

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)**

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**MISCELLENOUS APPLICATION NO. 43 OF 2015**

**ANDREW KAGGWA KKULUMBA ..... APPLICANT**

10

**VERSUS**

**BARCLAYS BANK (U) LTD ..... RESPONDENT**

15

**BEFORE: LADY JUSTICE FLAVIA SENOGA ANGLIN**

**RULING**

20 This application was made under S.98 CPA, 044, 0.46 and 0.52 r 1 C.P.R, seeking orders of this court reviewing the orders made in Originating Summons No. 06/2011, on the ground that it affects the Applicant's lawful possession and legal interest in LRV 3547, Folio 2, Plot 4134, Block 27 land at Masajja.

25 Alternatively but without prejudice to the foregoing, that orders staying execution of the order made in the said Originating Summons No. 06/2011, be made pending the outcome of HCCS No. 506/2014 for cancellation of title forged by JW Musiwani pending before the High Court Land Division.

30 Costs of the application be in the cause or abide the outcome of HCCS 506/2014.

The application was supported by the affidavit of the Applicant which was relied upon at the hearing. The brief grounds for the application are set out in the motion and I do not find it necessary to reproduce them here.

35 The Application was called for hearing on 19.08.15, and the matter proceeded exparte on the ground that Counsel for the Respondent was absent although there was evidence that he had been notified of the hearing, as per the affidavit of service dated 18.08.15. Counsel for the Applicant was directed to file written submissions.

40 Later, it was discovered that an affidavit in reply had been filed by Counsel for the Respondent on the same date that hearing proceeded exparte.  
It will accordingly be taken into account in determining the application.

45 Counsel for the Respondent also brought to the notice of court on 10.08.15, the case of Mohammed Alibhai vs. W.E Bukenya Mukasa and the Departed Asians Property Custodian

Board SC C.A 56/1996 – the case concerns review of party not to the original proceedings before the High Court.

5 Counsel also consented to Counsel for the Applicant’s filing an affidavit in rejoinder to the affidavit in reply. The affidavit in rejoinder was filed on 12.08.15.

The following issues were framed for determination:-

- 10 **1) Whether this court has power to review its decision.**
- 2) Whether the decision in Originating Summons 06/2011 should be reviewed.**
- 15 **3) Whether execution of the order in Originating Summons 06/2011 should be stayed pending the outcome of HCCS 506/2014, IN THE Land Division.**
- 4) What remedies is the Applicant entitled to.**

The issues 1 and 2 will be dealt with together.

- 20 **Whether court has power to review its own decision, and whether the decision in Originating Summons No. 06/2011, should be reviewed.**

Counsel for the Applicant relied on S.98 of eth CPA. The section empowers court to make any orders necessary for the ends of justice or to prevent abuse of the process of court.

25 He also cited S.82 CPA which allows any party aggrieved by an order from which an appeal is allowed but from which no appeal has been preferred to apply for review of the judgment of the court which passed the decree.

30 The case of **Edison Kanyabweru vs. Pastori Tumwebaze \_\_ SCCA 6/2004 and 0.46 rr1 and 2 C.P.R.** where relied upon for who can apply for review and the grounds for court to exercise its jurisdiction to review.

It was then submitted that the Applicant had proved in his affidavit in support that there was an error or mistake apparent on the face of the record as the court believed that the property was in possession of someone else other than the Applicant. Therefore review as justified.

35 The Respondent opposed the application relying on the affidavit in reply, contending among other things that the order for vacant possession was obtained against the proprietor of the suit property who is Joshua Wilber Musiwani. And that there is no new evidence that was overlooked by court and therefore there is no valid ground for review. The application was attacked as an attempt by the Applicant to deny the Respondent to recover under the foreclosure proceedings.

The case of **Mohammed Alibhai vs. W.E. Bukenya Mukasa and Another (Supra)** was relied upon to argue that ***“the applicant not having been a party to the original proceedings which resulted in the order sought to be reviewed had no locus to present the application and further that the applicant had not made out a case for review of the orders.”***

- 5 S.98 CPA empowers court to make any orders necessary for the ends of justice or to prevent abuse of the process of court. While S.82 CPA and 46 (1) C.P.R empowers any party who satisfies the conditions set out there under to apply for review.

Therefore court has powers under those provisions to review its own judgment / orders.

- 10 What is left for court to determine is **whether the Applicant had locus to present the application** and also **whether he has made out a case for review.**

Under 0.46 (1) C.P.R and S.82 CPA review can be sought by ***“any person considering himself / herself aggrieved by a) a decree or order from which an appeal is allowed but from which not appeal has been preferred, .... Or***

- 15 The Applicant in the present matter was not a party to the proceedings which he seeks to have reviewed. However, he is an aggrieved party in that he claims that his family is in possession of the property sought to be sold by the Respondent and that the property was fraudulently transferred into the names of the Judgment Debtor.

