

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

**MISCELLANEOUS APPLICATION NO 468 OF 2015**

**[ARISING FROM CIVIL SUIT NO 11 OF 2010]**

**CROWN CONVERTERS LTD}..... APPLICANT**

**VERSUS**

**1. HANS ANDERSSON PAPER}**

**2. PONDEROSA LOGISTICS LTD} .....RESPONDENTS**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**RULING**

The Applicant brought this application under the provisions of section 33 of the Judicature Act, sections 82 and 98 of the Civil Procedure Act as well as Order 46 rules 1 and 8 of the Civil Procedure Rules for the following orders:

1. An Order setting aside or review of the judgment against the Applicants delivered on 4<sup>th</sup> December, 2012.
2. An order allowing the Applicant to defend itself by adducing its evidence.
3. An order that Aniket Patel is added as a Defendant and or third party to the suit.
4. An order that Aniket Patel furnishes all documents in respect of the transaction of the alleged supplied goods.
5. Costs of the application are provided for.

The grounds of the application are contained in the affidavit of Mr Gopal D. Patel, one of the directors of the Applicant. The grounds contained in the notice of motion are that:

Firstly the Applicant was never served with summons to file a defence in the suit. Secondly, Mr Terrence Kavuma who purportedly represented the Applicant was never instructed by the Applicant to represent it in Civil Suit Number 11 of 2010. Thirdly, the Applicant was not given an opportunity to adduce evidence to defend itself to prove that he did not receive any goods alleged in the suit. Fourthly, the Applicant did not order receive any of the goods alleged in the suit. Fifthly, the Applicant also learnt that one Aniket Patel who was the Managing Director then was transacting in his individual capacity with the Respondent and other clients and in the disguise of the Applicant. Sixthly, if there were any transactions in respect of the disputed goods, then it is Mr Aniket Patel who transacted with the Respondent in his individual capacity which transactions he is personally liable for. Seventhly, that Mr Aniket Patel did not have any authority from the Applicant to order for the alleged goods. Lastly, it is averred that it is just and equitable that the application is allowed.

In the affidavit in support of the application Mr Gopal D Patel deposes that the Respondent filed civil suit number 11 of 2012 against the Applicant for recovery of a liquidated amount of US\$347,317.26 and US\$18,500 respectively. Summonses were never served on the Applicant or any persons with authority to receive the summons.

He learnt from a newspaper advertisement where the Applicant was being served by substituted service of an application for taxation hearing notices in the High Court. On behalf of the Applicant he instructed his lawyers to follow up the matter and it was informed that there was a judgment entered against the Applicant whereupon an application for taxation of the bill of costs had been filed. From the record of proceedings and subsequent judgment he learnt that Counsel Terrence Kavuma represented the Applicant throughout the trial. However, he maintains that the Applicant never instructed Mr Terrence Kavuma or any advocate and they did not have any discussions on the merits of the case with the said advocate to enable him adequately represent the Applicant. He also learnt that Mr Terrence Kavuma did not call any witnesses from the Applicant Company and proceeded to defend it as if there were no persons with authority in the Applicant Company. It followed that the Applicant did not have opportunity to adduce evidence in its defence by way of material, documentary or oral evidence. The Applicant intends to launch a complaint with the law Council against Mr Terrence Kavuma for purportedly representing the

Applicants without instructions. The Applicant and that one Aniket Patel who was at one time the managing director of the Applicant individually transacted with the Respondents under the disguise of the Applicant. He contends that if there was any transaction in respect of the alleged goods and its transportation, it was never ordered by the Applicant but by one Aniket Patel is an individual and it did so in his individual capacity. Furthermore the Applicant did not have the capacity to convert the quantity of paper purportedly supplied to it. There was no explanation by the Respondents on what basis they gave credit to the Applicant contrary the clear policy of the letter of credit from a reputable bank. The Applicant did not instruct the second Respondent to transport for it the alleged the goods.

Furthermore, he deposed to on the basis of information from his advocates that he believes that this court has inherent powers to review the judgment and set it aside or issue orders to meet the ends of justice. Secondly, that it is just and equitable that the application is allowed and judgment against the Applicant is set aside so that the Applicant can defend itself and add Mr Aniket Patel as a third-party.

