

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MASINDI**

**MISCELLANEOUS APPLICATION NO. 015 OF 2015**

**(Arising from Hoima Chief Magistrates Court Civil Appeal No. 55 of 2008)**

**BYENKYA JOHN:..... APPLICANT**

**VERSUS**

**TIZISIBWA IBRAHIM BIRALISI :..... RESPONDENT**

**RULING BY JUSTICE GADENYA PAUL WOLIMBWA**

**1.0 Introduction**

This is an application brought by way of Notice of Motion under Sections 83 and 98 Civil Procedure Act Cap 71 and Order 52 r. 1, 2 & 3 of Civil Procedure Rules SI 71-1. The Application seeks the following orders, namely that;

1. The record of proceedings and ruling before the Chief Magistrates court of Hoima at Hoima in Civil Appeal No. 55 of 2008 be called for and examined by this honorable court for purposes of satisfying itself as to the correctness, legality, propriety and regularity of the ruling and order passed on 30/06/2009.
2. That the findings and orders of the Chief Magistrates court of Hoima at Hoima in Civil Appeal No. 55 of 2008 condemning the appellant to costs be set aside.
3. Costs of this application be provided for.

The grounds of the Application are that: -

1. The Applicant is aggrieved and greatly prejudiced by the order of the chief magistrate condemning him to costs in civil appeal No. 55 of 2008.
2. That the Chief Magistrate in granting the respondent costs of civil appeal No. 55 of 2008 exercised her jurisdiction illegally or with material irregularity or injustice to the applicant.
3. The Chief Magistrate acted with material irregularity when she dismissed the applicant's Civil Appeal No. 55 of 2008 with costs to the respondent after coming to a finding that the proceedings of the LC111 Court of Buhimba Sub County in which the respondent was the plaintiff were illegal, null and void.
4. There is sufficient cause to warrant a revision of the proceedings and orders made in Civil Appeal No. 55 of 2008.
5. That it is fair, just and equitable that this application be allowed in all the terms prayed for.

The application was supported by the affidavit of Byenkya John the applicant, who briefly deponed that the Respondent was partly to blame for wrongly filing the case in the LCIII Court, which did not have jurisdiction to try the case; that the Chief Magistrate erred in law to grant the Respondent

costs in Civil Appeal number 55 of 2008 and that he believed that the decision of the Chief Magistrate was wrong and therefore needed to be revised.

The Respondent swore an affidavit in opposition to the application for revision. The Respondent deponed that he was not to blame for the case having been filed in the Buhimba LCIII Court; that the award of costs is discretionary and that it is the court which decides who pays the costs; that it is the Chairperson LCIII, Buhimba who instructed the court to hear the case; that the Applicant, who was aggrieved by the decision of Buhimba LCIII filed a notice of appeal against the decision but did not inform him until after 12 months, when he verbally informed him that he had filed a notice of appeal; that the decision of the LCIII court was declared void; that the Applicant filed CA 55 of 2008 on 30<sup>th</sup> September 2010; that the Applicant took no serious efforts to prosecute this appeal, which was dismissed with costs on 23<sup>rd</sup> August 2011; that after this, the Applicant filed MA 47 of 2011 to reinstate the appeal, which was again dismissed with costs on 25<sup>th</sup> October 2011 and lastly that the Application for revision was improperly before the court since revision is only applicable where no right of appeal lies but where such right has not been exercised.

## **2.0 Background to the Application**

The background facts as are relevant to this application are that the respondent filed Land Claim in the LCI Court. however, following a complaint against the LCI Chairman that he was conflicted the matter, the LCIII Chairperson of Buhimba Sub County directed that Land Claim No.23 of 2008 be heard by the LCIII Court. The LC III Court decided the case in favour of the Respondent on 21<sup>st</sup> November 2008. The applicant being aggrieved by the decision of the LCIII Court filed Civil Appeal No. 55 of 2008 in the Chief Magistrates Court of Hoima.

Her Worship Olive Kazaarwe Mukwaya, the then Chief Magistrate (as she then was), heard the appeal and ruled that the LC III Court of Buhimba Sub-county did not have jurisdiction to hear the case and advised the parties to file a fresh suit in a court of competent Jurisdiction. The Chief Magistrate, also dismissed the appeal because the Appellant had not filed a memorandum of appeal and served a notice of appeal on the Respondent. Furthermore, the Chief Magistrate dismissed the appeal with costs.

Dissatisfied with the dismissal order of the appeal with costs, the applicant filed this application for revision of the proceedings under section 83 of the Civil Procedure Act Cap 71.

