IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc. Civil Revision No. 0005 of 2020

In the matter between

OTTO ZAKEO **APPELLANT**

And

ONYUT AUGUSTINE **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 23 July, 2020.

Civil Procedure *— Revision — section 83 of the Civil Procedure Act, Cap 71 — court is empowered to revise decisions of Magistrates' Courts 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. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. — An application for revision can lie only on the ground of jurisdiction, and the High Court in exercise of its revisional jurisdiction is not a court of appeal on a question of law or fact. This provision applies to jurisdiction alone, the irregular exercise of or non-exercise of it or the illegal assumption of it — Under section 10 (1) (e) of The Local Council Courts Act, 2006 and item (a) of the Third Schedule thereto, Local Council Courts have unlimited jurisdiction over disputes in respect of land held under customary tenure. Section 11 (1) (c) of the Act.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application made under section 83 of the *Civil Procedure Act,* section 33 of *The Judicature Act* and Order 52 rules 1and 2 of *The Civil Procedure Rules,* seeking revision by way of setting aside, the judgment of the Chief Magistrate's Court delivered on 28th February, 2020, dismissing the applicant's appeal from the judgment of Odek sub-county L.C.III Court delivered on 5th September, 2019 between the same parties. It is contended by the applicant that in making that decision, the Chief Magistrate failed to exercise a jurisdiction vested in him or did so with material irregularity.

[2] The background to the application is that on or about 21st June, 2019 the respondent filed a suit against the applicant before the L.C.I of Orapwoyo village, over a land dispute between him and the applicant which Court delivered judgment in favour of the respondent on 3rd January, 2019. The L.C.I of Orapwoyo village then referred that decision to the L.C.II Court of Binya Parish which on 21st June, 2019 decided in favour of the respondent. The applicant appealed that decision to the L.C.III Court of Odek sub-county. The applicant lost that appeal in a judgment delivered on 5th September, 2019.The applicant appealed further to the Chief Magistrate's court which dismissed the appeal by a judgment delivered on 28th February, 2020, hence this application.

Arguments of counsel for the Applicant.

[3] Counsel for the applicant, submitted that the Chief Magistrate in the instant case never bothered to subject the record of proceedings of L.C.II and Sub County Courts to a fresh and exhaustive scrutiny as required by law. Had he done so, he would have found that the Local Council Court III of Odek Sub Court had received the appeal from the L.C.II Court of Binya Parish sitting as a Court of first instance which is contrary to the provision of section 11 of *The Local Council Courts Act*, *2006*. It was never heard by the L.C.I Court of Orapwoyo sitting in its judicial capacity as required by law but rather as a mediation committee. They

therefore contended that 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 proceedings lack the foundation and legitimacy of a proceeding at trial and cannot stand on their own. They prayed that the application be allowed. Counsel for the respondent, M/s Odongo and Co. Advocates did not file submissions in response.

Arguments of counsel for the Respondent.

[4] In response, counsel for the respondent M/s Odongo and Co. Advocates submitted that the application is misconceived and is an abuse of court process since the L.C.I of Orapwoyo village, where the suit was filed at first instance, had jurisdiction over the case and that court duly delivered its judgment in favour of the respondent on 3rd January, 2019. All subsequent appeals were rightly dismissed since they lacked merit. Instead of seeking leave to appeal to this court, the applicant opted to apply for revision, yet he did not attach to his application, copies of the relevant proceedings and decision of the court below. Although he filed the application during March, 2019 it was never served upon the respondent or his counsel, even when the court fixed it for ruling and invited the parties to file their submissions. They therefore prayed that the application be dismissed.

Revision.

[5] This court is empowered by section 83 of the *Civil Procedure Act*, *Cap 71* to revise decisions of Magistrates' Courts 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. It entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court, after satisfying

itself 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.

[6] An application for revision can lie only on the ground of jurisdiction, and the High Court in exercise of its revisional jurisdiction is not a court of appeal on a question of law or fact. This provision applies to jurisdiction alone, the irregular exercise of or non-exercise of it or the illegal assumption of it (see *Matemba v. Yamulinga [1968] EA 643*). This Court will not interfere under this section merely because the court below came to an erroneous decision on a question of fact or of law. This Court will not in its revisional jurisdiction consider the merits of the case however erroneous the decision of the court below is on an issue of law or of fact but will interfere only to see that requirements of law have been properly followed by the court whose order is the subject of revision. Where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law. A court is said to exercise jurisdiction illegally when it assumes a jurisdiction that is not vested in it by law, and is said to exercise jurisdiction with material irregularity when such a court is seized with jurisdiction but does so wrongly through some procedural or evidential defect.

[7] Within those confines, an application for revision 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, except if from lapse of time or other cause, the exercise of that power would involve serious hardship to some person.

