

UGANDA / JUDGMENT

Alia v Amati (Miscellaneous Civil Application No. 0039 of 2015) [2016] UGHCCD 70 (6 October 2016)

[2016] UGHCCD 70

COURT

HC: Civil Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Civil Application No. 0039 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0039 OF 2015

(Arising out of Moyo Chief Magistrate's Court Miscellaneous Civil Application No. 0017 of 2013 and Civil Suit No. 0018 of 2011)

ALIA STELLA BAYOA APPLICANT

VERSUS

AMATI COLLINS RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for revision of the ruling and orders of the Chief Magistrate of Moyo given severally on 13th December 2013 and 20th June 2014, in exercise of his supervisory powers, by which he set aside and cancelled a warrant of arrest issued in execution of the judgment and decree of a Grade One Magistrate, set aside and cancelled a warrant of committal of the judgment debtor to civil prison, restrained the Grade One Magistrate from issuing any other orders in that suit and subsequently set aside the ex-parte judgment that had been entered by the Grade One magistrate and directed the costs of those orders to be in the cause.

By a notice of motion dated 22nd August 2015, and an affidavit in support thereof the applicant seeks a revision of all those orders by way of setting them aside on the ground that in issuing the orders, the learned Chief Magistrate exercised a jurisdiction not vested in him by law. In the affidavit in reply, the respondent opposes the application and contends that the Chief Magistrate

properly exercised his supervisory jurisdiction to set aside the ex-parte judgment of the Grade One Magistrate and that it was wrong for the Grade One Magistrate to have gone ahead to issue a warrant of execution of a decree that had been set aside.

At the hearing of the application, counsel for the applicant, Mr. Henry Odama argued that the Chief Magistrate had acted illegally or with material irregularity when he exercised a jurisdiction not vested in him by setting aside the judgment of a Grade One Magistrate and issuing an injunctive order against the Grade One Magistrate, stopping him from continuing with the disposal of a suit under his jurisdiction. It was further wrong for the Chief Magistrate to have ordered the release of a judgment debtor committed to civil imprisonment by the Grade One Magistrate. All that the Chief Magistrate should have done under s 221 of *The Magistrates Courts Act* in exercise of his supervisory power was to forward the record of the Grade One Magistrate to the High Court with his remarks and comments.

In response, counsel for the respondent, Ben Ikilai opposed the application on account of having been served out of time without leave of court. The notice of motion was served more than two months after it was issued by court yet the requirement under O 5 rr 1 and 2 is that service should be effected within twenty one days, failure of which an extension should be sought or the suit will be dismissed. He cited *Orient Bank Limited v Avi Enterprises Ltd H. C. Civil Appeal No. 002 of 2013*; *Western Uganda Cotton Company Limited v Dr. George Asaba and three others H. C. Civil suit No. 353 of 2009* and *Asimwe Francis v Tumwongyeirwe Aflod, H. C. Misc. Application No.103 of 2011,* to buttress his submission that Order 5 r 1 (2) is mandatory, because failure to comply with it has consequences of dismissal of the suit. He further argued that there was inordinate delay if making the application for revision since it was filed more than a year after the orders were given and the applicant did not justify the delay. In reply, counsel for the applicant stated that the delay was occasioned by the applicant's initial choice to seek an administrative remedy through the Principal Judge.

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. It entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court, after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case or involving a miscarriage of justice occurred, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

Regarding the fact that service of the notice of motion in the instant application was effected more than twenty one days from the date of issue by court, I consider it to be settled law that the provisions of Order 5 of *The Civil Procedure Rules* are mandatory and should be complied with (see *Kanyabwera v Tumwebaze [2005] 2 EA 86 at 93*). However, non-compliance should not

necessarily result in dismissal in light of the provisions of article 126 (2) (e) of The Constitution, 1995, which enjoins courts to administer substantive justice without undue regard to technicalities. **For that reason each case is to be derided on its facts.** In **Byaruhanga* and Company Advocates v Uganda Development Bank, S. C. C. A No. 2 of 2007, (unreported)** it was left it to the discretion of the judge to decide whether in the circumstances of a particular case and the dictates of justice, a strict application of the law, should be avoided. The Supreme Court decided in that case that;

A litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.

In the instant case, the matters brought to the attention of court through this application raise issues of illegality. It would not be improper to dismiss the application on basis of technicalities without first examining the merits of an allegation of illegality in court proceedings. Any illegality brought to the attention of the court should not be ignored and the tendency of courts is to overlook any procedural impropriety there may have been in bringing such illegality to the attention of court (see **Makula International Limited v His Eminence Cardinal Nsubuga and another Civil Appeal Number 4 of 1981**. In any case, both s 83 of **The Civil Procedure Act** and section 17 (2) of **The Judicature Act, Cap 13** empower the High Court in exercise of its general powers of supervision over magistrates courts, on its own motion to invoke its inherent powers to prevent abuse of the process of the court. It is a statutory duty this court is obliged to perform with or without a formal application.