## **3.0 Representation**

Mr. Kasangaki Simon appeared for the applicant while Mr. Albert Collins Kyeyune represented the respondent.

## **4.0 Arguments by the Parties**

At the hearing both parties agreed to file written submissions which are on record. I will summarize the arguments of the parties in the next paragraphs.

### **4.1 Arguments of the Applicant**

The Applicant submitted that the Chief Magistrate erred in law when she dismissed the Appeal, after she had ruled that the proceedings before the LCIII Court were illegal as the court did not have jurisdiction to hear the case. He submitted that the Applicant raised issues of illegalities in the LCIII court and that once illegalities had been brought to the attention of the court, then they superseded and overrode questions of pleadings including admissions made therein. In other words, counsel submitted that the Chief Magistrate should have instead allowed the appeal.

He submitted that since the Chief Magistrate had found and ruled that the proceedings before the LCIII court were illegal, it was irregular for her to turn around and dismiss the Appeal. The Applicant criticized the Chief Magistrate for condemning him to pay costs of the Appeal and yet he was the successful party, having successfully argued that the LCIII Court did not have jurisdiction to hear the case out of which the appeal had arisen. He submitted that the Chief Magistrate exercised her jurisdiction injudiciously and arbitrary by awarding costs to the Respondent, when in the real sense, the Applicant was the successful party.

He submitted that under **section 27 of the Civil Procedure Act**, a successful litigant can only be denied costs for good cause either due to his conduct before the litigation or during the litigation. He submitted that in this case, no such conduct, had been made out against the Applicant to justify the court in denying him the costs of the Appeal.

He submitted that the Applicant cannot be faulted for the mistakes of the Respondent who filed the case in the LCIII Court, which was the wrong court. Lastly, counsel submitted that in all fairness, the court could have asked each party to meet their own costs. The Applicant prayed for the costs of the Application.

#### **4.2 Arguments of the Respondent**

The Respondent opposed the application on the following grounds.

Firstly, that the learned Chief Magistrate, arrived at her decision in awarding costs to the Respondent after giving all the parties chance to address her on the issue of costs.

Secondly, he submitted that the Chief Magistrate awarded costs to the Respondent because the Applicant failed to serve the Notice of Appeal on the Respondent, never filed a memorandum of appeal and took about one year without taking any action, I believe in moving the appeal towards hearing.

Thirdly, he submitted that the Chief Magistrate exercised her discretion in awarding the costs to the Respondent using powers granted to her in section 27(2) of the Civil Procedure Act, which provides that costs of any action, cause or other matter shall follow the event unless the court or the judge shall for good reason otherwise order.

With regard to the complaint that it is the Respondent who wrongly filed the case in the LCIII Court out of which the Appeal arose, counsel for the Respondent submitted that on the contrary, the Respondent filed his case in the LCI Court but because the Chairperson LCI had an interest in the matter, the LCIII Chairperson administratively ordered the LCIII Court to hear the case. He

therefore, submitted that it was wrong for the Respondent to be blamed for the administrative actions of Local Council officials.

Counsel, for the Respondent also, raised a preliminary objection to the effect that the Applicant having filed CA 0015 of 2010 in the High Court at Masindi, he had waived his right to petition for revision and that therefore, the Application before the court was incompetent.

Last but not least the Respondent, in the spirit of bringing litigation to an end avoiding abuse of court process, asked the court to dismiss the Application for being baseless and misconceived.

## **Consideration of the Application**

### **5.1 Consideration of the Preliminary Objection by the Respondent**

Before delving into the merits of the Revision, I will deal with the point of law raised by the Respondent that the Application before me is incompetent because the Applicant had waived his right to petition court for revision after he filed Civil Appeal number 15 of 2010 on September 30<sup>th</sup> 2015. The Applicant did not have chance to respond to this point in law because no room was provided for him to file a response in rejoinder. Despite this default, this court can address the matter since the matter is on a point of law.

From the record, the Application for revision was filed on 16<sup>th</sup> February 2015, six months before Civil Appeal number 15 of 2015 was filed. The revision application covered matters that are provided for in section 83 of the Civil Procedure Act. So, if at all there is a matter that is irregular here, then it is Civil Appeal Number 15 of 2015, which was filed later on, on 30<sup>th</sup> September 2010 and not the Revision Application which was filed earlier on.

