

UGANDA / JUDGMENT

Kemish v Dima (Miscellaneous Civil Application No. 0016 of 2015) [2017] UGHCLD 56 (27 April 2017)

[2017] UGHCLD 56

COURT

HC: Land Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Civil Application No. 0016 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0016 OF 2015

(Arising from Moyo Chief Magistrate's Court Civil Appeal No. 0001 of 2013)

KEMISH IBRAHIM APPLICANT

VERSUS

DIMA DOMNIC PORURESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application for revision of the decision of the Chief Magistrate at Moyo delivered on 19th September 2013 by which he allowed an appeal arising from the decision of the L. CIII Court at Ofua sub-county, set aside the judgment of that court on ground that the court had proceeded to determine the appeal without quorum but went ahead to issue a permanent injunction against the applicant, stopping him and persons claiming under him from interfering with the respondent's quiet enjoyment of the land in dispute. The applicants seek a revision of that decision and an order for a re-trial on grounds that the Learned Magistrate Grade One exercised his jurisdiction with illegality and material irregularity, or injustice and that it is just and equitable that the decision be revised. The grounds supporting the application are explained in the affidavit of the applicant which briefly are that;

The background to the application is that trial of the dispute between the parties over land commenced before the L. C. II Court of Illinyi Parish and thereafter an appeal to Ofua sub-county L. CIII Court both of which decided in the applicants' favour. On further appeal to the Chief Magistrate in Moyo, he set aside the decision of the L. C. III Court on grounds that it was not properly constituted at the time it considered that appeal and he went ahead to issue a permanent injunction against the applicant. The applicant contends that the decision of the Chief Magistrate is erroneous in that respect.

On his part, the respondent in his affidavit in reply is opposed to the application. He contends that the decision was proper in as far as the Chief Magistrate declared him the rightful owner of the land and the applicant's previous attempt to appeal the decision had been futile since the appeal had been dismissed on 26th June 2015 on grounds that it was incompetent as a third appeal without a certificate of importance. In the circumstances, the claim that the Chief Magistrate exercised his jurisdiction with illegality and material irregularity or injustice is refuted.

On the day the application came up for hearing, the applicant, who is unrepresented, was not in court but the respondent and his counsel were in court. Counsel for the respondent opted to leave the matter to court to decide without any submission on the merits. The court opted to dispense with the submissions of the applicant. This was because it would not be proper 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, hence this ruling.

The power of this court to revise decisions of magistrates' courts conferred by section 83 of ***The* Civil Procedure Act***, ***Cap 71*** is invoked 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, provided that no such power of revision can be exercised unless the parties have first been given the opportunity of being heard; or where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person. 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.

The Local Council Courts' jurisdiction over matters relating to land is conferred by section 10 (1) (e) of the *Local Council Courts Act, 2006*, whereby every local council court has jurisdiction for the trial and determination of land matters, subject to the provisions of the Act and of any other written law. According to section 10 (2) (b) of the Act, the jurisdiction of these courts in respect of causes and matters specified in the Third Schedule is not restricted by the monetary value of the subject matter in dispute. The Third Schedule of the Act lists civil disputes governed by customary law, triable by Local Council Courts and under item (a) of the schedule, jurisdiction is conferred over disputes in respect of land held under customary tenure.

The land in dispute being held under customary tenure, the dispute was triable by the Local Council Courts. However, section 11 of the *Local Council Courts Act, 2006* provides for the forum where suits are to be instituted, thus:-

“(1) Every suit shall be instituted in the first instance in a village local council court if that court has jurisdiction in the matter.....”*

(c) in the case of a dispute over immovable property, where the property is situated

Section 32 of the same Act creates appellate jurisdiction and in respect of Parish Local Council Courts provides as follows;

2) An appeal shall lie—

(a) from the judgment and orders of a village local council court to a parish local council court;

By that provision, L. C. II Courts have appellate jurisdiction only. It is trite law that the jurisdiction of courts is a creature of statute. A court cannot exercise a jurisdiction that is not conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a nullity **ab initio**. It is settled law that a judgment of a court without jurisdiction is a nullity and a person affected by it is entitled to have it set aside **ex debito iudicii** (See **Karoli Mubiru and 21 Others v. Edmond Kayiwa [1979] HCB 212**; **Peter Mugoya v. James Gidudu and another [1991] HCB 63**). Where a trial court has not exercised its original jurisdiction over a matter, there certainly cannot arise a valid appeal on the merits. All subsequent appellate proceedings lack the foundation and legitimacy of a preceeding trial and cannot stand on their own. Therefore, when the Ofua sub-county L. CIII Court decided on appeal from the decision of the L. C. II Court of Illinyi Parish, that decision was of no consequence and an exercise in futility since there had not been a prior trial by a court of first instance with competent jurisdiction at the L. C. I level.

