

After hearing the case exparte, the Trial Magistrate on the 3rd October 2017 made the following orders:

1. That the defendants being trespassers should deliver up vacant possession of the suit premises at **Mpererwe** comprised in **Kyadondo Block 206 Plot 671** immediately.

2. That a permanent injunction be issued against the defendants, their agents and workers from further trespassing and degrading the suit land, alter its layout or continuing the nuisance or further construction thereon.

3. The Trial Magistrate further ordered for the Abatement of the nuisance and demolition of the defendants' illegal structures from the suit land.

4. The court awarded the Plaintiff general damages for loss and suffering to the tune of 20,000,000/= (twenty million shillings).

5. The Plaintiff was also awarded the costs of the suit.

On the 24th October 2017, the file was forwarded to the Execution Division of the High Court and a Notice to show cause was issued for the Judgment Debtors to appear on the 15th November 2017.

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The Notices to show cause why execution should not issue were also served on the said Chairperson by a one Badru Baguma who according to his affidavit of service called all the said Judgment debtors on the 8th November 2017 and was able to meet them. The Process server claims he then effected service on them but they all declined to acknowledge service of the summons. It was instead the said Chairperson that acknowledged having witnessed the service and stamped on the notices to show cause why execution should not issue.

A warrant of vacant possession was then issued in the names of Kirunda Moses of Spear Link Auctioneers and Court Bailiffs who carried out the execution of the Court Order and made a return in court on the 15th October 2018 indicating that the defendants had been evicted, and illegal structures demolished. The court bailiff also reported that vacant possession of the suit premises had been given to Kiconco Medard, the Plaintiff. The Court Bailiff attached an inventory record and handover report on his return of warrant.

In December 2017 an application was filed by some of the defendants vide **Miscellaneous Application No. 315 of 2017** at The Chief Magistrate's Court of Nabweru seeking to set aside the exparte Judgment. The Application was dismissed on the 2nd July 2018 under **Order 9 Rule 22 of the CPR** for failure to prosecute it.

On 6th December 2017 an application was filed vide **Miscellaneous Application No. 2880 of 2017** in the Execution and Bailiffs Division for stay of execution. The application was fixed for hearing on 14th February 2018. The Applicants who filed **Miscellaneous Application 2880 of 2017** also applied for an interim stay of execution vide **Miscellaneous Application No. 2940 of 2017** and the application was allowed on condition that the Applicants deposit security for costs of **20,000,000/=** *within 30 days.* On the 19th December 2017, it was decided that the Main *Application had been* overtaken by events since the Applicants had accepted to deposit security for costs.

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It would appear the said condition was never met by the Applicants. Execution was therefore issued against the Applicants.

I summoned counsel for the parties to appear before me on the 22nd November 2018 to make their submissions on the matter before I could take a decision.

SUBMISSIONS BY COUNSEL FOR THE APPLICANTS.

Counsel for the Applicants, Abdulla Kiwanuka, submitted that the Applicants were making an application under **Section 83 of the Civil Procedure Act**. He contended that the section mandates courts to exercise jurisdiction which is vested in them. Counsel submitted that The Chief Magistrates Court of Nabweru has a limited pecuniary jurisdiction of 50,000,000/= (fifty million shillings) and the case before the Court led to the eviction of the Applicants whose interests on the suit land was over 200,000,000/= (two hundred million shillings) in monetary value basing on the compensation agreements that were tendered in Court during the trial.

Counsel for the Applicants further submitted that the Trial Chief Magistrate should have dismissed the case for want of jurisdiction or forwarded the case to the appropriate court with jurisdiction. Counsel contended that jurisdiction goes to the root of the subject matter and failure to observe the same rendered the decree and execution process a nullity. Counsel prayed that the Court should set aside the exparte Judgment and execution.

Counsel for the Applicants further submitted that the Hon. Chief Justice issued **Practice Direction No.7 of 2007** which was to the effect that Judges and Magistrates handling land matters should as much as possible visit the locus in quo to verify what is on the ground. Counsel contended that the Trial Chief Magistrate did not visit the locus in quo. That had the trial Chief Magistrate visited locus in quo, she would have realized that more than 100 people were on the suit land and not only 17 that had been

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sued by the Plaintiff. Counsel contended that more than a 100 people were evicted from the suit land and yet they were not parties to the suit.

Counsel for the Applicants further submitted that the warrant of eviction was issued without serving a Notice to Show Cause to the judgment debtors, who are the Applicants in this case. He emphasized that failure to issue a Notice to show cause to the affected people of Lusanja rendered the execution a nullity.

Counsel Luyimbazi Nalukola who jointly appeared with Counsel Abdalla Kiwanuka for the Applicants, submitted that this court should invoke its powers under **Section 83 of the CPA** to intervene in this case as the trial Chief Magistrate exercised her jurisdiction illegally or with material irregularity or injustice. He submitted that the facts of this case revealed all the irregularities which culminated into an absurdity. Counsel further submitted that the land in the Decree was in respect of land at **Sekanyonyi** and yet the victims are residents of **Lusanja**. Counsel for the Applicants contended that had the Trial Magistrate visited the locus in quo, she would have established that fact. Counsel associated himself with the submissions that had already been made by his colleague in respect of this matter.

