

UGANDA / JUDGMENT

Ssemakula v Uganda (Miscellaneous Application 8 of 2022) [2023] UGHC 169 (16 October 2023)

[2023] UGHC 169

COURT

High Court of Uganda

BEFORE

Nakachwa, J

CASE / FILE NUMBER

Miscellaneous Application 8 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT
MUKONO MISCELL ANEOUS APPLICATION NO. 008 OF 2022 (ARISING FROM
CRIMINAL CASE NO. 295 OF 2022 IN THE CHIEF MAGISTRATE'S COURT OF LUGAZI
AT LUGAZI)

SSEMAKULA ISAAC ::::::::::::::::::::::::::::::

VERSUS

UGANDA ::::::::::::::::::::::::::::::

BEFORE HON. LADY JUSTICE FLORENCE NAKACHWA RULING

- 1. This is an application for revision of proceedings in Criminal Case No. 295 of 2022 at Lugazi Chief Magistrate's Court. The application was brought by Notice of Motion under sections 17 and 33 of the Judicature Act, Cap. 13, sections 48 and 50 of the Criminal Procedure Code Act, Cap. 116 and rule 2 of the Judicature (Criminal Procedure) (Applications) Rules S. I 13 - 8. The Applicant is seeking for orders that
- (a) criminal proceedings against the Applicant in Criminal Case No. 295 of 2022 at Lugazi Chief Magistrate's Court terminated or stayed pending hearing be and determination of Civil Suit No. 33 of 2020; and
- (b) costs of the application be provided for.

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- 2. The application is supported by the Applicant's affidavit sworn on 15th August, 2022 and filed in this court on 4th October, 2022. The grounds are that:
- (a) on the 12th day of February, 2020, Ssekamoga Benjamin and Nampijia Alice filed Civil Suit No. 33 of 2020, against the Applicant and his sister (Babirye Brenda) for trespass on their land comprised in Kyaggwe Block 364, Plots 520 and 521 at Wakabuzi, Ngogwe Sub-County, Buikwe District and sought various orders;
- (b) the Applicant filed a written statement of defence and later an amended written statement of defence with a counterclaim on the 17th day of June, 2022, opposing the plaint and the prayers and clearly stating that he is currently in occupation and use of the suit land;
- (c) on the 6th day of July, 2022, Ssekamoga Benjamin and Nampijia Alice filed a reply to the Defendant's written statement of defence as well as a written statement of defence to the counterclaim;
- (d) in July, 2022, while Civil Suit No. 33 of 2020 was pending hearing in the High Court of Uganda at Mukono, Ssekamoga Benjamin (the 1st Plaintiff) took a complaint to

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Lugazi Police Station against the Applicant claiming that he had trespassed on the suit land and forcibly entered it;

- (e) the Applicant was consequently charged in the Chief Magistrate's Court of Lugazi at Lugazi with three \$(3)\$ counts of criminal trespass c/s 302 of the Penal Code Act, forcible entry c/s 77 of the Penal Code Act and malicious damage to property c/s 335 of the Penal Code Act;
- (f) while the Applicant was on remand at Lugazi Prison, Ssekamoga Benjamin in cohort with his agents threatened and attempted to evict his wife and children from the suit land which the Applicant is rightfully occupying;
- (a) the criminal case against the Applicant is intended to seek civil remedies with an aim of evicting him and his family before the hearing and conclusion of Civil Suit No. 33 of 2020, because the complainant has realized that the civil suit against the Applicant is a non-starter due to the fraud he engaged in;
- (h) the Applicant has learnt that the complainant (Ssekamoga Benjamin) is working in conjunction with police at Lugazi and the office of the Director of Public Prosecutions to cause this injustice to him because his lawyers wrote to the office of the Resident State Attorney and a copy to the Chief Magistrate's Court pointing out the existence of Civil

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Suit No. 33 of 2020 in the High Court of Uganda at Mukono over the same subject matter but no heed has been taken:

