

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

CIVIL REVISION NO.021/2018

(Arising from Chief Magistrate Court Of Mpigi at Mpigi)

1.SENTAMU JAMILU

2.NYANZI MUHAMMED

3.JUMA MATOVU:::APPLICANT’S

VERSUS

SEKATAWA HARUNA:::RESPONDENT

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BEFORE: HON. JUSTICE OYUKO ANTHONY OJOK

RULING

Background

This is an application brought under S. 83 and S.98 of the Civil Procedure Act, O.52 r1-3 of the Civil Procedure Rules. The application seeks for orders that the decision by the trial Magistrate Her Worship Sarah Basemera Ann (Mpigi) be revised and set-aside.

The grounds of the application are set out in the Notice of Motion supported by an affidavit of **Sentamu Jamilu** briefly the grounds of this application are as follows:

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(a) That the Respondent filed land matter No. 103 of 2011 against a one Matovu Juma a caretaker of the land and sought declaration as the owner of the suit land.

(b) That in Civil Suit No. 103 of 2011, the ownership of the Kibanja was not in issue and the Respondent was declared the owner of the suit land.

(c) That Matovu Juma never claimed ownership of the suit property but informed Court that he was only a caretaker on the suit kibanja.

10 (d) On admission of Matovu Juma that he was not the owner of the land but caretaker, Court declared the Respondent owner of the suit property without hearing the applicants for whom he was caretaking the land.

(e) That the Respondent then using the judgment in Civil Suit No. 103 of 2011, claimed sole ownership of the suit property which belonged to the estate of the late Abdullah Mbugano.

(f) That the 1st and 2nd Applicants vide civil suit No. 014 of 2015, filed a suit for determination of the ownership of the suit property having been refused to access and use the suit property.

20 (g) That the Honourable Magistrate Grade One dismissed the suit on grounds that there exists a judgment vide land matter No. 103 of 2011, which declared ownership of the suit property to the Respondent.

(h) That the Honorable trial Magistrate having received evidence from the Applicants held that there was proof of another interest

other than the Respondent's, but there exists a judgment that has never been varied.

The Respondents opposed the application in reply on the following grounds;

- 1) That I read the application whose contents have been explained to me by my counsel M/s Opyene & Co. Advocates and who have advised me which advice I verily believe to be true that this application for review does not pass test for an application for Review. It is untenable in law and abuse of court process, and advised my lawyers to raise a preliminary objection at the beginning.
- 2) I have also been informed by my lawyers herein stated above whose information I believe to be true that civil suit No. 14 of 2015 and land Cause No. 103 of 2011, were decided on merit.
- 3) In reply to paragraph 17 and 18 of the affidavit in support of Motion sworn by Sentamu Jamilu, the Respondent's ancestors are buried on the suit land and the graves are not at any risk of destruction as they belong to respondent's ancestors.
- 4) That I depone hereto in reply to Civil Revision no. 21 of 2018.

- 5) That all what is contained herein is true and correct to the best of my knowledge save for the contents of paragraphs which source I have disclosed.
- 6) That I pray that the application is dismissed with costs.

Legal representation:

The Applicants were represented by Mukiibi Sentamu & Co. Advocates and the Respondent was represented by Opyene & Co. Advocates.

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Submissions

Counsel For the Applicants filed submissions as required and Counsel for the Respondent did not file the submissions.

BACKGROUND

Your Lordship, the Applicants filed this application under Sections 83 and 98 of the Civil Procedure Act as well as Section 33 of the Judicature Act for revision of two judgments one in Civil Suit No. 103 of 2011, and the other Civil Suit No. 14 of 2015.

- 20 The parties to this suit are beneficiaries to the estate of the Late Abdullah Mbugano who formerly owned the suit land. He begot children including the Late Salima Namuleme, mother to the Late Ssegane Ali whose estate is administered by the Respondent.

The suit property measures approximately 4 acres and was preserved as a burial ground for the family of Mbugano Abdullah, and it is on the same land that the Late Abdullah Mbugano together with his late children were buried including the Late Salima (mother to Ssegane Ali).

