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The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No. 171 of 2023

*(Arising from Civil Appeal No. 028 of 2023)*

*(Arising from Kumi Magistrate's Court Civil Suit No. 16 of 2022)*

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Anyonga Alfred ..... Applicant

Versus

1. Kedi Kolostica

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2. Opio John Bosco

3. Otuna Anthony

..... Respondents

Before: Hon Justice Dr Henry Peter Adonyo

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Ruling

1) Introduction:

This application was brought by Notice of Motion under Sections 82 and 98 of the Civil Procedure Act, Cap 71, Section 33 of the Judicature Act, Cap 13, and  
25 Order 46 Rules 1 and 8 of the Civil Procedure Rules, SI 71-1 for orders that;

a) The judgement and orders of this honourable court delivered on 3<sup>rd</sup> October 2023 be reviewed to include an order of costs.

b) The costs of this application be provided for.

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2) Grounds of the application:

The grounds anchoring the application are set out therein and expounded in the supporting affidavit deposed by the applicant, and they briefly are that;

5 a) This court entered judgment in favour of the applicant as the respondent on 3<sup>rd</sup> October 2023 by dismissing the respondent's civil appeal No. 28 of 2023.

b) The court inadvertently omitted to pronounce itself on the issue of costs of the lower court and the appeal.

10 c) The respondent had been awarded costs of the lower court, and the same, together with costs of the appeal, had been sought by the respondent in its prayers for dismissal of the appeal.

d) There is an error apparent on the record of the judgement dated 3<sup>rd</sup> October 2023 as it is devoid of the said order for costs of the lower court and of the appeal.

15 e) It is important for the court to pronounce itself on the costs of the appeal.

f) The applicant is aggrieved by the error of the court failing to make a pronouncement on costs.

g) This court has the power to review its judgement.

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3) Grounds in opposition to the application:

The application was opposed by Opio John Bosco, – the 2<sup>nd</sup> respondent, in his affidavit in reply that he swore in his capacity and on behalf of the first and third respondents. He stated that;

25 a) Their lawyers advised that the grant of costs or not is an exercise of discretion by the court.

b) The costs of the lower court were granted to the applicant by the appellate Court.

30 c) The court exercised its discretion and made a deliberate decision based on the outcome of the appeal that was partial not to award costs at appeal but upheld the award of costs in the courts below.

- 5 d) They have been advised by their lawyers that the court's omission to  
pronounce itself on costs of appeal is not an error so manifest and clear.
- e) The application is misconceived, bad in law, frivolous, vexatious, and an  
abuse of the court process, and it does not raise any grounds for review.
- 10 f) The dictates of natural and substantive justice require the applicant's  
application for orders sought therein be dismissed.

4) Representation:

M/s Opio and Company Advocates represented the applicant, while M/s Alaka  
and Company Advocates represented the respondents.

- 15 The parties filed written submissions, which have been considered accordingly.

5) Issues:

From submissions, the applicant's counsel formulated an issue that suffices to  
determine the contention, thus;

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- a) *Whether there is an error apparent on the face of the record?*

6) Resolution:

- This application was brought under Section 82 of the Civil Procedure Act, Cap 71  
25 (CPA), which provides for review. It states that;

**Any person considering himself or herself aggrieved— by a decree or order from  
which an appeal is allowed by this Act, but from which no appeal has been  
preferred; or by a decree or order from which no appeal is allowed by this Act, may  
apply for a review of judgment to the court which passed the decree or made the  
30 order, and the court may make such order on the decree or order as it thinks fit.**



5 This application was also brought under Section 98 of the Civil Procedure Act, Cap 71 (CPA), which inherently empowers this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The application was likewise brought under Section 33 of the Judicature Act, Cap 13, which empowers this court to grant absolutely or on such terms and  
10 conditions as it thinks just all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

15 Equally, the applicant brought this application under Order 46 Rules 1, 2 and 8 of the Civil Procedure Rules SI 71-1, which provide for review and states that;

**1. Application for review of judgment.**

**(1) Any person considering himself or herself aggrieved—**

- a. by a decree or order from which an appeal is allowed, but from which no appeal  
20 has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order  
25 made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

1. A party who is not appealing from a decree or order may apply for a review  
30 of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant

5 and the appellant or when, being respondent, he or she can present to the  
appellate court the case on which he or she applies for the review.

