

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
MISCELLANEOUS CIVIL APPLICATION No. 0053 OF 2017
(Arising from Gulu Grade One Magistrate's Court Civil Suit No. 019 of 2010)**

5 **OYET CELESTINO** **APPLICANT**

VERSUS

OKELLO LUNJINO **RESPONDENT**

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Before: Hon Justice Stephen Mubiru.

RULING

15 This is an application for revision under the provisions of sections 83 and 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act*, and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks an order setting aside the judgment, execution of the decree, ordering a re-trial and awarding costs. He contends that there is an error material to the merits of the case, in that on 27th February, 2012 the court below decreed the land in dispute to
20 the respondent ex-parte without describing or delimiting its boundaries. In their submissions on behalf of the applicant, Counsel for the respondent M/s International Justice Mission argued that as a result in the process of execution of the decree which commenced on 29th July, 2015, the bailiff seeks to recover and hand over to the respondent, 50 acres of land yet he was decreed only eight acres. In the circumstances, the applicant stands to lose his houses and ancestral land if the
25 execution is not set aside. Moreover, there is no hardship likely to be occasioned by this application since the applicant is still in possession. Counsel for the respondent did not file any affidavit in reply or submissions in reply.

In response, counsel for the respondent, M/a Donge and Company Advocates submitted that the
30 trial magistrate was justified in the decision to proceed ex-parte against the applicant. All references to acreage by both parties in their respective pleadings were mere estimates. When the

court visited the *locus in quo* on 20th November, 2011 both parties were in attendance. While the respondent demonstrated the boundaries of the land he claimed to the court, the applicant only refuted the demonstrated boundaries but did not demonstrate a deferring set of boundaries. The court chose to describe the land in dispute as decreed to the respondent by the demonstrated boundaries and not in acreage. The decree was issued over four years ago and executed more than three years ago and the respondent placed in possession of the land. The application for revision is inordinately late and ought to be dismissed with costs.

Section 83 of the *Civil Procedure Act, Cap 71* empowers this court to revise decisions of magistrates' courts 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. "Material irregularity" within the context of this section is used in the restricted sense of "method of conducting a case." The expression means some material irregularity in procedure which may possibly have produced error or defect in the decision of the case upon the merits.

The material irregularity in procedure which may possibly have produced error or defect in the decision of the case upon the merits cited in the instant application, is that although in paragraph 3 of the plaint the respondent claimed for recovery of only eight acres, the area decreed to him by the court in fact measures approximately 50 acres. Judgment was entered *ex-parte* against the applicant on 27th February, 2012, declaring the respondent owner of the land "from the road up to the communal grazing land." The actual size or boundaries of the land were not specified in the judgment. As a result, when execution of the decree commenced on 29th July, 2015 it became apparent that the respondent was to recover approximately 50 acres as opposed to the eight he had sought in the plaint. Although the court prepared a map of the land decreed to the respondent, this did not cure the defect. The decision should be revised to correct the ambiguity in the dimensions of the land decreed to the respondent, it is argued.

It should be noted that the land in dispute is neither registered nor surveyed. By stating in paragraph 3 of the plaint that it measured "approximately 8 acres," the respondent thereby gave his own personal estimate of its size. Similarly in stating in his ground 3 of the notice of motion

that the land actually sought to be recovered by the respondent "measures approximately 50 acres," the applicant too is giving his own estimate of its size. This is clearly indicated in paragraphs 7 and 11 of the affidavit in support of the application where he states that the land is "over 50 acres." However, the court in its decision not only described the land by monuments,
5 both natural and artificial, i.e. the grazing land and road, but also prepared a drawing to illustrate its dimensions. The question for this court then is whether the choice between approximated measurements of the two parties as opposed to the monument-based measurements of the court, constituted a material irregularity in the proceedings or decision of the court below.

10 It is an established rule that where land is described by its admeasurements, and at the same time by known and visible monuments, the latter prevail. The question of quantity is mere matter of description, if the boundaries are ascertained. For example in *Howe v. Bass*, 2 Mass. 380 (1807), land that was conveyed was described as having a 45 foot street frontage and being bound by "certain known and visible monuments." It was found at a later date that the distance between the
15 monuments was 65 feet. The court found that the monuments should be held over measurements, opining that "there is no rule of construction more established than this, that where a deed describes land by its admeasurements, and at the same time by known and visible monuments, these latter shall govern." The rule is bottomed on the soundest reason. There may be mistakes in measuring land, but there can be none in monuments. When a party is estimating the size of land,
20 he or naturally estimates its quantity, and of course its value, by the features which enclose it, or by other fixed monuments which mark its boundaries, and he or she may be mistaken as to the size but not the monuments.