The Late Ssegane Ali as a family member and son to the Late Salima occupied the part of the suit land and dispute arose between him and the caretaker of the land a one Juma Matovu. The Respondent filed Civil Suit No. 103 of 2011 against the 3rd Applicant. The Court determined Civil
10 Suit No. 103 of 2011 in favour of the Late Ssegane Ali stating that the Defendant- Juma Matovu was a mere caretaker and did not have proprietary interests on the Kibanja. However, Court observed that on the suit Kibanja were graves that belonged to the Mbogo clan and the same should be maintained. It further observed that the Plaintiff, Ssegane Ali belonged to the Mamba clan and the graves thereon did not belong to his family lineage of Mamba clan. **Court however did not invite the family/beneficiaries of the Late Abdullah Mbugano.** The Defendant appealed the judgment vide Civil Appeal No. 68 of 2014 which was dismissed for want of prosecution.

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The 1st and 2nd Applicants unaware of the proceedings prior filed Civil Suit No. 14 of 2015 seeking declarations that the suit Kibanja belongs to the estate of the

late Abdullah Mbugano, this was after the Late Ssegane Ali stopped them from burying on the suit Kibanja which they call their ancestral burial ground.

The contestation was against the beneficiaries claiming that the 1st and 2nd Applicants belonged to the Mbogo clan and the Respondent to the Mamba clan. The late Abdullah Mbugano of Mbogo clan preserved the suit Kibanja as a burial ground, which cannot be solely owned by a grandchild from the maternal side.

10 Civil Suit No. 14 of 2015 was determined in favour of the Defendant/Respondent on the basis of a Judgment of Court that already existed, vide Civil Suit No. 103 of 2011 under Order 21 Rule 3(3) of the Civil Procedure Rules.

The Applicants filed this application for revision of the two Judgments to harmonize the position that property belonging to the Estate of the Late Abdullah Mbugano was declared property of a single beneficiary in Civil Suit No. 103 of 2011 without hearing the other beneficiaries to the Estate and the Magistrates Court despite observing the anomaly is bound by the
20 earlier decision.

Issues.

1. Whether the application is competent before this Honourable Court?
2. What remedies are available for the parties?

Resolution

1. Whether the Application is competent before this Honourable Court?

My Lord this Application is brought under S. 83 and S. 98 of the Civil Procedure

Act, (Cap. 71) which provides thus;

10 “The High Court may call for the record of any case which has been determined

under this Act by any magistrate’s court, and that Court appears to have

(a) exercised a jurisdiction not vested 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 (Emphasis mine)

the High Court may revise the case and may make such order in it as it thinks fit;

but no such power of revision shall be exercised-

20 (d) unless the parties shall first be given the opportunity of being heard; or

(e) where, from lapse of time or other cause, the exercise of that power would involve serious hardship to any person.

According to Black’s Law dictionary (9th edition), revision is defined as “a

re-examination or careful review for correction or improvement or an altered version of work"

The Court in **Johnson Katebalirwe Vs. Segonga Godwin T/A Platinum Associates Revision Cause No. 12 Of 2017** cited with approval of the case of **Mabalaganya Vs. Sanga (2005) E.A 152**, where the Court of Appeal of Tanzania held that, in cases where it exercises its Revisional Jurisdiction under Section 4 of the Appellate Jurisdiction Act, its duty entails examination by the Court of the record of any proceedings before
10 the High Court 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 the High Court.

My Lord, the grounds of the Application are basically that the Learned trial Magistrate having discovered divergent interests on the land, erred in law and in fact when he concluded that the suit property solely belonged to the Respondent, and failed to exercise the powers vested in the Honourable Court thereby occasioning a miscarriage of justice.

20 Furthermore, My Lord, both Courts discovered that there were burial grounds on the suit land that belonged to the Mbogo clan particularly the late Abdullah Mbugano's family. However, the trial Court in Civil Suit No. 103 of 2011 did not better investigate or invite the family members of the

Mbugano family to address and clarify their interests in the land before determining the matter which it did not do.