SUBMISSIONS BY COUNSEL FOR THE RESPONDENT

Counsel for the Respondent filed written submissions.

Counsel submitted in his written submissions that the Trial Chief Magistrate made orders in respect of land at **Sekanyonyi zone Mpererwe Block 206 Plot 671** and not land comprised in **Kyadondo Block 198 Plot 55 at Lusanja**.

On the issue of jurisdiction, counsel submitted that the respondent's cause of action was in trespass and for a declaratory order that the respondent is the owner of the suit land. He submitted that trespass is a tort. He cited the case of ***Justine E.M.N Lutaaya vs. Sterling Civil Engineering Company***

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Limited*-SCCA No.11 of 2002** where it was held inter alia that ***"Trespass to land occurs when a person makes an unauthorized entry upon land, and therefore interferes or portends to interfere, with another's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land..."

Counsel for the Respondent further submitted that trespass is a wrong that is impossible to estimate in terms of monetary or pecuniary value and no one can remove the jurisdiction of the court basing on the monetary value of the land trespassed upon. Counsel emphasized that the tort of trespass falls within the ambit of wrongs like assault, battery and defamation and these are incapable of pecuniary estimation unless the claimant pleads for damages which wasn't the case in this matter.

On the issue of service onto the defendants, counsel submitted that although there was no personal service onto the defendants it was through the L.C1 Chairman of the area where the land in dispute is situate. Counsel contended that this has always been the practice of this court and is considered as good service and deemed effective as long as it is not challenged. Counsel contended that none of the Applicants ever contested or challenged the service and indeed no one ever came out to inform court that they were not aware of the service and that they had been prejudiced in anyway.

Counsel for the Respondent cited the case of ***St. Aubyn (LM) vs Attorney General*-(1951) 2 All ER 473 at page 498** where it was held by **Lord Radcliffe** that ***"The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense impossible."***

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Counsel for the Respondent contended that this court has on numerous occasions where facts are so similar like the case at hand, to state that the expression *"service that is deemed to be good service"* is so broad that it even includes service that might produce the intended result. Counsel submitted that in this case the intended result was to have the defendants be heard and this was fully achieved.

Counsel for the Respondent further submitted that the Applicants pursued a post judgment remedy of review vide **Miscellaneous Application No.315 of 2018** arising out of **Civil Suit No.07 of 2017** which application was never pursued and this implied that the Applicants in this application were reluctant or even less interested in pursuing the post judgment remedy.

On the issue of the Trial Chief Magistrate not visiting the locus in quo, counsel for the Respondent submitted that **Practice Direction No.7 of 2007** does not make locus visits mandatory. He cited the case of ***Yeseri Waibi vs. Lusi Byandala***- **[1982] HCB 28** where court held that, ***"The practice for visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap, for then the trial magistrate may run the risk of being a witness in the case."*** counsel contended that in this instant case it did not necessitate a locus visit and that failure to visit the locus in quo was not fatal.

On the issue of not serving a notice to show cause before the warrant for eviction was granted, counsel submitted that the applicants (judgment debtors) were served but did not enter appearance. Counsel contended that the fact that the judgment debtors filed an application for stay of execution implies that they indeed received the Notice to Show Cause as to why Execution should not issue against them.

Counsel for the Respondent further submitted that there was no material irregularity in the entire handling of the case for this court to base on to exercise it Revisionary powers as per section **83 and 98 of the Civil**

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Procedure Act and prayed that this Court upholds the Judgment of the Trial Court.

ISSUES TO RESOLVE:

1. **Whether the Trial Court had jurisdiction to handle the case.**
2. **Whether service on the Applicants/defendants was effective.**
3. **Whether the Trial Magistrate had to visit the locus in quo before determining the case.**
4. **Whether the Execution was properly done.**

RESOLUTION OF ISSUES

1. **Whether the Trial Court had jurisdiction to handle the case.**

Section 207(1) (a) of the Magistrates Courts Act Cap 16 as amended by The Magistrates Courts (Amendment) Act, 2007 provides that ***"a chief magistrate shall have jurisdiction where the value of the subject matter in dispute does not exceed fifty million shillings and shall have unlimited jurisdiction in disputes relating to conversion, damage to property or trespass (emphasis mine).***

It is my considered view that the Jurisdiction of the Court should not only be determined from the cause of action or value of the subject matter where it applies, but also the remedies being sought from the court as well.

A suit to recover possession of land includes broadly speaking a claim to everything above the surface of that land. The value of the structures that were to be demolished had to be ascertained for the trial magistrate to

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determine whether she had the pecuniary jurisdiction to order for their demolition.