In the application before me, it is clear that the appeal to the Chief Magistrate was restricted to the proceedings and judgment of the Ofua sub-county L. CIII Court. The lawfulness or otherwise of the proceedings and judgment of the L. C. II Court of Illinyi Parish was not questioned or examined. This was a first appeal to a court of judicature arising out of proceedings conducted under the Local Council Court system, comprising courts mainly constituted by lay persons and before which advocates have no right of audience. The likelihood of irregularities in their proceedings is heightened by the very nature of their composition. It would be prudent of a Chief Magistrate's Court considering an appeal from an L. C. III Court, and I dare say a legal duty

incumbent on the court, to proceed like a first appellate court would. When parties appeal to a Chief Magistrate from the L. C. III Courts, they are entitled to a fresh and exhaustive scrutiny of the proceedings right from the court of first instance up until the appeal before the Chief Magistrate. I am buttressed in this view by section 40 of the *Local Council Courts Act, 2006* which imposes upon Chief Magistrates, a supervisory role to be exercised over local council courts on behalf of the High Court, with such general powers of supervision as are conferred on the High Court over Magistrates' Courts. The chief magistrate ought to have subjected the entire record of proceedings of the L. C Courts to a fresh and exhaustive scrutiny. Had he done so, he would have discovered the illegality in the underlying proceedings. He therefore failed to exercise a jurisdiction vested in him and proceeded with material irregularity.

To compound this irregularity, the Chief Magistrate proceeded to grant a permanent injunction against the applicant. A permanent injunction is distinct from an interlocutory injunction which a court issues pending the outcome of a suit. A permanent injunction is a final order of a court directing a person or entity to refrain from certain activities permanently. It presupposes a decision on the merits of the case. The dispute before the parties was over land. When the appeal came up for hearing before the Chief Magistrate on 9th July 2013, after hearing the submissions of the parties, who were unrepresented, the court made the following order;

Court: Matter adjourned to 12/07/2013 at 1.00 pm. Witnesses from both the appellant and the respondent to be heard. The court shall hear two witnesses from each side. Judgment to be delivered after hearing the evidence of the four witnesses

Indeed the court went ahead on 12th July 2013 to hear the *viva voce* testimony of two witnesses of the appellant and two of the respondent's. It thereafter delivered judgment on 19th September 2013. Having heard evidence of four witnesses on appeal, the Chief Magistrate apparently considered himself justified to issue a permanent injunction, but this was erroneous. An appeal ought to be determined based entirely on the material that was presented to the court below. Whereas section 80 (1) (d) of *The Civil Procedure Act* authorises an appellate court to take additional evidence or to require such evidence to be taken, it must first be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible (see *Ladd v. Marshall* [1954] 1 WLR 1489 at 1491; *Skone v. Skone* [1971] 1 WLR 817; *Mzee Wanje and others v. Saikwa and others* [1976-1985] 1 E. A 364 (CAK); *Attorney General v. P. K Ssemogerere and others*, Constitutional Application No. 2 of 2004(SCU); *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry*, S. C. Civil Application No. 133 of 2014* and *Hon. Bangirana Kawoya v. National Council for Higher Education H. C. Misc. Application. No. 8 of 2013*). From the record before me, it is clear that the learned Chief Magistrate did not advert to any of these principles before the decision to admit additional evidence on appeal. The grant of a permanent injunction was thus founded on a flawed judicial process and cannot be left to stand.

I accordingly find that the learned chief magistrate erred in making a decision on the merits of the case, based on defective proceedings of the L. C. III court which considered an appeal from the decision of an L. II Court acting as a court of first instance, and in admitting additional evidence on appeal without first addressing his mind to the principles which regulate that power. I find these to be material irregularities in the exercise of his jurisdiction which have occasioned injustice to the applicant. I therefore set aside the decision of the Chief Magistrate and substitute the orders of the chief magistrate with an order quashing and setting aside the proceedings and judgment of Dadamu Sub-county L. C. III court and that of the L. C. II Court of Illinyi Parish, on ground that the case ought to have commenced in the LCI court and not the L. C. II Court of Illinyi Parish. In light of the current doubtful legal status of L. C. Courts, I order a re-trial before a magistrate's court with competent jurisdiction. In the circumstances, the costs of this application will abide the result of the re-trial. I so order.

Delivered at Arua this 27th day of April, 2017.

.....

Stephen Mubiru

Judge.

27th April 2017.

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Prepared on 13 October 2026 · Esheria