The Court having been put to notice by the Defendant (Matovu Juma) stating that he is a caretaker for the Mbugano family, it should have invited the family members for proper and effective adjudication of the matters before the Court.

The Court is enjoined to add parties to a suit even on its own motion. Order 1 rule 10(2) of the Civil Procedure Rules provides thus;

10 *"The Court may at any stage of the proceedings either upon or without the application of ether party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."*

20 My Lord, the Court having discovered from the Defendant that the caretaker of the Mbugano family was on the land, it ought to have added the members of the Mbugano family as parties to the suit so as to completely adjudicate the matters before it.

My Lord, Revision is a tool that 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, but after the parties have first been given the opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

My Lord clearly, there was miscarriage of Justice when Estate Property was declared as property of a single beneficiary without according the other parties with an interest in the suit property an opportunity to be heard.

The Court in its Judgment in Civil suit No. 103 of 2011 stated on page paragraph 2 that the Defendant was a caretaker of the Mbogo clan and specifically the Mbugano family. Page 4 of Judgment states that; “*during the locus visit the graves discovered on the land indicated that some belonged to other persons other than the Plaintiff*”. The reasoning of the Defendant not belonging to the same clan he caretakes cannot be a reason to deny proprietorship of the Mbugano family. The Trial Magistrate further stated that, “considering the space occupied by the graveyards it is not

logical that 4 acres were demarcated for graves.” My Lord the family is within its right to preserve a big portion of its land for burial purposes. The reasoning attached to the decision is inconceivable and erroneous. All evidence pointed to another interested party but the Court did not find it appropriate to invite the family so as to completely resolve the matter.

The Court in **Tumusiime Vs Nkinze- Revision Cause No. 002 of 2010** cited with approval **Makula International Ltd Vs. H.E. Cardinal Nsubuga (1982) HCB 1**, wherein the Court held that Court cannot
10 sanction an illegality once brought to its attention.” I, therefore, declare that this was not a trial, it was a miscarriage of justice.

A trial without the concerned parties is not a trial at all, the question of ownership was determined between a caretaker and one of the beneficiaries. It would clearly end in favour of the beneficiary although that decision would be unjust to the other beneficiaries.

My Lord, We will address the question of undue hardship. In the case of **Kabwengere vs Charles Kangabi (1977) HCB 83**, it was held that, “Court cannot exercise its revision powers where there was a lapse of time
20 or other cause, exercise of which power would involve serious hardships to any person.” My Lord, the Applicant filed Civil Suit No. 14 of 2015 for redress although the same was erroneous, they could not file an application for Review since an appeal had been preferred.

It is clear from the Respondent's Affidavit in reply paragraph 4 that the suit Kibanja is still intact and nothing has changed. The ancestral graves that the Respondent states belong to his ancestor also belong to the Applicants. My Lord, the Respondent is a descendant of the Late Abdullah Mbugano having been born by the late Salima Namuleme daughter to the late Mbugano. However, the late Mbugano had other children and grandchildren. Therefore, whereas the Respondent has interest in the suit Kibanja, he is not the sole owner of the same. The Kibanja belongs to the estate of the late Abdullah Mbugano and not Ssegane
10 Ali as stated in Civil Suit No. 103 of 2011. My Lord there will not be any hardship since the suit Kibanja still has the graves and it has not been sold to any other person the status quo of the suit Kibanja has not changed.

My Lord, it is in the interest of Justice that the question of ownership should be finally resolved having heard from both sides. The subsequent Court heard both parties and when it visited the locus it established the two divergent interests on the land which it rightly noted. However, the Court was bound by the already existing Judgment that had not been overturned under Order 21 Rule 3(3) of the Civil Procedure Rules.

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In light of the authorities and submissions raised, it is our humble submission and prayer that this is a matter that warrants the Court to exercise its Revision powers to address the injustice that is faced by the family of the late Abdullah Mbugano.

