

UGANDA / JUDGMENT

Elelu v Eriono (REVISION APPLICATION HCT-12-CV-CR 2 of 2022) [2022] UGHC 84 (26 October 2022) [2022] UGHC 84

COURT

High Court of Uganda

BEFORE

Adonyo, J

CASE / FILE NUMBER

REVISION APPLICATION HCT-12-CV-CR 2 of 2022

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The Republic of Uganda

In The High Court of Uganda at Soroti

Revision Application No.02 of 2022

(Arising from Civil Suit No. 001 of 2012)

Elelu Samuel ::::::::::::::::::::::::::::::

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Versus

Eriono Charles ::::::::::::::::::::::::::::::

Before Hon Justice Dr Henry Peter Adonyo**Ruling****1. <u>Background:</u>**

The applicant brought this application against the respondent by notice of 15 motion under section 83 and 98 of the Civil Procedure Act cap 71, section 33 of the Judicature Act cap 13 and Order 52 rule 1 & 2 of the Civil Procedure Rules SI 71-1.

The applicant and the respondent are said to have entered into an agreement for exchange of land which was reduced into writing.

The agreement executed was for two different pieces of land measuring approximately \$122m \times 30m\$ formerly property of the plaintiff in return for a disputed an un surveyed plot formerly property of the plaintiff.

Thereafter, the plaintiff is said to have made attempts to acquire ownership of the other piece of land through the District Land Board but was frustrated 25 by the defendant who not only lodged an objection but even a complaint with

the District Land Board prompting the applicant to file Civil Suit No. 13 of \$\mathsf{S}\$ 2012.

The respondent denied the plaintiff's assertion and subsequently filed his defense with the suit then set for hearing.

The respondent, however, did not appear in court and so the suit was heard **ex parte** but was dismissed.

The applicant was not satisfied, he then appealed against the dismissal of his suit which appeal was too dismissed and now has filled this application for revision of the judgement and orders of the lower court in Civil Suit No.13 of 2012 delivered on 8th April, 2013 by H/w Wanume Deborah Chief Magistrate Soroti seeking for orders that;

- 1) The Judgement and orders of Civil Suit No.13 of 2012 in Soroti Chief Magistrate Court be revised.
- 2) A declaration that judgement be entered for the applicant.
- 3) That costs of this application be provided for.

The application is supported by the affidavit of Elelu Samuel but briefly are; 20

- a) That the applicant filed Civil Suit No. 13 of 2012 against the respondent in Soroti Chief Magistrate court.
- b) That the respondents filed his defense admitting the applicant's claim.
- c) That the court proceeded to hear the case ex-parte but dismissed suit
- on grounds that the application did not produce original agreement.
- d) That it was unjust for the trial magistrate to dismiss a suit which was admitted by the respondent.
- e) That it is in the interest of justice that this application be granted.
- The respondent in opposing the application stated that; \$\mathsf{S}\$
- a) The application does not meet the required test for revision and should summarily be dismissed with costs.

- b) That the applicant is guilty of deliberate falsehoods with regard to courts alleged observation of his admission of the claim, which is not reflected anywhere in the proceedings.
- c) That the applicants lawyer has misread the admission of exchange of pieces of land as admission of the claim which is not reflected anywhere in the pleadings.
- d) That there is no justice in granting this application.
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2. Representation:

M/s Engulu & Co. Advocates appeared for the applicant whereas M/s Echipu & Co. Advocates represented the Respondent. Both counsel filled written submissions.

3. Resolution: 20

> **Black's Law Dictionary** (9th edition), defines revision as; examination or careful review for correction or improvement or an altered version of work.

The bounds for the High Court to apply in its revisional jurisdiction are set out under Section 83 of the Civil Procedure Act. \$25\$

It provides as follows;

Section 83 of the Civil Procedure Act:

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
- c. Acted in the exercise of its jurisdiction illegally or with α material irregularity or injustice,

The High court may revise the case and may make such order in it as it thinks fit.

In the case of **Mabalaganya v. Sanga* [2005] E. A 152* it was held that; in cases where High Court exercises its revisional powers, its duty entails 15 examination of the record of any proceedings before it for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings before the

High court. 20

Arising from the position of the law above and the holding in the above cited cases, the decisions of lower courts may be revised by the High Court when a trial magistrate is alleged to have failed to exercise his or her jurisdiction or where he or she acts illegally or with material irregularity or unjustly.

In the instant matter, it is the contention of Counsel for the applicant that, 25 the trial magistrate, even after agreeing with the applicant's case and noting that the respondent had made admissions, went ahead to dismiss the suit on grounds that the applicant did not produce the original agreement.

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Counsel further submitted that further to the trial court not agreeing with S the applicant, the trial magistrate awarded costs against the applicant who had proceeded *ex parte*. That the applicant would not be entitled to costs in proceedings he did participate in.

Counsel for the respondent in response to counsel for the applicant submitted that the High Court may revise the case and make such orders as it thinks fit, but no such power shall be exercised unless the parties shall first be given opportunity of being heard.

That the contestation made by counsel for the applicant is that it is not necessary for the respondent to participate in this application be ignored.

