

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**(Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA)**  
**CRIMINAL APPEAL NO. 100 OF 2019**

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**ZEDEKIA KATO:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

10      *(Appeal from the decision of Hon. Lady Justice Jane Frances  
Abodo, J., dated 14<sup>th</sup> May 2019, in Kampala Criminal  
Appeal No. 128 of 2018)*

**JUDGEMENT OF THE COURT**

**Introduction**

15      This is a second appeal arising out of the decision of the High Court of  
Uganda at Kampala in an appeal from the decision of Nakaseke  
Criminal Case No 235 of 2018, in which the appellate judge ordered  
that the said criminal case be returned to the Grade I Magistrates' Court  
at Nakaseke for resumption of the trial.

**Background**

20      The facts that were accepted by the appellate judge were that the  
appellant was charged with the offences of criminal trespass c/t section  
302 (a) of the Penal Code Act, and fraudulent procurement of a  
certificate of title c/t section 190 (1) of the Registration of Titles Act  
(RTA). The particulars of the first count were that from 1999 up to the  
25      time he was charged, the appellant entered upon land comprised in  
Bulemezi Block 957 Plot 4, at Kasojjo-Ngando village, Ngoma subcounty  
in Nakaseke District, registered in the names of Enoka Misango  
Muyimba (deceased) with intent to intimidate, insult or annoy Kayuki

Samuel, the administrator of the estate of the deceased. In the 2<sup>nd</sup> count, it was alleged that on the 18<sup>th</sup> November 1999, at Bukalasa Land Registry, Wobulenzi Town Council in Luwerero District, the appellant fraudulently procured a certificate of title in his names for the land comprised in Bulemezi Block 957 Plot 4 at Kasojjo-Ngando, by falsely  
5 presenting himself as the legitimate proprietor of the land.

The appellant was arraigned before the Grade I Magistrate sitting at the Chief Magistrates Court at Luwero and he pleaded not guilty to the charges. When the case came up for hearing on the 1<sup>st</sup> November 2018,  
10 the appellant's advocate raised a preliminary point of law.

The gist of the preliminary point of law was that the complainant instituted a suit in the High Court Land Division as **Civil Suit No. 165 of 2010, Samuel Kayuki v Kato Zedekia, Israel Katabuke and The Registrar of Titles**, and it was still going on in the Land Division. That  
15 since the appellant was the registered proprietor of the suit land, he ought not to be charged with criminal trespass since section 59 of the RTA provides that a certificate of title is conclusive evidence of title. Counsel prayed that the charges be dismissed on that basis since it could occasion a miscarriage of justice if the appellant was tried yet  
20 there was still a civil suit continuing in the High Court over the same matter between him and the complainant. The objection was overruled.

Being dissatisfied with the decision of the Grade I Magistrate, the appellant appealed to the High Court, which too dismissed the appeal and ordered that the criminal proceedings continue against him in the  
25 Grade I Magistrates' Court. He now appeals to this court against the decision of the High Court on the following grounds:

1. The learned appellate judge erred in law and fact when she upheld the trial magistrate's orders that a registered proprietor in possession of land can be charged with criminal trespass.



2. The learned appellate judge erred in law when she upheld the trial magistrate's orders that criminal proceedings can continue against a registered proprietor in possession in a Magistrates Court when there is a pending civil suit instituted by the same person in the High Court Land Division for the same orders.

The appellant proposed that the appeal be allowed and the decision and orders of the appellate judge be set aside, so upholding the objections made by the appellant.

The respondent opposed the appeal.

### **Representation**

At the hearing of the appeal, Mr Esau Isingoma, represented the appellant. The respondent was represented by Ms Nabasa Caroline, Senior Assistant Director of Public Prosecutions.

The parties were directed to file written submissions before the hearing of the appeal. The appellant's submissions were filed on 20<sup>th</sup> October 2020, while the respondent's submissions were filed on 6<sup>th</sup> October 2020. This appeal was therefore disposed of solely on the basis of written submissions.