2. What remedies are available for the parties?

My Lord, it is evident that the Applicants have proved that the trial Magistrate *acted in the exercise of its jurisdiction illegally or with material irregularity or injustice* and that he committed some illegalities which the High Court has to revise.

In the case of **Hitila Vs Uganda (1969)1 E.A 219** the Court of Appeal of Uganda held that;

10 *“In exercising its power of revision, the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred. It was further held that the Court could do so in any proceedings where it appeared from any record that had been called for by the Court or which had been reported for orders or in any proceedings which had otherwise been brought to its notice.”*

20 It is clear from the two files that this is Estate land that was declared to be property of a single beneficiary without hearing the other family members which is a miscarriage of justice. It's the position of the law, that not affording a party the right of hearing is illegal.

In the case of **Tolit Charles Okiro Vs Otto Cipiriano Civil Revision No. 002 of 2019**, Hon. Justice Stephen Mubiru stated that; *“public interest emphasizes efficiency and economy in the conduct of litigation, in that the*

courts resources should be used in such a manner that any given case is allocated its fair share of resources, the most important of which in civil litigation is time. Each case whose trial is unduly prolonged deprives other worthy litigants of timely access to the Courts. Courts must ensure that each suit is dealt with expeditiously and fairly, allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”

My Lord, in light of that decision the best remedy is to have the question
10 determined as to whether the suit kibanja belongs to the estate of the late Abdallah Mbugano. In light of the evidence provided in Civil Suit No. 14 of 2015 this can clearly guide the Court to give a lasting solution and address the miscarriage of justice already committed.

Resolution by Court.

In the case of **Rwakijuma Kabagambe & 4 others Vs Clovis Sunday, HCT-CV-CA 005/09**

“It was held that in view of the fact that when Courts of law make decision regarding land they do two things simultaneously, they declare one party a
20 trespasser and therefore order that the party to leave the land.”

The second thing the Courts do simultaneously sometimes overtly but other times only by implication, is to declare the other party the rightful owner of that property as against the trespassing party but also as against the rest of the world.

It will be observed that **S.83 Civil Procedure Act** applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusion of the law or fact in the question of jurisdiction is not involved.....as regards alleged illegality urged by the applicant, according to the case of **Amir Khan VS Sheo Baksh Singh (1885) 11 CA 16, A 237**, a privy counsel case it is settled that, *“where a Court has jurisdiction to determine a question, it cannot be said that it acted illegally or with material irregularity because it has come to erroneous decision on the question of fact or even law.”*

10 Revision is only intended to correct errors which do not go to merits/substance of the dispute not the determination to the rights of the parties.

O.52 of the Civil Procedure Rules lays down the procedures which must be met by the Applicant who seeks an order for review.

O.46 r 2 of the Civil Procedure Rules also lays down some procedure to be fulfilled:

On ground No1 Whether or not the decision of the trial Magistrate can be revised or set aside.?

20 This was a case determined by Her Worship Sarah Basemera Anne Grade One, (Nsangi) the hearing started and judgment was entered in favour of the Respondent.

S.83 of the Civil Procedure Act and O.46 r 2 of the Civil Procedure Rules is very clear that the Magistrate either failed to exercise his

jurisdiction vested in it, acted in excess of jurisdiction or exercised the jurisdiction with material irregularity.

It's my considered opinion that the instant application is not the one that meets the criteria outlined under **S.83 of the Civil Procedure Act.**

Since issue number one failed, automatically there is nothing to be revised or set aside.

I therefore find this application incompetent and lacking merit. It does not certify the requirements under **S.83 of the Civil Procedure Act.**

The decision as passed by Magistrate Grade One was neither irregular nor illegal

The Applicant would have preferred an appeal if he was dissatisfied with the decision of the Magistrate and filed the memorandum within the time frame and therefore not convinced that this is an application for revision

This application is therefore dismissed with costs to the Respondent both in the Lower Court and High Court.

Right of appeal explained.

Dated this 31st day of March 2021

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HON.JUSTICE OYUKO ANTHONY OJOK
JUDGE