Further, although the application was filed more than a year after the decision sought to be revised was made, the respondent did not point out any specific or general prejudice or injustice which he is likely to suffer because of the belated application. Consequently, for all the foregoing reasons this is a case where it is clearly undesirable to have undue regard to the technicalities raised by the respondent and one where article 126 (2) (e) of **The Constitution, 1995** is applicable to justify overlooking the technicalities or shortcomings in procedure and instead focus on the merits of the substantive grounds raised. I am persuaded in coming to this conclusion by the decision in *Republic v Kajiado Lands Disputes Tribunal and Others Ex Parte Joyce Wambui and Another Nairobi [2006] 1 EA 318*, where the High Court of Kenya found that despite the procedural irregularities raised in that case, the Court could not countenance nullities under any guise since the High Court had a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

The gist of the arguments advanced against the impugned orders of the Chief Magistrate is that he acted illegally when in the purported exercise of his supervisory powers over the Magistrate Grade One, he made orders he was not legally authorized or empowered to make. In order to determine whether this accusation is correct or not, the court must first examine the genesis of and context in which the impugned orders were made.

Sometime during the year 2010, the applicant secured employment as a teacher in a school owned by the respondent's company. When her services were terminated during the year 2011, she sued the respondent for wrongful dismissal in the Grade One Magistrate's Court at Adjumani. The defendant did not file a defence to the suit and the hearing proceeded ex-parte against him. The respondent later filed an application to have the ex-parte judgment set aside. The respondent also filed a suit against the applicant accusing her of having committed the school financially by contracting a loan without authorization. The Magistrate Grade One dismissed that suit as well as the application for setting aside the ex-parte judgment in the applicant's suit for wrongful dismissal, both for want of prosecution.

Upon the complaint of the respondent to the Chief Magistrate, both files were called by the Chief Magistrate under his supervisory powers. In the meantime, the Grade One Magistrate opened up a duplicate file and proceeded to issue a warrant of execution in respect of the ex-parte judgment in the applicant's suit for wrongful dismissal. The respondent was then committed to civil prison. The Chief Magistrate eventually set aside all orders made by the Grade One Magistrate in both suits, cancelled the warrant of execution and issued an injunction against the Grade One Magistrate restraining him from issuing any further orders in the in the applicant's suit for wrongful dismissal. The judgment and decree remain unsatisfied.

Section 221 (1) and (2) of the *Magistrates Courts Act* confer upon the Chief Magistrate power over all magistrates courts within the area of his or her jurisdiction, in exercise of which he or she may call for and examine the record of any proceedings before a magistrate's court inferior to his or hers and situate within the local limits of his or her jurisdiction for the purpose of satisfying himself or herself as to the correctness, legality or propriety of any finding, sentence, decision, judgment or order recorded or passed, and as to the regularity of any proceedings of that magistrate's court.

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Upon coming to the conclusion that any finding, sentence, decision, judgment or order is illegal or improper, or that any proceedings are irregular, a Chief Magistrate is required by section 221 (3) of the *Magistrates Courts Act* to "forward the record with such remarks therein as he or she thinks fit, to the High Court." Section 221 (3) of the *Magistrates Courts Act* sets the limits within which a Chief Magistrate is competent to exercise supervisory jurisdiction. The provision does not confer on the Chief Magistrate any powers to set aside, cancel or modify any order made by a Magistrate Grade One in a judicial proceeding. In essence, the Chief Magistrate has neither appellate powers nor power of revision of a finding, sentence, decision, judgment or order of a Magistrate Grade

One. Such power is vested only in the High Court. An order made by a Chief Magistrate in excess of that authority would be void as being beyond the jurisdiction he was legally authorised to exercise.

A court ought to exercise its powers strictly within the jurisdictional limits prescribed by the law. Acting without jurisdiction or **ultra vires** or contrary to the provisions of a law or its principles are instances of illegality (see **Pastoli v Kabale District Local Government Council and others* [2008] 2 E. A 300*). Any order made by a Chief Magistrate in excess of the authority conferred by section 221 (3) of the **Magistrates Courts Act** would be void as being beyond the jurisdiction which the Chief Magistrate was legally authorised to exercise.

Whereas s 221 (4) of the **Magistrates Courts Act** empowers a chief magistrate who forwards a record of criminal proceedings to the High Court to release any person serving a sentence of imprisonment as a result of those proceedings on bail, pending the determination of the High Court, if he or she is of the opinion that it is in the interests of justice so to do, there is no corresponding power granted to release a civil debtor from civil imprisonment in respect of civil proceedings. It was erroneous of the Chief Magistrate to make such a direction in the impugned orders.

For the reasons stated above, I find that the Chief Magistrate exercised his jurisdiction irregularly and illegally when he set aside all orders made by the Grade One Magistrate in both suits, cancelled the warrant of execution and issued an injunction against the Grade One Magistrate restraining him from issuing any further orders in the in the applicant's suit for wrongful dismissal. All those orders are a nullity and are therefore hereby set aside, with costs to the applicant.

The orders and directions of the Grade One Magistrate are restored. That being the case, all original files relating to the impugned orders should be retrieved from the Chief Magistrate's Court at Moyo and returned to the Grade One Magistrate's Court at Adjumani for that court, within its jurisdiction and powers, to bring the proceedings before it to their logical conclusion. Any person aggrieved by those orders should seek the appropriate remedies before that court.

Dated at Arua this 6th day of October 2016.

Stephen Mubiru

Judge

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