But let me add and emphasize, that unlike review in section 82 of the Civil Procedure Act, where restrictions are imposed on parties with regard to appeals, no such restriction is placed on revision in section 83 of the Civil Procedure Act. Revision by its nature is unfettered power that is given to the High Court to correct errors in the judicial work of Magistrates and the court does not have to wait for an application for revision as it can on its own motion call for the records of the lower court to satisfy itself of the correctness of those decisions. This is the reason, why the law has not therefore, put restrictions on revision unlike the case with Reviews, where the powers of the court are limited. For emphasis, section 83 of the Civil Procedure Act provides that:

**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; or**
- c) Acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the High Court may revise the case and make such order in it as it thinks fit.**

Therefore, filing of an appeal by an applicant, does not make his or her application for revision incompetent. The objection or point of law raised by the Respondent, therefore lacks merit.

## **5.2 Consideration of the Revision Application**

The powers of revision of the High Court were considered by the Supreme Court in ***Attorney General and another Vs James Mark Kamoga & another SCCA No.8 of 2004*** where, Justice Mulenga (JSC) observed that **Section 83** of the Civil Procedure Act, Cap. 71 vests in the High Court supervisory jurisdiction to revise decisions of Magistrates Courts. In ***Munobwa Mohamed Vs Uganda Muslim Supreme Council H.C Civil Revision No. 01 of 2006***, the High Court held that in cases where it exercises its revision jurisdiction, the court's duty entails examination 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 it. Decisions of Magistrates will also be subjected to revision if they fail to exercise their jurisdiction or if they act illegally or with material irregularity or injustice. The court further observed that in Uganda, the powers of the High Court in Revision of the proceedings of the Magistrates' courts are not limited.

The Applicant is before the court to contest the decision of the Chief Magistrate in condemning him to costs in Civil Appeal number 55 of 2008. The Applicant is of the considered view that the Chief Magistrate should not have condemned him to costs, since she upheld his objection that the LCIII court did not have jurisdiction to entertain the case as a court of first instance. He submitted that under section 27 of the Civil Procedure Act, he should have been awarded costs as the successful party or in the alternative, that if costs were to be awarded to the Respondent, then the court should have given compelling reasons for its decision. The Respondent on his part supported the decision of the Chief Magistrate, which he submitted was based on proper exercise of judicial discretion.

The Chief Magistrate gave the following reasons for awarding costs to the Respondent:

**On whether the Respondent is entitled to costs. It was the contention of counsel for the Appellant that the parties should not be penalized for their ignorance. In this matter; considering the background of the case, if the only issue the court had to determine was the propriety of the LCIII proceedings, the court may have been of a similar view. But this court is faced with an appellant who lodged Notice of Appeal on 5<sup>th</sup> December 2008 and chose to take no real action for almost twelve months, instead he verbally informed the Respondent that an appeal had been lodged, details of what he didn't avail to the Respondent in the prescribed manner. For the action, this court is of the opinion that the Respondent is entitled to costs. In conclusion, the proceedings in the LCIII Court Buhimba and judgment thereto are declared null and void and quashed accordingly.**

From this decision, the Chief Magistrate was mindful of two things; firstly, that all factors remaining constant, the successful party should be awarded costs and secondly that a successful party can

only be denied costs if his or her conduct before or during the litigation was to blame as laid out in section 27 of the Civil Procedure Act. This section for emphasis provides that:

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force. The costs of and incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

In this matter, the Chief Magistrate, condemned the Applicant in costs for the following reasons:

- (i) failure to serve the notice of appeal on the Respondent;
- (ii) failure to file a memorandum of appeal;
- (iii) failure to fix the appeal for hearing for a whole year.

The Chief Magistrate’s decision was a reasoned decision in the context of section 27 of the Civil Procedure Act, which I can only interfere with if it was irrational, illegal or not based on sound legal principle. An inquiry into this matter will no doubt consider whether the Chief Magistrate exercised her discretion within the parameters of the law. In **Yahaya Kariisa Vs the Attorney General & M.K Radia SCCA No.7 of 1994; (Reported in, [1997] HCB 29)** the Supreme Court defined discretion as meaning **the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right equitable and reasonable.**

