

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT COMMERCIAL DIVISION

HIGH COURT MISCELLANEOUS APPLICATION NO.469 OF 2015

(ARISING FROM HIGH COURT CIVIL SUIT NO. 46 OF 2014)

MAYIRIKITI GENERAL AGENCY LTD & ANOTHER:.....PLAINTIFF

VERSUS

HOUSING FINANCE BANK LTD ANOTHER:.....DEFENDANTS

BEFORE: HON. JUSTICE H. P. ADONYO:

RULING:

1. Background:

Mr. Ssenkezi for the Applicants submitted that this is an Application brought by Notice of Motion under **Order 46 Rules 1, 2, and 6 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules** seeking for a review of the court made on the 19th day of May 2015 in **High Court Civil Suit No. 46 of 2014** between these same parties in which the Applicants were Plaintiffs and the Respondents, the Defendants seeking for review of costs. The grounds are as per deposition of the second Applicant Mr. Karegyeya John.

Learned counsel for the Applicants pointed out that though in the head suit although the Applicants won and was not faulted in the judgment by court strangely the costs of the head suit were awarded to the 1st Respondent/ 1st Defendant with the exact words of the court being **“I would award costs of this suit to the 1st Defendant in any event”** yet according to the second Applicant on the information of his counsel, a one Maiteki, he was informed that indeed the Second Respondent could not have been entitled to costs as against the Applicants for the Applicants were the ones had won the head suit on all issues framed before court meaning that there could have been a mistake, an error or a slip of the type in the awarding of the costs to the

losing party with in that since the said judgment was a follow up on an injunction earlier issued against the Respondents restraining them and their servants from evicting the Applicants from suit property comprising Kyadondo Block 210 plot 492 Kampala which was the subject of the head suit which in itself was granted with costs to be in the cause therefore when a careful reading of the judgment in the head suit is done it would be seen that the resulting costs should have followed the events with usually the winning party also securing costs.

That since the Applicants won all issues in the head suit there was no justification for the court then to turn around to award the First Respondent with the costs of the head suit against the Applicants yet the court itself had found that the Respondents were culpable on all issues framed making the Applicants believe that the award of costs to the First Respondent was in error and had therefore prejudiced the interests of the Applicants with the result that a miscarriage of justice had occurred for the decreed costs was for all intent and purpose equal to the amount which was in the first place in contention between the parties in the head suit yet the head suit was found in the favour of the Applicants.

Mr. Haguma for the Respondents opposed to this the Application. He argued that it lacked merits in that if the affidavit of Mr. John Karegyeya which is in its support is considered it would be found that the applicants were challenging the issue of costs as being an error on the face of record in the head suit which costs was granted to the First Respondent and not to the second Respondent yet the Respondents believed that there was indeed no error at all on the face of record and thus were the Applicant wishing to challenge anything in regards to the head suit then their only option would be to appeal the decision of the court in the head suit for what was being deposed by deponent in support of this application was on a point of substantive law and nothing else. In making this submissions the respondents relied on the case of **Nyamugogo and Nyamugogo Advocates v Kogo [2001]1 EA. 173** where it was held that there was a real distinction between an erroneous decision and error on the face of record which appealable and that a point which may be a good ground for appeal may be a ground not for review and thus if this authority is taken into account it would be found that this Application is misconceived and should be dismissed forthwith as it was on a wrong forum.

As to the issue of costs following the event, Mr. Haguma for the respondents submitted that it was the Applicants who were found culpable in the head suit by the court since they were

directed by the court to service the loan facility which they had even ever since failed to do so to date and thus cannot be stated to be the winning party for the Respondents were the winning parties.

In rejoinder, Mr. Senkeezi for the Applicants rejoined that this Application was merely challenging the award of costs to the Second Respondent and thus was properly before this court for review since the Applicants then were the Plaintiff were the winning party in the head suit and thus should have been granted the costs with the case of **Nyamugogo (Supra)** apparently supporting their cause as the Applicants feels that the orders on costs was apparently was made in error and that this was what informed the Applicants' decision to file this Application for review.

Further, it was submitted that this court had earlier issued a temporary injunction against the Respondents with the costs of that ordered to be in the cause and thus subsequently when the head suit was concluded it was in their favour and as usual the winning party was entitled to the costs since the underlying factor in the head suit was a sale by the First Respondent to the Second Respondent of a mortgaged property which the court did not uphold with the court faulting the First Respondent for entering into the sale of the mortgaged property yet at the same time it had already put in place such arrangement by which the mortgaged property was to be redeemed by the Applicants making it very clear that the First Respondent was culpable and thus should have met the costs of the head suit and since the contrary was on record, it meant that indeed there was an error apparent on the face of the record which the court should review by granting this Application accordingly.

Resolution:

I have carefully considered the submissions of the parties in this matter. From the records in the head suit, it is indeed observable that this honourable court faulted the First Respondent on all issues having found that it had gone into an arrangement for which would enable the Applicants redeem their mortgaged property after setting in placed a mechanism for paying off their loan obligation but turned around to purportedly sell of the mortgaged property to the Second Respondent without first engaging the correct procedures for such acts and thus was the one to bear the costs in the head suit not otherwise.

That being the case, it is the finding of this court that this application has merits for indeed First Respondent was held liable for purporting to sell unlawfully a mortgaged property while at the same time it had made fresh arrangements with the Applicants for the redemption of the mortgaged property within meaning of the holding in the case of **Global Trust Bank v Francis Mugisha HCCS No.05 of 2012** with its very act extinguishing any other procedural consequences until the performance or not of agreed position meaning that its only option was to continue with that process until the mortgaged property is either foreclosed by virtue of **Order 37 Rule 4 of the Civil Procedure Rules** through an originating summons by a judge in chambers where such relief as may be warranted in the circumstances would be granted and not otherwise but was found to have flouted the rules of procedures and that being so could not have been granted the costs in the head suit and indeed any was awarded to it that was clearly done in error which would require correction for as was pointed by Kiryabwire J (as he then was) in the case of **Commercial Microfinance Ltd v Davis Edgar Kayondo HCCS No 12 of 2006** where money is lent on the security of land then the lender gets nothing more than that security and where a lender wishes to foreclose a mortgage property then its only remedy would be to sue the borrower in order to get such specific orders of foreclosure and this court having adopted the rationale in that case could not have again turned around grant the First Respondent with costs in the head suit when it was the one which was in default. Therefore, it that was so then the record indeed contained an error which ought to be corrected accordingly for such a mistake was not in synch with the findings of the court.

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In the premises therefore, I find that this application has merits and is granted with the mistake on the court record in the head suit of **High Court Civil Suit No 46 of 2014** corrected as follows;

“c. For avoidance of doubt I would the award costs of this suit against the First Defendant accordingly”.

As for the costs of this application each party will bear own costs for the mistake which was pointed out to be in the court record was not occasioned by either party but by the court itself.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

10TH NOVEMBER, 2015