- 20 The Applicant has locus standi to make the application since decided cases have established that ***“the right to apply is not restricted to parties but is available to any person considering himself aggrieved.”***.. Refer to **Adonia vs. Mutekanga [1970] EA 429** cited in the case of **Muhammed Alibhai vs. Bukenya Mukasa and Departed Asians Property Custodian Board (Supra)**.

But since the order sought to be reviewed was not made against the Applicant, he has to prove any one of the grounds required for review of a judgment or order.

- 25 The situations where court can exercise its jurisdiction to review are provided for under 0.46 (1) C.P.R, S.82 CPA and have been confirmed by decided cases.

The situations include ***“discovery of new and important matter of evidence or mistake or error apparent on the face of eth record, or other sufficient reason.”***

- 30 ***“Error apparent on the face of the record”*** has been defined as ***“an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record. This may be one of fact, but it is not limited to matter of fact and includes also error of law.”*** – See **Edison Kanyabweru vs. Pastori Tumwebaze (Supra)**.

The Applicant in the present case claims that there is an error apparent on the face of the record in court's ruling, he seeks to be reviewed. The court held in the Originating Summons that ***"the Applicant Bank is entitled to receive possession of the premises from the mortgagor and the principal debtor."***

- 5 It is the contention of the Applicant that, the above ruling was contrary to the earlier ruling of the same court in **HCCMA 155/2012 – Etrance Saaid – Objector vs. Barclays Bank of Uganda**. Where court had ruled that ***"the Objector said to be in possession remains in possession of the property until otherwise directed by court."*** The Objector in that case is the wife of the Applicant in the present case.
- 10 Be that as it may, this court finds that there was no error or mistake apparent on the face of the record as Applicant's Counsel would want court to believe.

The Applicant admits in paragraph (i) of his affidavit in support that the land in issue comprised in LRV 33547, Folio 15 is in the names of Joshua Wilber Musimani and it is liable for sale as it was mortgaged. While the Applicant filed HCCS 506/2014, seeking cancellation of Musimani's  
15 title, the suit is not yet disposed of, although court is made to understand that it has been fixed for hearing. The property, the subject matter of eth suit has not yet been vested to the Applicant.

For all intents and purpose, a certificate of title is conclusive evidence of ownership. Therefore this court cannot be said to have made an error by directing that the Respondent gets vacant possession from the party in whose names the property is currently registered and who  
20 mortgaged it to the Respondent Bank.

The order was not made against the Applicant and it cannot prevent him from continuing with the process to recover the land. If the order is reviewed, it might preempt the decision of the court where the Applicant filed Civil Suit 506/14.

This court therefore finds that, the Applicant has not made out a case for review of the order  
25 made in the Originating Summons.

In the circumstances, I will proceed to determine **whether stay of execution can be granted pending the outcome of HCCS 506/14 in the Land Division.**

In making the alternative prayer for stay, Counsel for the Applicant relied upon S.98 of the CPA and S.33 of eth Judicature Act.

- 30 S.98 CPA empowers court to make such orders as maybe necessary for the ends of justice, and to prevent abuse of the process of court. While S.33 of the Judicature Act enjoins the High Court in exercise of its jurisdiction granted by law to ***"grant absolutely or on such terms and 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 brought before it, so that as far as possible, all matter in***

***controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matter avoided.”***

5 It was the submission of Counsel for the Applicant that, the Applicant stands to lose his property without being given a chance to be heard if execution is not stayed to give the Applicant to dispose of the civil suit before the Land Division.

10 He argued that, the rules of natural justice require the suit to be stayed and that this will prevent a multiplicity of suits while preserving the status quo. The case of **National Enterprise Corporation vs. Mukisa Foods HCMA 07/1998** cited with approval in HCCA NO. 62/12 **Commissioner Customs Uganda Revenue Authority vs. Kayumika Emile Ogave** was relied upon.

It was held in that case that ***“the court has power in its discretion to grant stay of execution where it appears to be equitable to do so with view of the party preserving the status quo.”***

15 Counsel for the Applicant then prayed court to stay the order in Originating Summons 06/2011 pending disposal of HCCS 506/2014 dealing with the true ownership of the property; otherwise the same would be rendered nugatory.

20 After giving the submissions of Counsel the best consideration, I can in the circumstances, court finds that it would have been preferable for the Applicant to apply for stay in the court where Civil Suit No. 506/2014, pending. However, the record indicates that there is an interim order of stay in respect of the same property vide civil suit No. 155/2012 filed by the wife of the Applicant against the current Respondent.

This court has been reliably informed that the two suits have been consolidated and are actually fixed for hearing on 18.08.16, in the Land Division.

25 Secondly, it is trite law that where fraud is alleged, the party alleging it ought to be given an opportunity to try and prove it. Since the Applicant before is alleging that the title to the property in issue was fraudulently changed into the Judgment Debtor’s name, it is only proper and just that a stay be granted to give the Applicant a chance to try and prove the fraud in civil suit 506/2014.

30 The application for stay is allowed on those grounds. The costs of the application are granted to the Respondent.

**FLAVIA SENOGA ANGLIN  
JUDGE**

**5 18.08.16**