The Plaintiff/Respondent had also indicated in his Plaint that he was seeking an order for demolition of the defendants/Applicants structures under the **Physical Planning Act, 2010. Section 2 of the said Act defines Court as "The High Court."** Therefore it was only the High Court that could grant such a remedy under the said Act.

Section 11 (1) of the Civil Procedure Act provides that ***"Except as is provided in this Act or the Magistrates Court Act, suits and proceedings of a Civil Nature shall be instituted in the High Court.***

(2) Whenever for the purpose of jurisdiction or court fees it is necessary to estimate the value of the subject matter of a suit capable of money valuation, the plaintiff shall in the plaint, subject to any rules of court, fix the amount at which he or she values the subject matter of the suit; but if the court thinks the relief sought is wrongly valued, the court shall fix the value and return the plaint for amendment."

It was therefore imperative to provide the estimated value of the structures that the Plaintiff was seeking the Court to demolish in order for the Trial Court to determine whether it was within the ambit of the Court's pecuniary jurisdiction to order. The said provision of the law is couched in mandatory terms for purposes of determining whether the court has jurisdiction to determine the matter.

If a Court has no jurisdiction over the subject matter of the litigation, its Judgment and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the court in which they are rendered, but shall be declared void by every court in which they may be presented. See the case of ***Assanand and Sons (Uganda) Limited versus East African Records Limited*- [1959] EA 360.**

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It is therefore clear that the Trial Court had no jurisdiction to handle the case.

2. Whether service on the defendants/Applicants was effective.

Order 5 rule 10 of the Civil Procedure Rules Cap 71 provides that ***"wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient."***

Since the Respondent/Plaintiff had indicated that the Applicants were staying on his land, it was practical to serve them since they could be easily traced. The LC 1 Chairperson that was served was clearly not an agent of the Applicants/defendants.

Even when the Process server of the trial Court stated that he had served the defendants personally, in all his affidavits of service he indicated that he served them with the Plaintiff's agent. He does not mention the names of this agent who helped him to identify the Applicants/defendants!

Order 5 rule 16 of the Civil Procedure Rules Cap 71 provides that ***"the serving officer shall, in all cases in which the summons has been served under rule 14 of this order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."(Emphasis mine.)*** This is to ensure that the process server who in most cases does not know the identity of the parties he is meant to serve, serves the right parties and there is evidence to that effect. In all the affidavits of service that were sworn by a one Jabero Jacob the court process server, he did not indicate the time he served the parties and who identified those parties to him which he should have done by stating the name and the address of the identifying person as required by the law. The service was defective.

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Article 44(c) of the Constitution provides that there shall be no derogation of the right to a fair hearing. From the affidavits that were sworn by the process servers, it was evident that the Applicants/defendants were not properly served. It is therefore not surprising that they never filed their defences.

3. Whether the Trial Magistrate had to visit the locus in quo.

I agree with the submission by counsel for the Respondent that it is not mandatory to visit the locus in quo in all land disputes as there are land disputes that can be conclusively resolved without necessarily visiting the locus in quo. Courts visit the locus in quo to verify the evidence given in court. It is also my considered view that it is not only to verify the evidence that was adduced in court but also for the Trial Magistrate or Judge to make his own observations at the locus in quo. That is why **Practice Direction No.1 of 2007** that was issued by the Hon. Chief Justice should be followed. The Court should as much as possible take interest in visiting the locus in quo while handling a land dispute.

In this particular case if the Trial Magistrate had visited the locus in quo, it would have alerted the Applicants/defendants that someone had sued them in Court and I am sure they would have taken appropriate action at that stage. It would also have enabled the Court to know whether there were other parties that had an interest in the land apart from those that has been sued and find out a mechanism to deal with those other interests. It would also have alerted the Trial Magistrate to appreciate the magnitude of the dispute she was dealing with and whether she actually had the jurisdiction to grant the remedies that were being sought by the Respondent/Plaintiff.

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4 . Whether the Execution was properly done.

The execution was a nullity as it was based on a decision that was issued by a Court without competent Jurisdiction. Determining the merits or the demerits of the execution process would therefore be superfluous.

Suffice to say that there was a contention as to which land the Court Bailiff carried out the execution. The return that was made by the Court Bailiff to the Registrar of the Execution and Bailiffs Division on the 15th October 2018 indicates that it was in respect of **Kyadondo Block 206 Plot 671 at Sekanyonyi Mpererwe and not Lusanja.** If there was a dispute in that regard, the affected parties should have filed objector proceedings in the Execution and Bailiffs Division which should have investigated the matter.

In all therefore, I find that the Trial Court exercised a jurisdiction not vested in it in law.

There was also no effective service effected on thApplicants/defendants.

The Trial Court Judgment and the Execution process will therefore be set aside.

Any aggrieved party is advised to institute their suit in a Court with Competent Jurisdiction.

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Hon. Justice John Eudes Keitirima

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