The general powers of this court are stated in rule 32 of the Court of Appeal Rules as follows:

**(1) On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental or consequential orders, including orders as to costs.**

**(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.**

The import of rule 32 (2) was explained by the Supreme Court in **Kifamunte Henry v Uganda, Criminal Appeal No. 10 of 1997** where it was held, relying on the decision in **Rex v. Muhamed Ali Hasham, (1948)8 EACA 93** that,

5        "... once it is established that there is competent evidence it is not open  
to us on a second appeal to go into the question of the sufficiency of such  
evidence as there is and to reverse the decision of the trial court, which  
has been upheld by the first appellate court, on the ground that the  
10        evidence is of an unsatisfactory nature or is insufficient to support the  
findings of fact, or that on it we ourselves would have come to a different  
decision."

The Supreme Court in the same case went on to refer to the decision in **R v. Hasan bin Said (1942)9 EACA 62** where it was held that on a second appeal,

15        "... the court is precluded from questioning the findings of fact of the trial  
court, provided that there was evidence to support those findings, though  
it may think it possible or even probable, that it would not have itself  
come to the same conclusion: it can only interfere where it considers that  
20        there was no evidence to support the findings of fact, this being a  
question of law."

We observed that what is required of us in this matter given the 2 grounds of appeal raised by the appellant is to determine two questions of law. The facts upon which the appeal is based are not in contest. We shall therefore proceed to determine those two questions of law.

## 25        **Submissions of Counsel**

The appellant's counsel addressed both grounds of appeal together. The respondent's counsel responded in like manner.

The appellant's counsel submitted that though it was brought to her attention, that the 1<sup>st</sup> appellate judge did not consider the legality of the  
30        charges against the appellant, she did not consider it. Further that the  
appellant was the registered proprietor of the land in dispute, and there



was a civil suit pending before the High Court brought by the same complainant against him seeking similar orders. Counsel for the appellant stated that the trial judge observed that although the subject matter in both cases was synonymous, a criminal case is not the same as a civil case in the ordinary sense. She added that the appellant was being tried under different laws which makes the causes of action and the remedies different.

Counsel for the appellant further contended that a claim of ownership of land is a civil right which should never be criminalised as the same would amount to a prosecution. He went on to distinguish the authorities that the 1<sup>st</sup> appellate judge relied upon to reach her decision. He stated that the facts in **Kibuuka Patrick v. Uganda, Court of Appeal Criminal Appeal No 346 of 2017** and **Charles Harry Twagira v. Uganda, Supreme Court Criminal Appeal Criminal Appeal 27 of 2003**, were different for those in the instant case.

Counsel went on to submit that the two cases above could be distinguished from the case at hand in that the decisions were on appeals on a ruling of no case to answer. But in this case, the judge was informed that the appellant is the registered proprietor and therefore the contention was that a registered proprietor could not be charged for criminal trespass when there is a civil suit pending in court between the same parties. That the appellant's prayer was that we set the ruling of the trial magistrate aside, stay the proceedings in the trial court, or order that the criminal case in the magistrates' court be terminated.

Counsel for the appellant further contended that this appeal is based on the jurisdiction and legality of the court to charge and try a registered proprietor of land in possession and or occupation of the land, during

the pendency of a civil suit before a court of competent jurisdiction, seeking for similar orders.

He went on to submit that it was inconceivable that the appellant should be subjected to a criminal trial where he will be acquitted because he has a certificate of title to the land in issue. That trespass  
5 is a wrong against possession, yet the appellant is in possession of the land in dispute. That if the civil matter is decided in his favour when he has already been imprisoned, he would have suffered double jeopardy.

He concluded that the 1<sup>st</sup> appellate court erred in law when it held that  
10 the institution of criminal proceedings against a registered proprietor during the pendency of civil proceedings seeking the same remedies in the High Court is an abuse of court process and the same violates the appellant's rights. He prayed that the appeal be allowed and the orders of the High Court and Magistrates court be set aside, and that the  
15 proceedings in the magistrates' court be terminated.

In reply, counsel for the respondent submitted that because it is an appeal against an interlocutory ruling, this appeal is contrary to the provisions of section 5 of the Judicature Act which provides that no appeal lies against interlocutory orders of a Magistrate in criminal  
20 proceedings. He referred us to the decision in **Kibuuka Patrick** (supra) to support his submission.

Regarding the question whether criminal proceedings should be halted pending the completion of civil proceedings, he referred us to the decision in **Machumbi v Uganda, Constitutional Reference No. 17 of**  
25 **2011**, where it was held that civil proceedings are not a bar to criminal proceedings. He added that since there was no abuse of court process, this court should order that the matter be sent back to the Magistrates Court for it to be concluded by that court.