- I would agree with counsel for the applicant that where party was not a 15 participant in an earlier proceeding before court such a party can only apply to be made party to such a matter on such condition as the court may deem fit upon giving the court sufficient reason for having failed previously to be a party.
- Accordingly, in this matter, the respondent did not apply to be made party to 20 this matter giving the court sufficient reason for having failed previously to be a party and the matter had indeed proceeded *ex parte*. Accordingly, I would agree with counsel for the applicant that since no such permission had been granted to the respondent to be part of these proceedings, then the respondent is accordingly barred from participating in this matter. 25

In relation to the issue raised by the Applicant, I note from the proceedings the following statements made by the trial magistrate and I quote that;

".....the plaintiff did not avail to court the original agreement on which they exchanged land hence no purchase agreement on record..."

The magistrate further added that;

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"...in court's opinion since the plaintiff has not availed a certified copy of the exchange agreement of the original agreement to court and which he relied on to file his suit, court cannot believe his evidence and suit is dismissed. On the other hand, the plaintiff had not come with clean hands but tell lies...."

The law as provided under **Section 101 of The Evidence Act** states that 15 whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

"Documentary Evidence" is defined under The Evidence Act to mean all documents produced for the inspection of the court. 20

Section 60 of The Evidence Act provides for proof of contents of documents that the contents of documents may be proved either by primary or by secondary evidence.

According to the applicant, he states that he produced photocopies in court and that the original was kept in the bank. 25

Section 64 of the Evidence Act provides for cases in which secondary evidence relating to documents may be adduced in court; thus;

Secondary evidence may be given of the existence, \$(1)\$ condition or contents of a document in the following \$cases -\$

- (a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in section 65, that person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his or her **representative in interest**;
- (c) when the original has been destroyed or lost, or is in the possession or power of any person not legally bound to produce it, and who refuses to or does not produce it after reasonable notice, or when the party offering evidence of its contents cannot, for any other reason not arising from his or her own default or neglect, produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;

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- (e) when the original is a public document within the of section meaning \$73\$;(f)when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in Uganda, to be given in evidence;(g)when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

- (2) In cases (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.
- (3) In case (b) of subsection (1), the written admission is admissible.
- (4) In case (e) or (f) of subsection (1), a certified copy of the document, but no other kind of secondary evidence, is admissible.
- (5) In case (g) of subsection (1), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

The above are the provisions of the law which must be taken into account 25 when a document is produced in court.

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- In relations to the instant matter, the perusal of the lower court record show $\$S\%$ that the agreement produced in the lower court by the applicant/plaintiff was neither an original nor a certified document and no reason was given to court as to why neither could not be produced in court yet it was claimed it was in a bank for safety reasons.
- No evidence was adduced in the lower court for the non-failure to produce 10 the original document or even a certified copy so that the court would have the opportunity to assess veracity of the tendered photocopy document.

Given this noncompliance with the clear provisions of the law, I am inclined to agree that the trial magistrate was right to state that since the plaintiff did not avail court with the original copy or certified the photocopy, there was no evidence of the exchange in regards to which land for court to base on as to which exact piece of land was exchanged and the size which the parties do not agree on. For without the original document or certified photocopies, the trial magistrate could not rely on the document presented by the plaintiff and therefore did not prove his case as required by the law.

In the case of **Hitila Vs Uganda** [1969] 1 E. A 219 the Court of Appeal of Uganda held that;

"In exercising its power of revision, the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving **a miscarriage of justice* had occurred."***

It was further held that;

"The Court could do so in any proceedings where it appeared from any record that had been called for by the Court or which had been reported for orders or in any proceedings which had otherwise been brought to its notice."

- In conclusion, I would conclude that there was no error made material to the \$10\$ merits of the case or involving a miscarriage of justice in regards to the dismissal of the case but only disagree with the costs awarded against the plaintiff.
- Accordingly, this revisional application is allowed only in respect of the issue of costs which should not have been awarded as it was awarded in error given 15 the fact that the matter before the lower court proceeded **ex parte** and so there was no reason for awarding costs against the applicant. That award of costs by the lower court is set aside.
- As for the non-consideration of the non-certified photocopy document presented as evidence of an agreement between the parties therein, I would 20 hold that there was no miscarriage of justice occasioned to the applicant for the court could not on its own determine what was not proved before it in terms of the size of the land in dispute even though I note that the respondent/defendant was not disagreeing with the applicant / plaintiff on \$L_{L}\$ the issue of the exchange of land but the parties were only disagreeing on the 25 size of land he had intended to give the plaintiff/applicant. That aspect had no evidentiary proof to it. As for costs in this application, I do award no costs.

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Orders: \$S\$

- a. The Judgement and orders of the lower court is upheld, even though the respondent had filed a defense admitting the applicant's claim, as no interlocutory judgment was adjudged and the plaintiff's claim thereafter proceeded **ex-parte** but was dismissed suit on grounds that the plaintiff did not prove his case as he did not produce in court the original agreement nor a certified copy.
- b. The decision of the trial magistrate to dismiss a suit which was admitted by the respondent but not proved is held to not be unjust.
- c. The award of costs in a matter which proceeded *ex parte* by the lower court was in error given. That award is set aside.
- d. As for costs in this application, no costs are awarded.

I so order.

Hon justice Dr Henry Peter Adonyo

Judge

\$26^{th}\$ October 2022

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