Was the Chief Magistrate fair and just in denying the Applicant costs? I can appreciate that the Chief Magistrate was not happy with the Applicant for not serving the Notice of Appeal on the Respondent because if he had done so he would have given the Respondent notice of his intention to appeal against the decision of the LCIII Court. I can also appreciate the displeasure the Chief Magistrate felt when she discovered that the Applicant had not filed his memorandum of appeal. But here the Applicant was not to blame as he did not have the record of the lower court to frame his grounds of appeal. I equally appreciate the Chief Magistrate’s anger when she had to drag the appellant to fix the appeal for hearing. On the face of it, some of the reasons advanced by the Chief Magistrate for condemning the Applicant in costs are credible. But this was part of the story or one face of the coin. The Chief Magistrate, unfortunately forgot to look at the role of the respondent, the LCIII court and delay to avail the record of the LCIII court that were partly to blame for having the case in a court which did not have jurisdiction and delay to have a proper appeal before the court. The Chief Magistrate, had an illegal decision before her, which could never have stood the test of time as an illegality can never confer any rights to anyone. Secondly, the Chief Magistrate should have given consideration to the fact that the LCIII court had not submitted its record from which the Applicant was going to frame his grounds of appeal for which, the Applicant was not to blame. In these circumstances, the learned Chief Magistrate should have weighed the failures of the Applicant and the failures of the Respondent, which in this case were in equilibrium and should have in the circumstances ordered each party to meet

their own costs. If these reasons were not adequate to convince the Chief Magistrate not to condemn the Applicant in costs, she should have looked at the illegal nature, in which the LCIII court had assumed jurisdiction to hear the case through no fault of the parties to make a decision that reflected the status of the matters on the ground. Consequently, I will use my powers under section 83 (c) of the Civil Procedure Act to substitute the decision of the Chief Magistrate condemning the Applicant in costs with an order that each party meets the costs of the appeal.

### **Other pertinent issues that merit consideration by the High Court on revision**

I will now consider other pertinent matters concerning the record of the lower court pursuant to my powers in section 83 of the Civil Procedure Act to ensure that records of Magistrates courts are in accordance with the law.

I have noted that the Chief Magistrate found that the LCIII Court did not have jurisdiction to hear the case and therefore declared its decision. I have also noted that the Chief Magistrate, faulted the Appellant for not serving the Respondent with a Notice of Appeal and not filing a Memorandum of Appeal. The Chief Magistrate correctly ruled that in the absence of a Memorandum of Appeal, there was no proper appeal before her and dismissed the appeal. Here the Chief Magistrate, was in error. The Chief Magistrate should have struck out the appeal instead of dismissing it as doing so meant that the appeal had been decided on merit whereas not.

Furthermore, the Chief Magistrate, having found that the appeal before her was incompetent, should not have gone ahead to entertain the merits of the appeal by considering the legality of the decision of the LCIII Court. The Chief Magistrate could only consider the merits of the appeal if she had a valid appeal before her. The appeal before her was invalid and therefore, the Chief Magistrate erred in law when she quashed the decision of the Buhimba LCIII, regardless of the fact that the LCIII had sat without jurisdiction and its decision was void.

That notwithstanding, I will not resurrect the decision of the LCIII Court since illegalities once discovered on the record, must be corrected to avoid perpetration of injustice. See: **Makula International Ltd Versus His Eminence Emmanuel Cardinal Nsubuga and Rev. Fr. Dr. Kyeyune, CACA No. 4 of 1981 or 1982 HCB 11** where the Court of Appeal inter alia held that:

**A court of law cannot sanction what is illegal, an illegality once brought to the attention of Court, overrides all questions of pleading, including any admission thereof and court cannot sanction an illegality.**

For the record, I hereby nullify the decision of Buhimba LCIII Court in Case number 23 of 2008, for the reason that it was rendered without jurisdiction and as advised by the Chief Magistrate, the parties are at liberty to file a new case in a court of competent jurisdiction if they have not yet filed the case.

### **Who should pay the costs of this application?**

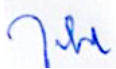
The Applicant asked for the costs of the application while the Respondent called for the dismissal of the application with costs. As I observed above costs should go to the successful party unless

there are good reasons to order otherwise. Here, the Applicant has succeeded in getting the decision of the Chief Magistrate reversed and I do not therefore see any reasons why I should deny him costs. Costs for this application will therefore go to the Applicant.

**Decision**

- a) The decision of the Chief Magistrate awarding costs to the Respondent in Civil Appeal 55 of 2008, is hereby set aside and substituted with an order that each party meets their own costs of the Appeal.
- b) The decision of Buhimba LCIII Court is set aside for being null.
- c) The costs of this Application are awarded to the Applicant.

It is so ordered.

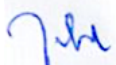


Gadenya Paul Wolimbwa

**JUDGE**

7<sup>th</sup> May 2020

I direct the Registry of the Court through the SAD to email this decision to the parties on 12<sup>th</sup> May 2020, which is the date of delivery of the judgment. The Registry shall keep on the record evidence that the decision was emailed to the parties.



Gadenya Paul Wolimbwa

**JUDGE**

7<sup>th</sup> May 2020