

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

MISCELLANEOUS CAUSE NO. 32 OF 2011

**(Arising from Civil Suit No. 28 OF 2010, of the Chief Magistrate's Court of Nabweru
holden at Nabweru)**

And

**(Arising from Miscellaneous Application No.309 of 2010 of the Chief Magistrate's Court
of Nabweru Holden at Nabweru)**

YEKOYADA KIWANUKA ::::: APPLICANT

VERSUS

**1. KITAMIRIKE EDWARD
2. MUHAMOOD LUWALIRA ::::: RESPONDENTS**

RULING BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction

1.1 The applicant through his lawyers M/s Kaddu & Partners Advocates brought this application against the respondents jointly and /or severally by way of Notice of motion under Sections 83 (a) and (c) of the Civil Procedure Act, Cap. 71 and Order 52 rules 1 and 3 of the Civil Procedure Rules, Statutory Instrument no. 71-1. This application is supported by the affidavit sworn by the applicant.

1.2 The 2nd respondent, through his lawyers M/s Musoke Law Practitioners filed in Court an affidavit in reply to this application and it's supportive affidavit. In essence, the 2nd respondent opposed this application in his affidavit evidence.

1.3 on the day of hearing this application, the court was informed that the 1st respondent is dead. The applicant opted and proceeded against the 2nd respondent.

2. The application

2.1 This application is seeking the following orders; that:-

(a) The records of Civil Suit No. 28 of 2011, and Miscellaneous Application No.309 of 2010, Yekoyada Kiwanuka vs 1. Kitamirike Edward, 2. Muhamood Luwalira

respectively, both of the Chief Magistrate's Court of Nabweru at Nabweru be called for in order for this Honourable Court to satisfy itself as to the legality, propriety and appropriateness of the judgment, ruling, decrees and all orders emanating therefrom and to have them revised and quashed.

(b) The costs of this application be provided for.

2.2 This application is based on the following grounds:-

(a) The trial Chief Magistrate's Court exercised a jurisdiction not vested in it in law when it entertained the above suits before it, whose pecuniary value is in the environs of 125,000,000/=

(b) In the alternative, but without prejudice, to the foregoing, the trial Chief Magistrate's Court acted in the exercise of its jurisdiction illegally and with material irregularity and injustice when it summarily dismissed the aforesaid suits.

(c) It is in the interests of justice that the said files be called for and the judgment, rulings and all orders emanating therefrom be revised and quashed.

3. Resolution of the application by Court.

3.1 The parties were directed to file written submissions. Counsel for the parties never in their submission relied on any case law. Yet this area has a wealth of decisions. To say the least the submission by both parties lack authorities to back up their respective submissions on the matter.

On the onset of the submissions by counsel for the applicant, Counsel for the applicant abandoned ground one (1) of the application. Counsel for the applicant only argued ground two (2) of the application.

3.2 Ground 2: The trial magistrate acted in the exercise of her jurisdiction illegally and with material irregularity and injustice when she summarily dismissed the aforesaid suits.

3.2.1 This application seeks for the review of the judgment in Civil Suit No. 28 of 2010 and Ruling in Miscellaneous Application No. 309 of 2010 based on the above ground.

I have perused the submissions by Counsel for the 2nd respondent. The said submissions are not challenging the submissions by Counsel for the applicant. In his submissions, Counsel for the 2nd respondent stated:

“ the site visit, according to what was reported on Court record, found that the suit land was generally a bush, which was used for grazing cattle. There was no confirmed garden on the land. The applicant’s residential house was on land adjacent to the suit land; across the road. In effect, the claim of holding a kibanja on the 2nd respondent’s land was found to be false.”

When the applicant’s suit was dismissed on the 21/09/2010, the 2nd respondent applied for and was granted consequential orders, viz, that the applicant be evicted from the suit land. The order was extracted on the 05th April, 2011 and served on the applicant. Upon receipt of the said order, the applicant willingly obliged, by ceasing to bring his cows to graze on the 2nd respondent’s land. The 2nd respondent took full possession of his land, and commenced developing it. This is a period of over one (01) year ago. Now the applicant seeks to reverse the status quo.

The 2nd respondent feels that this will occasion serious injustice and hardship on him. That it will mean that his developments on the land have to be demolished in order to accommodate the applicant’s cows, who will be using it for grazing.

3.2.2 Under Section 83 (e) of the Civil Procedure Act, it is provided that:

“the High Court may revise the case and may make such order in it as it thinks fit, but no such power of revision shall be exercised (e)Where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person”

Counsel for the respondent relied on Section 83 of the Civil Procedure Act which reads:

“ 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).....
(b).....