It is trite that the duty and burden of proof lies on the applicant because she is  
the one who seeks to get a decision of this court in her favour. (See: Sections 101  
and 102 of the Evidence Act, Cap 6).

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a) Whether there is an error apparent on the face of the record?

Upon perusal of the pleadings, the respondents indicated under paragraph three  
of their affidavit in reply that they will raise a preliminary objection. A preliminary  
15 objection was raised in the respondents' counsel submissions that the application  
is incompetent, bad in law, and barred by law and as a result of which it should  
be struck out with costs on the grounds that no decree was extracted.

Counsel for the respondents contends that the law governing review is Section  
82 of the Civil Procedure Act and Order 46(1) of the Civil Procedure Rules which  
20 refer to decrees and orders, to that end, counsel avers that there can be no  
review where there is no decree or order.

Counsel averred that there is no decree or order that was extracted and he  
referred this court to the case of ***Manyangwa Lovincer and Others vs Musoke***  
***Charles and others, Miscellaneous Application No. 0014 of 2018*** in which Hon.  
25 Justice Dr Joseph Murangira held that it was a serious irregularity.

Counsel for the respondents contends that the applicant failed in his duty to  
extract a decree before he applied for review which to counsel is a serious  
irregularity which calls for dismissal of the application with costs.

On the other hand, I have not found on the record any submissions of the  
30 applicant's counsel in rejoinder to the preliminary objection.



5 For that reason, I have incorporated only the respondents' submissions in determining the preliminary point of law.

The groundbreaking case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696*, defined what in law constitutes a preliminary objection. at page 700 Law J A had this to say: -

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*"So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court or a*  
15 *plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..."*

At page 701 Sir Charles New Bold, P. added the following:-

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*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*

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A close reading of Section 82 of the Civil Procedure Act, Cap 71 (CPA) and Order 46 Rule 1 of the Civil Procedure Rules indeed makes reference to a person applying for review to have been aggrieved from an order or decree from which no appeal has been preferred or no appeal is allowed under the Act.

5 A perusal of Civil Appeal No. 28 of 2023 which was between the parties herein in which I delivered a judgement on 3<sup>rd</sup> October 2023 show that no decree has yet been extracted.

The position of the law is that a review be based on orders or a decree. This clearly the intention of Section 2(o) of the Civil Procedure Act which defines an “order”  
10 to mean the formal expression of any decision of a civil court which is not a decree, and shall include a *rule nisi*;

The law under which this application was brought suffices to state that any person aggrieved by a decree or order can apply for review.

This particular law thus gives an indication that a review must emanate from an  
15 order.

For this application, I have had the occasion to peruse the court record and I find that no order extracted from the judgement or a representation of the same orders is on record. Since an application of this nature ought to emanate from an order or a decree of the court which is not the case in this instant application  
20 then I am persuaded by the submissions of counsel for the respondent that his submissions as regard preliminary objection disposes off this instant application for the reason that this application which is for review is not based on any decree or order extracted in accordance with the provisions of Section 82 of the CPA and Order 46 Rule 1 of the Civil Procedure Rules SI 71-1.

25 This is a serious irregularity as was pointed out in the case of ***Manyangwa Lovincer and Others vs Musoke Charles and others, Miscellaneous Application No. 0014 of 2018*** (supra) as there is no decree or order that was extracted which would give this application a foundation. Since there is none then this application is premature and thus lacks a foundation. The preliminary objection raised by the  
30 counsel for the respondents is sustained.

5        7) Conclusion:

The above conclusion being so then based on my finding on the preliminary objection above, then I would conclude that this application lacks a foundation and thus lacks any merit. It is accordingly dismissed with costs to the respondent in the premises.

10      I so order.



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Hon. Justice Dr Henry Peter Adonyo

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Judge

5<sup>th</sup> April 2024