In the reply Faisal Mukasa, an advocate of the High Court of Uganda practising in the name and style of Messieurs Fides Legal Advocates affirmed an affidavit pursuant to having read the Applicants application plus the supporting affidavits. The facts in the deposition are that on 14<sup>th</sup> January, 2010 his firm on behalf of the first Respondent and later on behalf of the second Respondent instituted civil suit number 11 of 2010 against the Applicant for recovery of various sums due to the first Respondent and he personally participated as Counsel for the Respondents. On 14<sup>th</sup> January, 2010 his firm extracted summons from the court and it was duly served upon the Applicant's employees/agents who duly acknowledged receipt of summons. It was therefore false to assert that the Applicant was never served with summons in the main suit. For the Applicant's lawyers Messieurs Muwema & Mugerwa advocates, the Applicant responded to the summons and filed a written statement of defence to that effect on 29<sup>th</sup> January, 2010. The affidavit of Mr Gopal is false because the additional report of any allegations against Counsel Terrence Kavuma before the Law Council. Right from the commencement of proceedings the Applicant was always duly represented by Counsels, its own officials and the court record clearly reflects this.

The court held that there was overwhelming evidence adduced to support the Plaintiff's case and the Respondent proved their respective claims against the Applicants. There are various correspondences between the Applicant's officials and the Respondents wherein the Applicant on various occasions admitted to being indebted to the Respondents for the sums claimed in the suit and the correspondence was admitted in evidence. The evidence adduced was sufficient to reach the conclusion that the Respondents supplied the alleged goods to the Applicants whose receipt was duly acknowledged by officials of the Applicant's Company. From the available records, there was never a time when the Respondents dealt with the Applicants officials in their personal capacities but only dealt with them as agents of the Applicant. The Applicant company directors and officials who dealt with the Respondents were duly seized with authority to do so and held out by the company as having such authority and to the satisfaction of the innocent Respondents who are mere third parties to the company's internal management. The Applicant's statement of accounts tendered in evidence clearly defrayed the Applicant's company indebtedness to the Respondent by which Mr Gopal as a director ought to have been notified of the suit sale transactions between the company and the Respondents and for which he is precluded from pleading ignorance of the suit sums.

The Applicant's prayer to have Mr Aniket Patel added as a co-Defendant for years after the conclusion of the suit is not only dilatory but an object abuse of due process calculated at obstructing the successful Respondents from realising the long overdue fruits of their judgment. The issue of whether the Respondent did not deliver the goods to the Applicant was the only issue pursued by the Applicant in the written statement of defence, cross examination and submissions and it was found in favour of the Respondents by the court.

The Applicant has fraudulently and in a bid to put its assets away from the Respondents and to delay justice, transferred its business, assets and employees to a new company called Crown Paper Ltd trading at the same address as the Applicant and in the same business and employing the same persons including Mr Krishna. The incorporation of the new company is intended to defeat the creditors such as the Plaintiff. Finally, because that the application does not raise any grounds for review, or demonstrate that there was discovery of new evidence that was not

available to the Applicant at the trial nor does it demonstrate an error apparent on the face of the record.

In a supplementary affidavit in reply Mwesigwa Richard, the court process server and a clerk working with Fides Legal Advocates, deposed to an affidavit containing the following facts: On 14<sup>th</sup> January, 2010, he received the summons and plaint in respect of civil suit number 11 of 2010 from the registry of the High Court commercial division for service upon the Applicant was the Defendant. On 19<sup>th</sup> January, 2010 he proceeded to the Applicant's factory which he knows is located at plot 35/36, Bombo road Kawempe, Kampala for service of the summons on the Applicant. Upon arrival to the factory he introduced himself and the purpose of his visit to the Applicant's receptionist named Ms Eunice who after consultation with her seniors in the company acknowledged receipt of the summons by appending her signature and returning the duplicate copy to the deponent. In the premises, he deposed that the affidavit of Mr Gopal is false as far as he personally effected service of the suit summons upon the Applicant.