(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and may make such order in it as it thinks fit.....”

3.2.3 According to the proceedings in the lower Court, the plaintiff filed Civil Suit No. 54 of 2006 against the defendant on 7/4/2006 in the High Court of Uganda at Nakawa.

The plaintiff (applicant) was seeking the following orders against the defendants (respondents):

- (i) A declaration that the plaintiff is a lawful kibanja owner.
- (ii) A declaration that the defendants are trespasser on the plaintiff's kibanja.
- (iii) An eviction order against the defendants from the plaintiff's kibanja.
- (iv) Damages for trespass.
- (v) A permanent injunction restraining the defendant from interfering with the plaintiff's quiet possession on the kibanja.
- (vi) Costs of the suit.
- (vii) Any other relief court deems fit.

On 10/5/2006, the defendant filed a joint written statement of defence in which a counterclaim was raised.

The following orders were sought in the counterclaim;

- (i) That the plaintiff is a trespasser on the defendant's land
- (ii) A permanent injunction restraining the plaintiff, his agents or workmen from trespassing on the defendant's land.
- (iii) General damages for trespass.
- (iv) Costs of the counterclaim.

On 19/05/2006, the plaintiff filed a reply to the written statement of defence and counterclaim.

3.2.4 It is also important to note that:-

On 21/09/2010 when the matter came up for hearing, the plaintiff and his Counsel were recorded as being absent. It was also recorded that the 1st defendant had passed way and that there was no legal representative.

Counsel for the 2nd defendant was reported to be present and he prayed for dismissal of the plaintiff's suit (recorded in Nabweru Court as Civil Suit No. 28 of 2010) for want of prosecution under Order 9 rule 22 of the Civil Procedure Rules.

Consequently, Court proceeded to dismiss the suit for want of prosecution. Following the dismissal, the plaintiff filed Miscellaneous Application No. 309 of 2010 in which he sought to set aside the dismissal of Civil Suit No. 28 of 2010 and the same was finally heard on 21/12/2010.

3.2.5 For purposes of emphasis, the following were the orders sought in Miscellaneous Application No. 309 of 2010;

- (i) That the order of dismissal of Civil Suit No. 28 of 2010 be set aside.
- (ii) That the said suit No. 28 of 2010 which was dismissed on 21/9/2010 for want of prosecution under order 9 rule 22 of the CPR be re-instated and be heard and determined on its merits.
- (iii) Costs of the application be provided for.

On 11/3/2011, the trial Chief Magistrate delivered her ruling in which she dismissed the application to set aside the dismissal and re-instate Civil Suit No.28 of 2010 to be heard and determined on its merits.

Further Counsel for the applicant submitted that the material irregularity and injustices complained about are evident in the ruling referred to above and that are highlighted here-below; First and foremost, it is our view that the trial chief Magistrate should have confined herself to the matters that were raised in Miscellaneous Application No.309 of 2010, that is to determine whether there was sufficient cause as to why the applicant was not in Court when his case was coming up for hearing.

This issue was addressed on page 3 paragraph 2 of her ruling:-

“the most important issue this Court has to determine is whether there was sufficient cause as to why the applicant was not in Court when his case was coming for hearing. O.9 r 22 CPR states that where a suit is wholly or partly dismissed under 0.9r 22 CPR the plaintiff shall be precluded from bring a fresh cause of action but he or she

may apply for an order to set aside the dismissal. Having perused the entire record, there has been inordinate delay on the part of the plaintiff to prosecute his case. In Nakawa High Court he requested several adjournments to have the matter settled out of Court. In Kasangati court, the applicant never bothered to have the matter fixed for hearing until the 2nd respondent lodged a complaint that the plaintiff's case was not proceeded with and it was forwarded to this Court for further management. Even when it was fixed for hearing in this Court, the applicant through his lawyers was always requesting for adjournments to settle the matter out of court. So from 2006 up to date 2011 the main suit has never taken off.”

However, in paragraph 3, she delved into the issue of ownership of the suit land and whether the applicant/plaintiff had a kibanja thereon, irrespective of the fact that neither the applicant/plaintiff nor the 2nd respondent/2nd defendant had adduced evidence to prove their respective claims.