He prayed that the appeal be dismissed.

### **Resolution of the appeal**

Two questions lie for the determination of this court in this appeal.

5 i) Whether the appeal was filed contrary to section 5 of the  
Judicature Act, that is, whether the appeal before court is a  
competent appeal;

ii) Whether civil proceedings relating to a dispute over land in the  
High Court between the same parties preclude the filing of  
criminal proceedings based on similar facts over the same land.

10 Regarding the competency of the appeal before us, we observed that the  
1<sup>st</sup> appellate judge considered the competency of the appeal and she  
resolved the question as follows:

15 *"An appeal being a creature of statute, the appellant in this case at page  
2 of the record of proceedings sought leave of the lower court to file this  
appeal and the same was granted. As such, this appeal is competent."*

Having observed that appeals are creatures of statute, the 1<sup>st</sup> appellate  
judge did not go on to consider which statute allowed the filing of the  
appeal against the decision on a preliminary point of law before the  
conclusion of the criminal proceedings in the trial court. The matter has  
20 now come up formally before us and it has to be disposed of  
comprehensively on the basis of the law and past precedents of this  
court and the Supreme Court.

Counsel for the respondent submitted that section 5 of the Judicature  
Act prohibits appeals from the interlocutory orders of a magistrate in  
25 criminal proceedings. However, we think he meant section 5 (5) of the  
Act which provides as follows:

5           “(5) Where the appeal emanates from a judgment of the chief  
magistrate or a magistrate grade I in the exercise of his or her  
original jurisdiction, and either the accused person or the  
Director of Public Prosecutions has appealed to the High Court  
and the Court of Appeal, the accused or the Director of Public  
Prosecutions may lodge a third appeal to the Supreme Court,  
with the certificate of the Court of Appeal that the matter raises  
a question of law of great public or general importance or if the  
Supreme Court, in its overall duty to see that justice is done,  
10           considers that the appeal should be heard, except that in such  
a third appeal by the Director of Public Prosecutions, the  
Supreme Court shall only give a declaratory judgment.”

We observed that the whole of section 5 of the Judicature Act provides  
for appeals to the Supreme Court in criminal matters. The provision  
15           clearly does not apply to the matter now before us, except in as far as it  
states that where this court finds that a decision made by this court  
raises a question of law of great public or general importance, this court  
may grant a certificate to a party interested in resolving it to do so in  
the Supreme Court.

20           The respondent's counsel also referred us to the decision in **Patrick  
Kibuuka v Uganda (supra)** in further support of the argument that this  
appeal is incompetent. We carefully considered the decision of this court  
in that matter. We observed that the appeal in that matter was against  
a decision of the High Court on an application for revision of the order  
25           of a Magistrate Grade I who found that the appellant charged with  
threatening violence contrary to section 81 (a) of the Penal Code Act,  
had a case to answer. As to whether that decision was interlocutory or  
final and therefore deserving of an appeal as of right, this court  
compared a decision that an accused person has no case to answer to  
30           one that he/she has a case to answer. In respect of a ruling that the  
accused has a case to answer, the court held that:



5       *"On the other hand, where the court rules that there is a case to answer upon closure of the prosecution case, the order is interlocutory because section 128 of the Magistrates Court Act requires the court to once again explain the charges to the accused. Secondly, the court is required to explain the rights of the accused person being heard in defence including the right to remain silent. The court may adjourn the proceedings for the hearing of the defence on another date. The ruling on the case to answer is therefore interlocutory and not final."*

10       This court relied on the decision of the Supreme Court in **Charles Harry Twagira** (supra) in respect of a finding by the Chief Magistrates Court, that the accused had a case to answer, in which the Supreme Court held that:

15       *"The right of appeal of an accused person appearing in a Chief Magistrates Court is conferred by section 204 of the Magistrates Court Act, 1970 and section 5 (5) of the Judicature Act. The appellant is being tried by a Chief Magistrate. In so far as relevant the applicable provisions of section 204 (old s. 216) state:*

**204 (1) Subject to the provisions of any other written law and save as provided in this section, an appeal shall lie**

20       **(a) to the High Court, by any person convicted on a trial by a court presided over by a Chief Magistrate.**