In rejoinder Mr. Gopal D Patel affirmed another affidavit in which he deposed as follows: Eunice has never been a receptionist or an employee of the Applicant and she never consulted any of the persons with authority to receive documents on behalf of the Applicant and could not have acted on behalf of the Applicant. Secondly there was no official or other person from the Applicant's office that ever appeared in court in respect of the suit. On the basis of information from his advocates Messieurs R MacKay advocates, the perusal of the record shows that no representative of the Applicant Company appeared as alleged by Mr Faisal Mukasa. Furthermore, the court reached its decision in favour of the Respondent due to the circumstances where the Applicant never had an opportunity to be heard or to adduce its evidence to rebut the allegations of the Respondents. Furthermore, it is not true that the Respondents supplied the Applicant with goods alleged as the Applicants did not receive the said goods. The Applicant discovered that the Respondent and one Aniket Patel connived to claim that there was such a transaction in order to defraud the Applicant. It was the Applicants policy that the goods supplied to it was always against letters of credit from a reputable bank or a personal guarantee to the effect that the same would be paid personally by the person guaranteeing the supply of goods. The first Respondent was fully aware of this policy is because on previous occasions it had

transacted with the Applicant on the basis of letters of credit from the bank of Baroda. Furthermore, the Applicant learnt that one Aniket Patel had incorporated a company in the name and style of MAFUCO (U) Ltd which company he would be used to transact with third parties including the Respondents and would in turn transfer the liability onto the Applicant. Aniket Patel on several occasions dealt with SPEDAG East Africa through the said company and fraudulently invoiced the Applicant which fraud was discovered and the goods were delivered to MAFUCO (U) Ltd despite reminders according to correspondence attached as annexure "B". The second Respondent and one Aniket Patel on several occasions defrauded the Applicant by over invoicing the Applicant and later on overcharging the invoice according to annexure "C". It would be just and equitable to add Mr Aniket Patel as a party to enable the court determine all matters in controversy relating to the alleged delivery of goods so as to avoid a multiplicity of suits. The Applicant never transferred its business assets and employees to a new company called Crown Paper Ltd or incorporated in new company and the said company is different from the Applicant.

Before filing the action Messieurs Muwema & Mugerwa advocates were the Applicants advocates and withdrew from representing the Applicant and were never again instructed to represent the Applicant according to a copy of the withdrawal annexure "D".

In a further supplementary affidavit filed on court record on 23<sup>rd</sup> February 2016 Mr Gopal D Patel attached to the record of proceedings for his assertions that no representative of the Applicant appeared in court during the proceedings. Secondly he reiterated earlier information that the Applicant never instructed Mr Kavuma Terrence to defend the civil suit because at that time Messieurs Muwema & Mugerwa advocates had withdrawn from representing the Applicant in all cases according to a copy of the letter of withdrawal annexure "B". He further deposes that the second Respondent was transacting with one Aniket Patel in his personal capacity and not the Applicant as payment was made by Aniket Patel who his personal account as opposed to the company policy of dealing through a reputable bank. Lastly, it shows that Mr Aniket Patel is currently charged at the anticorruption court for fraudulent actions committed by him while he was managing the Applicant Company according to the charge sheet annexure "E".

The Applicant is represented by Counsel Ojok Geoffrey Odur while the Respondent is represented by Counsel Wabwire Anthony. The court was addressed in written submissions.

The Applicant's Counsel addressed the following issues;

1. Whether there are sufficient grounds for Court to review and or set aside the judgment.
2. Whether Aniket Patel can be added as a party to the suit.
3. What are the available remedies to the parties?

In resolution of Issue 1 on whether there are sufficient grounds for Court to review and or set aside the judgment, the Applicant's Counsel relies on section 82 of the Civil Procedure Act which deals with review of a decree or order on the application of a person considering himself or herself aggrieved by the decree or order. Furthermore an application for review is made under Order 46 rule 1 of the Civil Procedure Rules. An aggrieved person can apply for review upon the discovery of a new and important matter of evidence previously over looked by excusable misfortune or where there is a mistake or error apparent on the face of the record. Thirdly an aggrieved person can apply for review for any other sufficient reason.

