**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CIVIL APPEAL NO. 0026 OF 2015**

**(Arising from KASESE MISC. APPLICATION NO.002 of 2013)**

**(Arising from KASESE CIVIL SUIT NO. 005 o f 2011)**

**MWAKA BENJAMIN...............................................................................APPELLANT**

**VERSUS**

**MUKIRANIA YUSUF ..........................................................................RESPONDENT**

**BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE**

**Judgment**

This is an appeal against the decision of His Worship Katorogo Moses Chief Magistrate of Kasese delivered on 5th June 2015.

**Background**

The Respondent in the instant appeal instituted an Application under **Orders** **46 Rules 1, 2 & 3** and **52 Rules 1 & 2** of the Civil Procedure Rules and **Sections** **82** and **98** of the Civil Procedure Act.

The Application sought for orders that Court reviews the judgment in KAS – 00 – 005 of 2011 with orders that the judgment of LCII Court of Kinyamaseke dated 25/03/2006 in land dispute No. 08 of 2006 is a nullity and costs of the application.

The Application had an affidavit in support sworn by the Respondent, General Secretary LCII Court Kinyamaseke and affidavits in reply sworn by the Appellant and executive members of the LCII Court Kinyamaseke opposing the application.

The trial Magistrate after hearing the Applicant (Respondent in the instant appeal) and the affidavits in support of the application declared the said judgment No. 005 of 2005 to be reviewed to read that the LCII judgment of Kinyamaseke Parish was a nullity and that the land in question which was bestowed on the Respondent on the LCII judgment be reviewed and the land vested in the Applicant and the Respondent pays the costs of the Application.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose grounds are;

1. That the learned Chief Magistrate erred in law and fact when he relied on the affidavit of the Local Council II General Secretary of Kinyamaseke Parish and ignored the contents of the affidavits in reply on Court record made by the other four Parish executive committee members and held that the judgment made by the Local Council II Parish executive committee of Kinyamaseke was a nullity.
2. That the learned Chief Magistrate erred in law and fact when he condemned the Respondent to costs on a Court decision not arising from his error, omission and or concealment.
3. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong decision.

Counsel Victor A. Businge appeared for the Appellant and Counsel Sibendire Bigogo Geoffrey represented the Respondent. By Consent both parties agreed to file written submissions. The Appellant however, did not file written submissions as was agreed before Court.

**Ground 1: That the learned Chief Magistrate erred in law and fact when he relied on the affidavit of the Local Council II General Secretary of Kinyamaseke Parish and ignored the contents of the affidavits in reply on Court record made by the other four Parish executive committee members and held that the judgment made by the Local Council II Parish executive committee of Kinyamaseke was a nullity.**

Counsel for the Appellant submitted that the learned Chief Magistrate should have set aside the lower Court judgment and order for a retrial instead of finding it a nullity. That a Court of competent jurisdiction should have been ordered to retry the matter and in the circumstances each party should have been ordered to bear its own costs.

Counsel for the Respondent on the other hand submitted that this Ground is too argumentative and this is prohibited under **Order 43 Rule 1(2)** of the Civil Procedure Rules. That the ground be struck off.

However, he went on to submit that there were no such affidavits of the members of the Local Council II Court on the record of the lower Court. That these affidavits were never referred to in the hearing by the Appellant and are not on record.

That a Local Council II judgment can only be valid if it is signed by five members and the Secretary of Kinyamaseke LCII Court denied ever signing the said judgment. That the Respondent was also appearing before the same Court with a different person over the same land and thus it was impossible that the same Court could have been handling the same suit land between two sets of parties.

In regard to the Ground be argumentative and in contravention of the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules, true, the Grounds lacks brevity. However, in the interest of justice and fairness I will address the same. Thus, the ground is maintained and not struck out.

In the instant appeal Counsel for the Respondent alludes to the fact that the affidavits made by the other four Parish executive committee members are not on record and were not referred to during the hearing of the case. From my perusal of the record I notice that the affidavits are on record. However, the dates on the said affidavits do not add up.

The affidavit in support of the application sworn by Mukirania Yusuf was filed on 19th Feb 2013.

The affidavit in reply sworn by Mwaka Benjamin was filed on the 24th Oct 2013.

The supplementary affidavits in reply that were filed without leave of Court as per the record of proceedings were filed all on the 22nd Feb 2013. These were the affidavits of Abdalla Azizi, Mbusa Aston, Bwambale Sunday and RHT Muhindo Delina.