Similarly in *McIver's Lessee v. Walker*, 9 Cranch ,13 U.S. 173 (1815) at 178, it was held that; " it
25 is a general principle that the course and distance must yield to natural objects [mentioned in the deed]. All lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey; consequently if marked trees and marked corners be found conformably to the calls of the [deed], or if water-courses be called for in the [deed], or mountains or any other natural objects, distances must be lengthened or shortened, and courses
30 varied so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances, are more

probable and more frequent, than in marked trees, mountains, rivers or other natural objects capable of being clearly designated and accurately described." It is thus an established principle that known monuments must govern over bearings and distances. If there are conflicting calls as to the size of land, those measurements which, from their nature, are less liable to mistake, must control those which are more liable to mistake (see *Bank of Australasia v. Attorney-General* (1894) 15 NSW 256 at 262 and *Hutchison v. Leeworthy* (1860) 2 SALR 152).

Monuments are something tangible that the lay persons can see and understand. While anyone can comprehend and visualise that they own land at the top of the hill or to up to a stream, the size of an acre or hectare may vary in lay persons' estimations. Because of these issues and the fact that no person will measure the same thing exactly the same way, monuments must govern over bearings, acreage and distances. No matter how "accurate" a measurement is, it has a lower value than a natural or artificial monument. Any natural object, and the more prominent and permanent the object, the more controlling as locator, when distinctly called for and satisfactorily proved, becomes a landmark is not to be rejected because the certainty which it affords, excludes the probability of mistake (see the Supreme Court of Georgia case of *Margaret Riley v. Lewis L. Griffin and others*, (1854) 16 Ga. 141).

In the instant application, the description of land decreed to the respondent is based on the court's own observations at the *locus in quo* (see annexure "d" to the affidavit in support of the notice of motion). The trial Court provided a description of the land decreed to the respondent by reference to both natural and artificial monuments seen on the ground, and illustrated in the sketch map it drew. While anyone can comprehend and visualise these monuments, the size of an acre may vary in lay persons' estimation. Because of the fact that no person will measure land exactly the same way by approximation as each of the parties to this application have demonstrated, monuments must govern over their respective estimates of acreage. I have therefore not found any material irregularity in procedure which may possibly have produced error or defect in the decision of the case upon the merits, such as is proposed by the applicant.

On the other hand, it is trite that litigation must come to an end. In *Brown v. Dean* [1910] AC 373, [1909] 2 KB 573 it was emphasised that in the interest of society as a whole, litigation must

come to an end, and “When a litigant has obtained judgment in a Court of justice.....he is by law entitled not to be deprived of that judgment without very solid grounds.” The maxim *interest reipublicae ut finis litium* is strictly followed. Courts should not be mired by endless litigation which would occur if litigants were allowed to file all manner of application during and after trial
5 without any restrictions. Courts hence tend to be stringent in allowing a applications whose effect would be to re-open a case, which has already been completed. On the other hand, courts must administer justice and in exceptional circumstances, applications of that nature should be allowed. The appellate court should weigh these two interests when determining whether an application made so long after a decision should be made.

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Applications for revision must be brought without undue delay. The judgment in the instant case was delivered on 27th February, 2012. Execution commenced on 29th July, 2015. Although the applicant claims to have become aware of the *ex-parte* judgment only when execution commenced, the application was filed two years later on 14th March, 2017, without furnishing
15 any explanation for the inordinate delay. Neither is there any indication that an application was ever made seeking to set aside the ex-parte decree nor is there an appeal pending against the decision in Gulu Grade One Magistrate's Court Civil Suit No. 019 of 2010 of 27th February, 2012, more than six years after it was delivered. For all the foregoing reasons, I do not find any merit in the application and it is hereby dismissed with costs to the respondent.

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Dated at Gulu this 25th day of October, 2018.

Stephen Mubiru

Judge

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