

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAHA**

**REVISION CAUSE NO. 002 OF 2010  
(ARISING FROM MSK C.S. NO. 52 OF 2003)**

**TUMUSIIME LAUBEN::: APPLICANT**

**VERSUS**

**NKINZE GAADI::: RESPONDENTS**

**BEFORE: THE HON. JUSTICE Dr. FLAVIAN ZEIJA**

**RULING**

This Application came to this court by way of a formal complaint. Counsel for the applicant wrote a formal complaint to the Inspector of Courts dated 13<sup>th</sup> October 2008. The Inspector of Courts upon analyzing the complaint made a report to the Chief Registrar detailing the anomalies associated with this complaint. The Chief Registrar instructed that the file be placed before a Judge for possible revision, hence this revision cause. It is prudent to note at this stage that there is no clearly laid out procedure for revision. In LDC Vs Edward Mugalu, HCMA No. 63 of 1990, the court observed that:

*“it is sufficient for any aggrieved party or his lawyer to write to the Registrar High Court drawing his attention to any irregularity of any subordinate or magistrate courts in any decision and requesting that the matter be brought to the attention of the court”*

This revision was initiated by letter in form of complaint and it is sufficient.

The facts leading to this revision cause are strange but also saddening. There was a suit filed before the Chief Magistrates’ Court of Masaka. Nkinze Guard the plaintiff (now respondent) sued Tumusiime Lauben (Now applicant) seeking vacant possession of a plot of land in Kyazanga Kitooro Trading Centre, Masaka District, which had allegedly been

encroached on by Tumusiime Lauben. The plaintiff was represented by Matovu John of Matovu, Kamugunda and Co Advocates, while the defendant was represented by Ausi Twijukye of Ausi Twijukye and Co Advocates. Tumusiime Lauben filed a defence and a counterclaim. The case was before His Worship Batema D.A. the Chief Magistrate.

Before the case could be heard, the Chief Magistrate decided to visit the Locus in quo. When the Magistrate arrived at the locus, he invited one person called Abaasi Rutangura who is said to have sold the disputed land to the plaintiff and defendant. The said Abaasi informed the Magistrate that he had sold one part of the house to the plaintiff and another to the defendant. The Magistrate demarcated the house and divided it between the plaintiff and defendant as Abaasi had indicated. He concluded the case without hearing from the parties! There are a number of issues to note that arise from this action by the Chief Magistrate as observed from the record:

1. The sole witness (Abaasi) the Magistrate called at the Locus did not give a testimony. He just gave a statement because he was not sworn. This is strange because the proceedings at the locus are taken to be part of the proceedings in court and any person to testify at the locus must be sworn and should have been a witness in court.
2. Neither the plaintiff nor the defendant testified. None was allowed to call witnesses at the locus as well as in court.
3. The Chief Magistrate made a Judgment and executed it. The trial Magistrate visited the locus to ascertain the boundaries but strangely handed over the disputed land to the parties at the same time.
4. Whereas both parties were represented, there is no record showing where they made any submissions or input before judgment. Even the sole witness dictated by court was never cross-examined by either advocate of the parties to the case.
5. There was a counter claim pending but Judgment was delivered in the main suit before considering the counter claim.
6. There were no orders as to costs.

7. The trial Magistrate warned and quarrelled with the defendant, Tumusiime during the Locus in Quo proceedings. He warned the defendant that he has been sending him threatening messages and that he can be prosecuted. I shall give the details of this quarrel later.

There is something strange about the conduct of this case right from the time of filing. It was adjourned 42 times for a span of three years without a single hearing. The dates below can provide some insight into what I'm talking about. This case was filled on the 7<sup>th</sup> day of April 2003. It first came up for hearing on 12/6/2003 but it was adjourned. 21<sup>st</sup> Aug 2003- adjourned. 21<sup>st</sup> Sep 2003 - adjourned. 2<sup>nd</sup> October 2003 - adjourned. 15<sup>th</sup> October 2003 -adjourned. 10<sup>th</sup> Dec 2003 -adjourned. 12<sup>th</sup> Feb 2004 -adjourned. 3<sup>rd</sup> March 2004-adjourned. 26<sup>th</sup> April 2004- adjourned. 24<sup>th</sup> of May 2004- adjourned. 31<sup>st</sup> of May, 2004-adjourned. 7<sup>th</sup> of July 2004- adjourned. 7<sup>th</sup> Sept 2004 -adjourned. 27<sup>th</sup> Sep 2004 - adjourned. 20<sup>th</sup> Oct 2004 adjourned. 4<sup>th</sup> Nov 2004- adjourned. 6<sup>th</sup> Dec 2004- adjourned. 18<sup>th</sup> Jan 2005- adjourned. 18<sup>th</sup> Feb 2005- adjourned. 13<sup>th</sup> April 2005- adjourned. 25<sup>th</sup> May 2005- adjourned. 17<sup>th</sup> June 2005- adjourned. 31<sup>st</sup> Aug 2005- adjourned. 24<sup>th</sup> Nov 2005- adjourned. 14<sup>th</sup> Nov 2005- adjourned. 17<sup>th</sup> Feb 2006- adjourned. 31<sup>st</sup> March 2006- adjourned. 11<sup>th</sup> May 2006- adjourned. 15<sup>th</sup> May 2006- adjourned. 20<sup>th</sup> June 2006- adjourned. 28<sup>th</sup> June 2006- adjourned. 21<sup>st</sup> July 2006- adjourned. 30<sup>th</sup> Aug 2006- adjourned. 7<sup>th</sup> Oct 2006- adjourned to visit locus.

This inordinate delay is surprising. In all these adjournments, the litigants were attending court.