[8] It is argued by counsel for the applicant that section 40 of *The Local Council Courts Act, 2006* imposes upon Chief Magistrates, a supervisory role to be exercised over Local Council courts on behalf of the High Court. It confers such general powers of supervision as are conferred on the High Court and therefore the Chief Magistrate's Court is under a duty to subject the entire record of proceedings to a fresh and exhaustive scrutiny. It is argued in the instant case that had the court done so, it would have discovered that the L.C.1 executive of Orapwoyo did not preside over the dispute as a court of law, but rather as mediation committee. Therefore no appeal could arise to a higher court from such proceedings.

[9] This argument is premised on the fact that in the Judgment of the LCII Court of Binya Parish, at page one, paragraph one, the Court stated;

> This *is the judgment on the case referred by the Chairperson L.C.I Orapwoyo Village, Binya Parish, Odek Sub County the attached letter is our reference. The case had earlier been heard by L.C.I as mediation and the team give their opinions and the LCI chairperson ruled that…"* (sic).

It is contended by counsel for the applicant that this shows clearly that the matter was never heard by the L.C.I Court of Orapwoyo sitting in its judicial capacity as required by law, but rather as a mediation committee seeking an amicable settlement. Therefore the L.C.II Court of Binya heard the matter as a court of first instance, yet under section 32 (2) (a) of *The Local Council Courts Act, 2006* it only has appellate jurisdiction. There not having been a judgment at first instance, the purported appeal thereafter was something void *ab initio*, erroneous, null and void.

[10] However, in paragraph 7 of the respondent's affidavit in reply, copies of the summons issued to the applicant by the L.C.I Court of Orapwoyo village have been attached alongside the resultant judgment of that court. The attachments show that the respondent testified as P.W.1. His witnesses were; P.W.2 Okot

Santonino, P.W.3 Obote Fredrick and P.W.4 Oyoo Albino. The record indicates that the trial proceeded ex-parte after the applicant declined to attend the proceedings, insisting that it should be heard by the L.C.I Court of Layoko village, his apparent place of residence. This was followed by a decision to the effect that;

> "*Mzee Onyut should continue utilising this land. Otto Jakeo does not have land here. There are things which show that this land belongs to Onyut but Otto Jakeo does not have, even one*." (sic).

[11] A judgment is a final and authoritative pronouncement of a court, adjudicating the rights of the parties to a legal action on the matters in dispute before it. Section 2 (i) of *The Civil Procedure Act* defines a judgment as "the statement given by the judge of the grounds of a decree or order." It is defined by *Blacks Law Dictionary* as "the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination." Although its form is not consistent with convention, in substance this was the decision of the L.C.1 Court since it contains an evaluation of the evidence, the reasons for the decision and the decision itself, albeit in a very succinct manner. This was not mediation but rather an ex-parte hearing. Mediation results in a settlement or at best, a judgment by consent which was not the case here. The applicant opted not to participate in the proceedings. That in his conclusion the Chairman of the Court opined that he was to refer the matter to the L.C.II Court on account of the fact that the respondent had refused to submit to the court's jurisdiction, yet he was continuing to exhibit violent behaviour and to cut down trees near the respondent's courtyard, did not convert the proceedings into a mediation.

[12] Under section 10 (1) (e) of *The Local Council Courts Act, 2006* and item (a) of the Third Schedule thereto, Local Council Courts have unlimited jurisdiction over disputes in respect of land held under customary tenure. Section 11 (1) (c) of the Act, provides that in the case of a dispute over immovable property, a suit is to be instituted in the first instance in a village Local Council Court within the area of

whose jurisdiction where the property is situated. The record of proceedings indicates that the land in dispute is held under customary tenure, is located at Orapwoyo village and not at Layoko village as contended by the applicant, and therefore the L.C.I Court of Orapwoyo village had subject matter jurisdiction over the dispute. I have neither found illegality nor material irregularity in the L.C.I Court's exercise of its jurisdiction.

[13] Section 32 (2) (a) of *The Local Council Courts Act, 2006* provides that an appeal lies from the judgment and orders of a village local court to a Parish Local Council Court. Under this provision, the right is conferred upon "a party dissatisfied with the judgment or order of a Local Council Court." According to section 33 (2) thereof, the appeal is presented in a memorandum signed by the appellant, setting forth the grounds of appeal. In the instant case there appears not to have been such a memorandum filed by either party. Instead the L.C.I Court of Orapwoyo village, on basis of what appears to have been its own volition, "referred" the matter to the L.C.II Court of Binya. This explains reference to the letter from the L.C.1 Chairman, contained in the L.C.II Court judgment of 21st June, 2019.

[14] I find a procedural irregularity concerning the manner in which the L.C.II Court of Binya became seized of the matter. The mater went before it by reference rather than by way of appeal. While a right of appeal is conferred on a party to the litigation, the power of reference is vested in the court. A reference is ordinarily made in a pending proceeding, where a subordinate court entertaining some reasonable doubt with regard to a question of law or usage having the force of law, seeks the opinion of the superior court in order to enable the subordinate court to arrive at a correct conclusion. When a question of law is referred to a superior court, the superior court returns the case to the subordinate court with an expression of its opinion upon the question referred for final adjudication by the subordinate which referred the question. While an appeal is preferred after a decree is passed or an appealable order is made, however in collegial courts, a

judgment of a single Judge in the exercise of original or appellate jurisdiction, may by reference, be re-considered by the full bench. In that case the decision of the full bench becomes the decision of the court.