**(b) .....**

**(2) any appeal under subsection (1) of this section may be on a matter of fact as well as on a matter of law.**

25       *Clearly these provisions do not confer a right of appeal to the High Court in respect of interlocutory orders, i.e. discretionary orders or rulings of the Chief Magistrate during a trial in criminal matters. This may explain why, after the Chief Magistrate's ruling, that the appellant had a case to answer, the appellant chose to seek from the High Court a revisional order rather than a decision on appeal."*

30       This court relied on the decision above in **Kibuuka Patrick** (supra) where it held that:

35       *"Decisions of the Supreme Court are binding on this court and perhaps this is where the matter should end as there is no need to consider the further arguments in this matter. There is no right of appeal from an interlocutory ruling. The appeal cannot spring from a decision in the revision order emanating from the ruling of a Magistrates Court."*

We are mindful of the fact that the decision of this court above related to a similar appeal to that in **Twagira's case (supra)**. The case now before us could be distinguished from **Twagira's case** and **Kibuuka's case (supra)**, in that the preliminary point in this case is different. It is whether the appellant can be tried by a Magistrates' Court on charges of criminal trespass and fraudulent acquisition of a certificate of a title, during the pendency in the High Court of a civil matter based on the same facts. We therefore must establish whether the decision of the trial magistrate on that point was interlocutory or final, in order to establish whether it could be appealed under section 204 of the Chief Magistrates Act.

An interlocutory order is defined by Black's Law dictionary (9<sup>th</sup> Edition, West) as, *"(Of an order, judgment, appeal, etc.) interim or temporary, not constituting a final resolution of the whole controversy."*

The order of the trial magistrate that the prosecution of the appellant could proceed in spite of the civil suit in the High Court was not a final order. It did not dispose of the controversy whether the appellant committed the offences charged or not. It was therefore an interlocutory order.

It is our view that the provisions of section 204 (1) of the MCA are very clear and unambiguous. It provides that:

**(1) Subject to the provisions of any other written law and save as provided in this section, an appeal shall lie**

**(a) to the High Court, by any person convicted on a trial by a court presided over by a Chief Magistrate.**

An appeal from the decision of a magistrate's court only lies after the accused person has been convicted by that court. Leave to appeal against any order before that does not cure the defect in the appeal. The trial court had not yet convicted the appellant on the charges before it. In fact, it had not taken any evidence to that end. The appellant did not



refer us or the 1<sup>st</sup> appellate court to any other law under which the appeal could have originated before the High Court, and this court after it.

We therefore find that the appeal before the High Court was incompetent. In similar vein, this appeal is incompetent and ought to be dismissed.

However, for completeness, we went on to consider the question whether the magistrates' court could try the appellant on charges of criminal trespass and fraudulent acquisition of a certificate of title during the pendency of a civil suit in the High Court over the same facts, and for the same orders.

We observed that this question has already been resolved by this court. In **Uganda v. Sarah Kulata Baangwa, Criminal Appeal No. 002 of 2021**, this court reversed the decision of the High Court where it stayed the criminal proceedings before the Anti-Corruption Court and held that criminal proceedings cannot be brought against a party in a controversy over land which is pending in a civil suit in the High Court. The respondent appealed to the Supreme Court in **Sarah Kulata Basangwa v. Uganda, Supreme Court Criminal Appeal No. 3 of 2018**. The court affirmed the decision of this court and held that,

*"It cannot be a correct proposition of the law that where a civil suit is pending between two 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 (a) matter that is also a subject of civil litigation, that alone amounts to interference with the independence of the judiciary...*

...

*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 (sic) of a civil case."*

We therefore see no reason to delve into this matter any further because it has already been conclusively resolved by this court in another  
5 matter, and the decision was affirmed by the Supreme Court.

In conclusion, this appeal was not only incompetent but it also had not merit at all. It is therefore hereby dismissed.

Nakaseke Criminal Case No. 235 of 2018 should be returned to the Magistrates Court at Nakaseke for that court to continue with and  
10 complete the criminal trial against the appellant.

It is so ordered.

Dated at Kampala this <sup>19<sup>th</sup></sup>.....day of <sup>oct</sup>..... 2021.

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Kenneth Kakuru

**JUSTICE OF APPEAL**

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Muzamiru Mutangula Kibeedi

**JUSTICE OF APPEAL**

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Irene Esther Mulyagonja

**JUSTICE OF APPEAL**