

UGANDA / JUDGMENT

Captain Kabareebe v Banyenzaki (Civil Revision No. 16 of 2013) [2013] UGHCCD 145 (4 November 2013)

[2013] UGHCCD 145

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Civil Revision No. 16 of 2013

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA – NAKAWA CENTRAL CIRCUIT

CIVIL REVISION NO. 16 OF 2013

CAPT. DAVID KABAREEBE ::::::::::::::::::::::::::::::::::: APPLICANT

V E R S U S

BANYENZAKI CHRISTOPHER ::::::::::::::::::::::::::::::::::: RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

The Applicant brought this application under the provisions of section 83 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules for revision of proceedings in Misc. Application No. 195 of 2009 arising out of Civil Suit No. 1090 of 2008 and stay execution of the ex parte – Judgment entered against him on 25th November 2008 in Civil Suit No. 1090 of 2008.

The grounds of the Application as contained in the Affidavit of Captain David Kabareebe are that the Respondent/Plaintiff obtained an ex parte Judgment against the Applicant in the Chief Magistrate's Court at Nakawa.

Further that Applicant's former Lawyer *Guma Davis Banda* filed Miscellaneous Application No. 195 of 2009 to set aside the ex parte Judgment but on 23rd March 2009, the Chief Magistrate without hearing any of the Parties dismissed the Application on the grounds that it was premature as no execution proceedings had commenced.

Mr. Kabareebe also deponed that the Applicant's Lawyer brought the said error to the attention of the Successor Magistrate who declined to entertain the Application on grounds that he had no jurisdiction to revise the Order.

Mr. Banyenzaki Christopher deponed an Affidavit in reply that the Applicant was duly served with the hearing notice which his Advocates duly received but failed to show sufficient cause for non-attendance of Court.

He deponed further that the Misc. Application No. 195 of 2009 was prematurely filed on 23rd March 2009 to set aside a Judgment which had not been delivered at that time but was delivered on 12th April 2009.

Mr. Banyenzaki also deponed that there is no ruling or Order dismissing the said purported Application. Further that the Applicant has no defence since he extorted UGX. 10,000,000/= from him at gunpoint.

SUBMISSIONS

Counsel for Applicant argued that on the day the Learned Chief Magistrate dismissed the Application for setting aside the ex parte Judgment, none of the Parties or their Advocates were in Court and none of the Parties had moved the Court.

He argued that the trial Magistrate could not on his own volition dismiss a matter without fixing or hearing the matter. He submitted that the Magistrate failed to exercise jurisdiction. Additionally, that if he did so, then it was with material irregularity which occasioned a miscarriage of justice to the Applicant.

Learned Counsel for the Applicant submitted that the Magistrates' action of dismissing the Application without giving an opportunity for the Applicant to be heard violated the Constitution and principles of natural justice and was in contravention of Article 28 (1) of the Constitution of the Republic of Uganda.

The Respondent's Counsel argued that the Applicant had failed to attach the Order or ruling to show that the Application had been dismissed.

Counsel for the Respondent argued that the Applicant filed the application for stay of execution on 23rd March 2009 yet at the time, the Judgment had not been delivered and was only delivered later on 12th April, 2009. He submitted that such an application was an abuse of Court process and that the Applicant should have waited for the trial Magistrate to deliver the Judgment before filing an application to set it aside.

BRIEF FACTS

The brief facts are that the Respondent/Plaintiff sued the Applicant/Defendant claiming UGX.10M as money had and received and general damages. The case for the Respondent was that in July, 2007, Proscovia Kabagambe, a niece to the Applicant was assaulted by the Respondent/Plaintiff to his home for an amicable settlement to which the Respondent obliged. The Respondent stated

that while there, the Applicant, an Army Officer, put him at gun point and coerced him to sign an agreement to pay UGX. 20,000,000/= as damages for assaulting Proscovia Kabagambe. The Respondent made a down payment of UGX. 10,000,000/=. The Respondent then sued the Applicant. When the matter came up for hearing, the Applicant and his Counsel did not turn up and the hearing of the suit proceeding ex-parte. An ex-parte Judgment was delivered by His Worship in favour of the Respondent on 12th April 2009.

The Applicant then filed an application to set aside the ex-parte Judgment vide Miscellaneous Application No. 195 of 2009. The Applicant now brings an Application for Revision of proceedings in the above Application.

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:-

1. Exercised a jurisdiction not vested in it in law;
2. Failed to exercise a jurisdiction so vested; or
3. 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;..." The Court has powers to revise proceedings, Judgments and Orders of the Magistrates' Court. A Decision may be revised whenever the trial Magistrate fails to exercise his or her jurisdiction or where she/he acts illegally with material irregularity or injustice. See ***Munobwa Muhammad vs. Uganda Muslim Supreme Council. Civil Revision No.1 of 2006***. The above section refers to irregular exercise or non-exercise of jurisdiction. It does not refer to conclusions of law or fact in which a question of law is not involved. See ***Olegum Joseph vs. Arono Betty Civil Revision No. 13 of 2011***. In the instant case, it is my finding that the Learned Chief Magistrate had jurisdiction to entertain Miscellaneous Application No. 195 of 2009.

I perused this matter which is the subject of this application. I note that there are no proceedings on this file. Rather there are two copies of the Notice of Motion filed on the 23rd March 2009. According to the note of the Chief Magistrate on the file,

*"*This Application is premature as no Judgment has been delivered yet and as such there is no decree to set aside*."*

I also perused the proceedings of Civil Suit No. 1090 of 2008 and noted that an interlocutory Judgment was entered on 25th November 2008. The matter was thereafter set for formal proof. Hearing of the matter then continued up to March 2009 until the ex parte Judgment was delivered on 12th April 2009.

In the circumstances, I do not fault the Chief Magistrate for finding that the Application was premature. I do not in any way see how the Chief Magistrate failed to exercise jurisdiction vested in him or how he acted illegally or with material injustice. I cannot therefore revise the Order and proceedings of the Chief Magistrate.

I now move to the second issue which concerns stay of execution. The notice of motion did not make any reference to applicable laws. However, briefly under Order 43 rule 4 (3) of the Civil Procedure Rules, the Court making an Order for stay of execution must be satisfied;

1. That substantial loss may result to the Applicant unless the Order is made.
2. That the application has been made without unreasonable delay and that security has been given by the Applicant for the due performance of the decree or Order as may ultimately be binding upon him or her.

The question before this Court is to determine whether this application meets the above requirements. Both Counsel did not make any arguments in respect to this ground.

Regarding the first ground, the Applicant has not in any way shown that he will suffer substantial loss if the Order for stay of execution is not made. He only prayed for the stay of execution without going further to show cause why.

As far as the second condition is concerned, the Applicant has not been diligent in filing an application for stay of execution. The Judgment in question was delivered on 12th April 2009, a period of about four and a half years ago.

In my opinion, there has been unreasonable delay which is not justifiable. It seems that the delay is meant to prolong the process of execution of the decree. Turning to the third condition, I do not see any evidence that security for costs has been furnished neither is there any commitment/ proposal. Hence in that case, 043, r 4(3) CPR has not been fulfilled Order is granted.

In the circumstances, I dismiss the application.

Application **DISMISSED** with costs.

Signed:.....

Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

04th November 2013

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