Turning to this application, it was instated by complaint hence no enabling laws were referred to. However, the enabling law for revision is S. 83 of the Civil Procedure Act. It provides that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. It provides:

**83. Revision.**

*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 may make such order in it as it thinks fit; but no such power of revision shall be exercised—  
(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.*

The situation at hand is governed by S. 83(c) of the CPA.

For the Applicant, it was submitted that the trial Magistrate acted illegally and with material irregularity and injustice. It is argued that by the trial Magistrate visiting the locus before trial of the case, it was highly irregular. There was no evidence given in court upon which the trial Magistrate decided to visit the locus. Even then, what took place at the locus left a lot to be desired, as there was no hearing. The applicant's counterclaim was also disposed of without a hearing.

Counsel for the respondent on his part conceded that a revision be made after perusing the proceedings of the lower court and submissions by counsel for the applicant. However, counsel for the respondent informed court that this matter had been overtaken by events and the order for a retrial would not serve any purpose or ends of Justice. The plaintiff/respondent sold off his own part of the land as demarcated by the chief Magistrate to Eric Mugabi. Eric Mugabi demolished his side and rebuilt it with new structures. The defendant also sold part of his land as demarcated by the Magistrate to David Ssebuguzi who also demolished the structure and transformed it into something else. The plaintiff/respondent and defendant/applicant no longer have interests in the land.

After carefully perusing the record and the submissions of both counsel, I'am of the considered view that the applicant was denied an opportunity/right to be heard. The **Article 28 of the Constitution of Uganda 1995** is alive to this right. Everyone is entitled to the right to be heard. The constitution also provides for a fair hearing. Article 44 of the

constitution amplifies this right by providing that the right to be heard is non derogable. In the case of **National Enterprises corporation versus Mukisa Foods Ltd; CA Civil Appeal No. 42 of 1997** quoting the case of **Evans vs Bartlam [1937] AC 473 at 480**, the Court stated that *unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.*

All the parties did not lead evidence in this case. There was no cross-examination of witnesses. It was like a kangaroo court. Only one person called Abaasi Rutangura who had sold land to the plaintiff and defendant was allowed by the Magistrate to speak. He was not cross examined on his testimony. He was not sworn. After Abaasi speaking, the chief Magistrate stated:

*I am of the very conclusive opinion that the court must believe Rutangura the seller. He is so firm and believable that no other evidence is necessary. He knows what he sold to each party. Any party contesting his testimony can sue him for having sold air to him and recover his money with or without interest. I am proceeding to demarcate this plot into two and close the litigation. Let us get a tape measure. Let the LCs and Counsel assist court”*

So in an instance, the Chief Magistrate pronounced judgment and executed it. It was as simple as that. There were no orders as to costs. Since Judgment had been made in favour of the respondent, the Magistrate should have made orders as to costs. He did not.

What is interesting is that at the locus, the Chief Magistrate quarrelled with the applicant in the following words:

*“I must warn you in the presence of counsel and the whole village. You have been sending me threatening SMS messages. That is criminal and you can be prosecuted. But I will not be diverted.”*

Clearly, one can easily impute a dispute from this statement. What the magistrate should have done was to decline to hear this matter since he already had personal issues with the applicant. It is not clear why the applicant would send threatening messages to the chief magistrate before visiting the locus. Did they have a conflict before? What were the threatening messages about? It leaves many unanswered questions.

I can safely conclude that what the Chief Magistrate did was an illegality. As it was held in the case of **Makula International Ltd Vs. H.E. Cardinal Nsubuga (1982) HCB 1**, court cannot sanction an illegality once brought to its attention. I therefore declare that this was not a trial. It was a miscarriage of justice.

In any case, there is a standard procedure for visiting locus which must be adhered to. In the case of **David Acar & 3 Ors v. Alfred Acar Aliro [1982] HCB 60**, Justice Karokola guided on the procedure thus:-

*“.....I wish to comment about the manner in which the trial was conducted at the locus-in-quo..... When the court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is my view not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings.”*

Clearly, the learned Chief Magistrate violated this entire procedure. He visited the locus before hearing any evidence. At the locus, he did not allow witnesses to testify. He did not allow any cross examination of the single witness he relied upon. He invited the entire village to witness. Then executed the judgment he instantly made.

**I now turn to the most difficult part of this revision; i.e. Remedies.**

When the applicant appeared before me, I asked him whether the status quo of the land still exists. He confirmed that the status quo of the land no longer existed. It was disposed of. Reading the Pleadings of the defendant (Defense and Counter claim) the defendant pleaded that he owned the entire house part of which the plaintiff was claiming. In his counterclaim, the defendant was claiming for an eviction order, permanent injunction, general and special damages for trespass and costs of the suit. The plaintiff/respondent was also claiming for the same orders.

As I mentioned earlier, the defendant and plaintiff both sold their land after the Magistrate made a decision. Their prayers in the pleadings in the lower court are therefore not attainable. Court can no longer grant an injunction or issue a permanent injunction since the land has changed hands. 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 or other cause, the exercise of which power would involve serious hardships to any person.

This revision cause was filled in 2008. This matter could have been handled earlier to avoid a miscarriage of justice. Unfortunately, 9 years later, its intended objective cannot be achieved. As the adage goes, “Justice delayed is justice denied”. I can only make declaratory orders. I cannot order a retrial as the circumstances on the ground have changed. It is also possible that given the lapse of time, some of the witnesses could have died. The land has already changed hands. I can only declare that this was not a trial but a mistrial.

I make no orders as to costs since this conundrum was caused by a judicial officer. The respondent cannot be faulted for what happened.

Dr Flavian Zeija

Judge

1/9/2016