- (i) the prayers sought in Civil Suit No. 33 of 2020, substantially settle the complaints raised in Criminal Case No. 295 of 2022:
- (i) Criminal Case No. 295 of 2022 at Lugazi Chief Magistrate's Court is intended to hoodwink court and harass the Applicant before Civil Suit No. 33 of 2020 is determined, which is a total violation of the Applicant's constitutional rights;
- (k) this honourable court is empowered by law to curtail the abuse of court process and restore the Applicant's constitutional rights; and
- (I) it is only fair and just for this honourable court to stay or terminate criminal proceedings against the Applicant in Criminal Case No. 295 of 2020.
- 3. The application was never opposed by the Respondent despite proof of effective service on it and appearance on 2 occasions by its legal representative. On 8th August, 2023, when the case came up for hearing, the Respondent who was represented by Counsel Ninsiima Emily, the Senior State Attorney from the

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Office of the Director of Public Prosecutions, who was directed by this court to file its response to the application and Respondent's written submissions on 16th August, 2023.

However, the Respondent's counsel failed to file the said documents as directed. The Applicant was represented by Counsel Nazaami Robert from M/s Nazaami & Co. Advocates, who filed the Applicant's written submissions on 12th May, 2023.

- 4. The Applicant's counsel reiterated the averments in the supporting affidavit and submitted that it is trite law that criminalizing land disputes is an abuse of court process and perverts the course of justice which renders criminal proceedings in the lower court irregular. Counsel cited the case of Okello Oris Otama & Another v. Uganda, Cr. Session Case No. 639/13.
- 5. The Applicant's counsel submitted that Civil Suit No. 33 of 2020 and Criminal Case No. 295 of 2022 are in respect of the same subject matter and that the criminal acts were allegedly committed during the pending civil suit. Counsel argued that the civil case is about civil trespass and the criminal case is about criminal trespass on the same land.
- 6. It was further contended for the Applicant that the Plaintiff in Civil Suit No. 33 of 2020 is the complainant in Criminal Case No. 295 of 2022, at the Chief Magistrate's Court of Lugazi at

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Lugazi and that the said complainant is using the criminal matter to threaten and attempt to evict the Applicant's family from the suit land which is currently occupied by him. Counsel argued that it would therefore be irregular, an abuse of court process for the Chief Magistrate's Court of Lugazi to continue with the unfair trial when offences complained of arose after instituting the civil suit. Learned counsel invited this court to terminate the criminal proceedings.

7. Counsel added that land disputes especially where ownership is at stake should be left for arbitration by the civil courts for they amount to an abuse of court process when criminalized. Counsel prayed that the criminal proceedings in the lower court of Chief Magistrate's Court of Lugazi at Lugazi against the Applicant be terminated or stayed pending hearing and determination of Civil Suit No. 33 of 2020 and that costs of this application be granted to the Applicant.

Issue: Whether the criminal case should be stayed or terminated pending disposal of the civil suit.

Court's consideration

8. The legislature has given the High Court powers to supervise magistrates' courts in order to avoid miscarriage of justice and curtain irregularities. The relevant laws on this matter are stated below.

9. Section 48 of the Criminal Procedure Code Act, Cap. 116, provides that:

> "The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court."

\$10. Section 17 of the Judicature Act, Cap. 13 states thus:

> "(1) The High Court shall exercise general powers of supervision over Magistrates' Courts.

> (2) With regard to its own procedures and those of the Magistrates' Courts, the High Court shall exercise its inherent powers—

> (a) to prevent abuse of process of the court by curtailing delays, in trials and delivery of judgement including the power to limit and discontinue delayed prosecutions;

(b) to make orders for expeditious trials:

(c) to ensure that substantive justice shall be administered without undue regard to technicalities."