[15] In the instant case it is apparent that in proceeding from the L.C.I Court of Orapwoyo village to the L.C.II Court of Binya, a procedure designed for a subordinate court seeking the opinion of a superior court with regard to a question of law or usage having the force of law, was adopted instead. The resultant judgment of the L.C.II Court of Binya did not take the form of an expression of opinion of a superior court guiding a subordinate court to arrive at a correct conclusion, or the decision of a single judge reconsidered by the full bench in a collegial court. It is instead akin to a confirmation of the decision of the L.C.I Court of Orapwoyo village, after reviewing the material that was presented to that court. Therefore although initiated in form and procedurally as a reference, the judgment of the L.C.II Court of Binya is in substance a reconsideration of the dispute on appeal. The question then is whether this flawed procedure resulted in a miscarriage of justice.

[16] A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. I have formed the opinion that for this matter to have been reconsidered as a reference rather than as an appeal did not detract from the quality of the decision of the L.C.II Court of Binya in its judgment of 21st June, 2019. A first appellate court has the duty to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. Despite the fact that the proceedings before it were not initiated by either party but rather the trial Court, that is exactly what the L.C.II Court of Binya did. It subjected the evidence presented to the L.C.I Court of Orapwoyo village to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

[17] Furthermore, by virtue of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*) which enjoins courts to administer substantive justice without undue regard to technicalities, it is not desirable to place undue emphasis on form rather than the substance of court decisions. This was a procedural error not going to jurisdiction of the court. A procedural error which could have no impact on a court's decision is not jurisdictional in nature and cannot invalidate it. Ordinarily, a statute or rules which impose a procedure to be observed in invoking a decision making process is not to be interpreted as denying legal force to every decision that might be made in breach of the procedure. Rather, the statutes or rules are ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance. Ordinarily, breach of procedural requirements cannot be material unless compliance could have resulted in the making of a different decision. Acting on a mistaken basis as to the appropriate procedure does not necessarily vitiate the decision if it would be authorised on another procedural basis.

[18] In any event, the applicant appealed the decision of the L.C.II Court of Binya to the L.C.III Court of Odek sub-county and later to the Chief Magistrate. In neither of those appeals did he complain of any prejudice occasioned by the fact that proceedings before the L.C.II Court of Binya were commenced irregularly. The applicant's conduct was a submission to the jurisdiction the L.C.III Court of Odek sub-county and constituted a waiver of that irregularity. The concept of waiver presupposes that the person who has a choice of two benefits is fully aware of his rights to the benefits, but he decides to take one but not both. The applicant waived that procedural flaw when he chose to appeal the decision on its merits and not on basis of the procedural flaw, when he could have done both.

[19] Under section 32 (2) (d) of *The Local Council Courts Act, 2006,* appeals lie from decrees and orders made on appeal by a Chief Magistrate, with the leave of the Chief Magistrate or of the High Court, to the High Court. Instead of invoking that provision, the applicant sought revision. The grounds of revision are narrower

than those of appeal. Revision, as stated before, relates to jurisdiction, viz., want of jurisdiction, failure to exercise a jurisdiction or illegal or irregular exercise of jurisdiction, and not against conclusions of law or fact in which the question of jurisdiction is not involved. An application for revision therefore is not a substitute for an appeal. A right of appeal is a substantive right given by statute. There is no right of revision. It is only a privilege. The ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has the authority and power to determine. If a subordinate court falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, it does not necessarily exceed its authority or powers.

[20] The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of the ordinary jurisdiction of a court. The formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the subordinate court. Such a mistake on the part of a subordinate court entrusted with authority to identify, formulate and determine such issues and questions, not involving mistakes as to jurisdictional facts such that the court misconceived the extent of its powers, will not constitute error susceptible to revision. Similarly, a failure by a subordinate court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within its jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve error susceptible to revision.

[21] In the instant case, the learned Chief Magistrate acted within his jurisdiction in dismissing the appeal. There is nothing of a jurisdictional perspective involved in the judgment of the Chief Magistrate's Court delivered on 28th February, 2020, dismissing the applicant's appeal from the judgment of Odek sub-county L.C.III Court. That the Chief Magistrate's Court may have come to a wrong decision on a point of law or fact is no reason at all for this Court to revise its judgment or orders.

Order:

[22] In the final result, the application has no merit and it is therefore dismissed with costs to the respondent.

Delivered electronically this 23rd day of July, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : M/s Abore, Adonga and Ogen Co. Advocates.

For the respondent : M/s Odongo and Co. Advocates.