The contents of paragraph 2 on page 4 of the ruling are even more explicit in showing the material irregularity and injustice. They are that:-

“Looking at the number of courts this suit has been moving from and up to now, it has never taken off, it shows that the applicant has never been serious in prosecuting his case. He has just been buying time to stay on the land which does not belong to him. There has been inordinate delay to prosecute this case, the applicant has not shown any good cause from 2006 up to 2011 why the case has never been prosecuted. Such endless litigation should be discouraged in courts. There has been dilatory conduct on the part of the applicant to prosecute his case. The applicant/plaintiff should stop engaging in unnecessary litigation which are costly and time consuming. I am saying this because the applicant's chances of success in the main chances suit are very minimal. The first respondent/defendant who was his landlord never recognized him as a kibanja holder on his land which he sold the second respondent. The first set of Lawyers who represented the applicant/plaintiff in the High Court Nakawa reported to the trial judge by then that the land was vacant. They only saw some coffee plants and cassava. Since the matter has been adjourned on several occasions to settle this land dispute amicably, it should be encouraged on both sides. The applicant/plaintiff cannot claim a right of occupancy where he has no kibanja interest. He should vacate the second respondent's land because he is a bonafide purchaser for value and he cannot be deprived of his interest by the applicant/plaintiff who had no right of occupancy at the time when the

second respondent purchased the suit land from the 1st respondent.”

(Underling is mine for emphasis)

In brief, the trial chief magistrate made some of the following findings/observations;

- (i) The applicant had not shown any good cause from 2006 up to 2011 why the case has never been prosecuted and that such endless litigation should be discouraged in Courts.
- (ii) The applicant/plaintiff should stop engaging in unnecessary litigation which are costly and time consuming. I am saying this because the applicant's chances of success in the main suit are very minimal. The 1st respondent/defendant who was his landlord never recognized him as a kibanja holder on his land when he sold to the 2nd respondent.
- (iii) The first set of lawyers who represented the applicant/plaintiff in the High Court at Nakawa reported to the trial Judge by then that the land was vacant. They only saw some coffee plants and cassava.
- (iv) The applicant/plaintiff cannot claim a right of occupancy where he has no kibanja interest. He should vacate the 2nd respondent's land interest because he is a banafie purchaser for value and he cannot be deprived of his interest by the applicant/plaintiff who had not right of occupancy at the time when the 2nd respondent purchased the suit land from the 1st respondent.

The above findings by the trial chief magistrate in such an application to set aside the order of dismissal of the applicant's suit for want of prosecution were prejudicial and occasioned a material irregularity and injustice to the applicant for the following reasons;

- (i) The case had been before Nabweru Chief Magistrate Court for less than a year and it was erroneous for the chief magistrate to base her finding on the fact that it had not been prosecuted since the year 2006.
- (ii) The findings regarding ownership of the suit land, whether or not the applicant had a kibanja thereon and whether or not the 2nd respondent was a bonafide purchaser for value without notice were outside the ambit of Miscellaneous Application No. 309of 2010.
- (iii) The remedy granted to the 2nd respondent that the application should vacate the 2nd respondent's land was outside the ambit of Miscellaneous Application No. 309of 2010.

The remedies, granted to the respondent, specifically ordering the application to vacate the suit land, should only have arisen after the hearing of the counterclaim but there is no record from the lower Court showing that the counterclaim was heard.

Order 8 rule 13 of Civil Procedure Rules provides that:

“if in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with”.

It would follow that since the counterclaim was never proceeded with, then the trial chief magistrate should not have delved into matters that had been raised by counterclaim and as such no finding should have been made that the 2nd respondent was a bonafide purchaser for value without notice and consequently that the applicant/plaintiff should be evicted from the suit land as the extracted order provided. Upon dismissal of the applicant’s /plaintiff’s suit, the trial chief magistrate should have fixed the hearing of the counterclaim interparties. Her failure to hear the counterclaim was an error of law and it caused injustice against the applicant.

In view of the above, I find that the trial chief magistrate acted in the exercise of her jurisdiction with material irregularity and injustice and I hold that this application has merit. It ought to succeed as against the 2nd respondent.

4. Conclusion

In the result and for the reasons given hereinabove in this ruling, this application succeeds. It is accordingly allowed in the following orders; that;

- (1) The judgment, ruling, decrees and all orders emanating from Civil Suit no. 28 of 2010 and Miscellaneous Application no. 309 of 2010 are set aside.
- (2) Civil Suit no. 28 of 2010 between the parties, of the Chief Magistrate’s Court of Nabweru is reinstated. The same shall be heard as soon as practicable before another magistrate with competent jurisdiction within thirty (30) days from the date of this ruling. This suit shall be given a special Civil Session for its quick disposal.

- (3) The Registrar of this Court shall cause the original file of the said suit, civil Suit No.28 of 2010 to be delivered to Nabweru Chief Magistrate's Court within seven (7) days from the date of this ruling.
- (4) The applicant is awarded costs in this application and in Miscellaneous Application No.309 of 2010.

Dated at Kampala this 15th day of February, 2013.

sgd
Murangira Joseph
Judge