Another affidavit in reply was sworn by Mwaka Benjamin was filed on the 22nd Feb 2013.

The affidavit in Rejoinder by Mukirania Yusuf was filed on the 19th Feb 2014.

From the above, it is evident that the supplementary affidavits that the Appellant contends the trial Magistrate did not look at were sneaked onto the Court record without leave of Court, and also back dated.

Further, the Appellant without shame added a second affidavit in reply with an earlier date than that that he had initially filed. The Appellant’s affidavits even have different signatures by the deponent.

I am inclined to believe that all these affidavits filed on the 22nd Feb 2013 were sneaked onto the Court record even after the Respondent had filed his affidavit in Rejoinder in 2014. Otherwise the Respondent would have made a rejoinder in that regard which is not the case. The rejoinder on record only covers what was alluded to by the Appellant in his affidavit in reply filed on the 24th Oct 2013.

The said supplementary affidavits were also not referred to during the hearing to the application.

I also observed that the hand written judgment on record allegedly made by the Local Council II Parish executive committee of Kinyamasekeon 02/03/2005is not signed by any of the executive members, all there is, are names outlined with no signatures attached and even the stamp has no date appended under the Chairperson’s name where it was placed.

There is a second judgment allegedly made by the same Court on 25/03/2006 that is typed and signed by the five executive members. This is the one that the General Secretary Malimoto Ivan denied appending his signature on alleging that the said Court had never handled any matter between the two parties.

In the circumstances am inclined to agree with the trial Magistrate that the said judgment was a nullity and I see no fault in his reliance on the evidence as adduced by the Respondent. The trial Chief Magistrate upon finding the judgment of the LC II Executive Committee a nullity went ahead and made his own decision to determine the issues at hand thus there was no need to order for a retrial by another Court.

This ground therefore miserably fails.

**Ground 2: That the learned Chief Magistrate erred in law and fact when he condemned the Respondent to costs on a Court decision not arising from his error, omission and or concealment.**

Counsel for the Respondent submitted that it is trite law that costs follow the event as per **Section 27** of the Civil Procedure Act and in the circumstances there is nothing that would have prevented the learned trial Magistrate from exercising his discretion. That in any case it is the Appellant that misdirected Court to act on a wrong judgment of the LCII of Kinyamaseke Parish which he very well knew had not handled the matter. Thus, the trial Magistrate properly exercised his discretion in awarding costs to the Respondent.

In the case of **Butagira Vs Deborah Namukasa (1992-1993) H.C.B 98 at 101**, it was held that:

*“The general rule is that costs shall follow the event and a successful party should not be deprived of them except for good cause. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation but matters which led up to the litigation.”*

Costs are awarded at the discretion of Court to the successful party. The Appellant stated that it was not his fault that there was an error, omission and concealment. However, the Appellant very well knew what he was relying on in his evidence thus, he cannot again deny that it was not part of his doing yet he brought a judgment to Court that he very well knew was a nullity.

I find no fault in the trial Magistrate awarding costs to the Respondent after he came out the successful party.

This ground fails.

**Ground 3: That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong decision.**

Counsel for the Appellant submitted that the trial Magistrate ought to have relied on the affidavit of Abdalla Aziz who was present when the General Secretary of the Parish Executive Committee signed the judgment.

Counsel for the Respondent on the other hand submitted that it is now settled that this type of ground cannot be handled as a ground of appeal because it is not precise. That it should therefore be struck out. That however, in relying on the affidavit of the Secretary of the LCII Court Kinyamaseke the learned trial Magistrate properly evaluated the evidence and came to the most fair and just decision. The members’ affidavits if available on Court record; were smuggled in because they did not form part of the record of proceedings at the time of the hearing of the application.

In my opinion I find this ground too broad, inconcise and in contravention with the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules. The Appellant will not take this Court on a fishing expedition. This ground is accordingly struck out.

In a nut shell, this appeal lacks merit and fails on all grounds. The appeal is accordingly dismissed with costs. The decision of the lower Court is upheld.

Right of appeal explained.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**

Judgment read and delivered in open Court in the presence of;

1. Counsel Victor A. Businge for the Appellant.
2. Counsel James Court Clerk.
3. Both parties present.

In the absence of Counsel Sibendire Bigogo for the Respondent.

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**OYUKO. ANTHONY OJOK**

**JUDGE**

**28/09/2017**