With regard to the ground of 'any other sufficient reason', the Applicant's Counsel submitted that there is need to establish whether the Applicant is an aggrieved party as provided for under the law. In the case of *Ladak Abdallah Mohammed vs. Insingoma Kakiiza Civil Appeal No. 8 of 1995* it was held that an aggrieved party means a person who has suffered a legal grievance.

In the circumstances of this suit the Applicant's Counsel submitted that judgment had been passed against the Applicant and the claim directly affects it. In the premises, the Applicant is an aggrieved party and the affidavit in support of the application, the supplementary affidavit and affidavit in rejoinder all prove that the Applicant has sufficient reason to warrant review of the decision. The sufficient reason includes the fact that the Applicant was never served with court summons. Secondly, it did not instruct Terrence Kavuma to represent it and defend it. Thirdly the Applicant did not have an opportunity to defend itself. Fourthly, the Applicant is not indebted to the Respondents and there was collusion between Aniket Patel and the Respondents to defraud the Applicant. Sufficient reason has been held to include mistake of Counsel, illness and

ignorance of procedures in the case of **Philip Ongom versus Catherine Nyero Owoto, Civil Appeal No. 14 of 2001.**

The Applicant's Counsel further addressed the court on the question of service of summons and submitted that the Respondent's Counsel claims that summons were served at the Applicant's premises and it was duly received which begs the question as to why the same process was not used to serve taxation notices instead of serving through the newspaper yet it was confirmed in the cross examination of Mr. Gopal that the offices still exist in that known place.

Secondly, with regard to Mr. Kavuma Terrence being clothed with instructions, Counsel submitted that the record shows that Mr. Kavuma Terrance was given the file by Mr. Kigundu on the 2<sup>nd</sup> March, 2011 and when asked by court whether he had instructions on 15<sup>th</sup> March, 2011 but he did not give an answer and throughout the trial he would say he wanted to consult on whether he still had instructions and Mr. Kavuma did not indicate that he had consulted anyone from the Applicant company. In the case of **Hon. Charles Bakkabulindi versus The Uganda League Limited, Constitutional Application No. 64 of 2014**, Hon. Justice Geoffrey Kiryabwire J.A held that failure to consult with a lawyer leading to a contempt order against a client who has a defence to the allegation is sufficient reason for court to review its order.

The Applicant's Counsel submitted that because the said advocates did not consult with the client and therefore did not have instructions to represent the client, they jeopardized the client rights to defend itself as there was no witness called in defence before the court decided the case. The Applicant deponed that they have a defence based on fraud on the part of the Respondents and Aniket Patel. All the above constitute sufficient cause to warrant a review of the decision and to setting it aside.

In reply the Respondent's Counsel agreed with the issues as framed and submitted that there is no new or important matter of evidence that was not brought to the Court's attention during the trial and hearing of HCCS No. 11 of 2010. Secondly, there is no error or mistake apparent on the face of the record that ought to be rectified in this case. As far as any other sufficient cause is concerned the affirmation in reply shows that the Applicant was served with the summons on 19<sup>th</sup> January, 2011 receipt of which was acknowledged by one of the Applicant's employees



which is also corroborated by the filing of a written statement of defence filed on 29<sup>th</sup> January, 2010.

Counsel relied on Order 29 rule 2 (b) of the Civil Procedure Rules which provides that subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office, then at the place where the corporation carries on business. He submitted that Mr. Gopal admitted in cross examination that the Applicant's physical address is Plot 35/36 Bombo Road and that's where the company carries out its business and that at the time of service he was there and the summons were acknowledged and therefore the Applicant's allegation of want of service of summons is a falsehood.

With regard to the allegation that Mr. Kavuma Terence did not have instructions, Counsel submitted that the record of proceedings of 01/03/2011 shows that Mr. Kavuma sought an adjournment to the proceedings to enable him appreciate the file having inherited the same recently from his predecessor Counsel Kiggundu who also belonged to the same law firm as Mr. Kavuma which law firm is Messrs Muwema, Mugerwa and Co advocates. The Applicant does not dispute the fact and as admitted by Mr. Gopal in cross examination that the said firm acted as the company secretary of the Applicant. The allegation that Counsel Terence Kavuma acted without instructions does not present sufficient cause to invalidate the said proceedings.