\$11. This provision of the Judicature Act demonstrates that the inherent powers of the High Court are intended to ensure expeditious trial, to ensure that technicalities are not used to defeat substantive justice and to curtail delays. While exercising

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supervisory powers, the High Court may look at the correctness of the proceedings, application of the law to the facts, legality and propriety.

- It is important to note that Civil Suit No. 33 of 2020 which 12. is pending trial before this court and Criminal Case No. 295 of 2022, pending trial before Lugazi Chief Magistrate's Court are both arising from the same subject matter, that is a land dispute. The complainant and the accused in the criminal case are both parties to the civil suit where there is a dispute over ownership of the subject land.
- 13. However, it should be noted that although the two cases are arising from the same subject matter, there may be criminal elements that the state may be interested in prosecuting. Besides, the remedies sought in the civil and criminal proceedings are different in nature. In a criminal case, the state is always interested in punishing the culprit; while in civil cases, the plaintiff may be interested in restoration of the rights infringed upon by the defendant.
- Civil suits arise out of civil wrongs which are purely \$14\$ infringements on the rights of an individual. In criminal proceedings, the crimes are regarded as offences against society as a whole and that explains the reason why it is prosecuted and controlled by the state even if sometimes

initiated by private prosecution. The state may take over or discontinue a criminal proceeding from a private prosecutor at any stage depending on the merit or demerit of the case. At the end of a criminal trial, there may be a conviction or an acquittal. Alternatively, after the prosecution has presented its evidence. the court may acquit the accused on no case to answer or after the defence is given, acquit or convict after full trial and finding that the accused person is guilty of the offence charged.

In *Joseph Agenda v. Uganda*, High Court Criminal 15 **Miscellaneous Application No. 003/2011**, **Justice Lameck N. Mukasa** clearly distinguished between civil litigation and criminal proceeding in which he held that:

> "There is a clear distinction between civil and criminal" actions. The civil proceedings determine the civil litigants' civil claims or liabilities and the standard of proof is on the balance of probabilities. There is a public interest in the criminal proceedings and the required standard of proof is beyond reasonable doubt. The civil proceedings are individualistic in nature while the criminal proceedings are public in nature. Administrative policy therefore gives priority to the public interest in law enforcement."

The issue whether civil and criminal cases arising from 16 the same subject matter can proceed concurrently before courts of competent jurisdiction or not have been settled by the

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Supreme Court of Uganda in the case of Sarah Kulata Basangwa v. Uganda, Supreme Court Criminal Appeal No. 03/2018, where the Supreme Court in affirming the decision of the Court of Appeal quoted at pages 8 - 9 that:

"It cannot be a correct position of the law that where a civil suit is pending between parties, no criminal proceedings may be instituted against one of the parties arising from the same facts.

It is not correct to suggest that whenever criminal proceedings are instituted in respect of matter that is also a subject of civil litigation, that alone amounts to interference with the independence of the judiciary"

At page 10 of the judgment, the Supreme Court held thus

"We are in agreement with the Court of Appeal that criminal proceedings may emanate from the same facts but it doesn't deter prosecutors to institute criminal proceedings because the facts are similar to that of a civil case."

In the instant case, the Applicant was charged with 17. criminal trespass contrary to section 302 (b) of the Penal Code Act; forcible entry c/s 77 of the Penal Code Act and malicious damage to property c/s 335 (1) of the Penal Code Act, Cap 120. In the pending Civil Suit No. 33 of 2020, the plaintiffs are seeking a declaration of ownership of the suit land and a declaration that the defendants are trespassers on the suit land.

Basing on the authorities cited in this ruling, I hold that a 18. criminal case can be prosecuted concurrently with the civil case. Each case will be determined on merit. Therefore, this application lacks merit and is hereby dismissed with no order as to costs because the Respondent did not file a reply to the application. I so rule.

This ruling is delivered this

In the presence of: (1)*Mr.* Ssemakula Isaac, the Applicant; (2) Ms. Pauline Nakavuma, the Court Clerk.

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