On the issue of alleged fraud by the Respondents and Aniket Patel, the Respondent's Counsel submitted that those allegations are unfounded and equally superfluous and for the Applicant to succeed, it must prove that there is a new matter of evidence that it could not adduce at the trial upon exercise of due diligence. In the premises, the Applicant was duly served with the summons and duly represented in the case and has not proved any new evidence to warrant late tendering in court and the allegations of fraud are only internal affairs of the Applicant company which do not affect third parties.

The Applicant has not proved any error apparent on the face of the record in evaluation of evidence and application of legal principles in HCCS No. 11 of 2010 to warrant a review of the judgment arising there from.

In rejoinder, Counsel for the Applicant submitted that S.33 of the Judicature Act empowers this court to grant absolutely or on such terms as it thinks fit all such remedies so that all matters in controversy brought before it are completely determined to avoid multiplicities of legal proceedings concerning any of those matters before it. The Applicant never had the opportunity to adduce evidence before court to defend itself and yet the evidence was readily available but the Applicant was not aware of the proceedings that's why it did not attend any proceedings and the allegation in the affirmation of Mr. Faisal that the officials of the Applicant duly represented it on the record is false. The Applicant also told court in cross examination that much as Muwema & Mugerwa Co. Advocates were its lawyers, the said advocates withdrew from representing them by 1<sup>st</sup> March, 2011 when this hearing begun which court was aware of as it was the reason Mr. Kiggundu had withdrawn from the case and is the reason the taxation notice was advertised in the newspapers. Because Mr. Kavuma did not inform the court about whether he had instructions, the court just assumed he had instructions. With reference to section 74 (1) a) of the Advocates Act, it is provided that an advocate shall not take instructions in any case except from the party on whose behalf he or she is retained or some person who is the recognized agent of that party. As such Mr. Kavuma acted illegally which illegality court should not condone as held in **Makula International vs. Cardinal Emmanuel Nsubuga (1982) HCB 11.**

The alleged fraudulent dealings cannot be said to be an internal affair of the Applicant as the Respondents dealt with one Aniket Patel in his personal capacity and in certain cases inflated prices to cheat the company. Golding Simon in Company Law 2<sup>nd</sup> Edition page 116 explains that the courts will lift the veil to prevent the use of a registered company for fraudulent purposes or for evading a contractual obligation or liability. In the premises, he prayed that court finds this as one of the reasons warranting lifting of the veil which constitutes sufficient cause to warrant review and setting aside of the judgment.

Furthermore, the Applicant's Counsel submitted that the Applicant only chose to rely on the ground of sufficient cause because that ground gives court a wide discretion than the rest and the mere fact that one relies on it does not mean that other circumstances disclosing other grounds of review do not exist. The Applicant adduced sufficient evidence to satisfy that ground to persuade court to review its decision.

With regard to service of summons, Counsel in rejoinder submitted that the employee called Eunice who allegedly received court process for the Applicant has never been part of the Applicant Company and the summons purported to have been served does not bear the stamp of the company to show that it was received or left at their premises.

On the question of whether Aniket Patel can be added as a party to the suit, Counsel for the Applicant submitted that upon reviewing and setting aside the judgment Aniket Patel should be added as a party to the suit as the supplementary affidavit and affidavit in rejoinder show personal dealings with the Respondents which actions he is personally liable for and since Order 1 rule 13 of Civil Procedure Rules allows the court to add a party to a suit.

In reply the Respondent's Counsel submitted that this application is misconceived and incompetent because under Order 1 rule 13 a party can only be added before trial or at the trial of the case and HCCS No. 11 of 2010 is far beyond any of these stages as trial was completed on 4<sup>th</sup> December, 2012 when judgment was given and the Applicant has not demonstrated how necessary the joiner of the said party would be or would have been in the adjudication of the issues in HCCS No. 11 of 2010 and prayed that the Application be dismissed.

In rejoinder, Counsel for the Applicant submitted that they are aware that a party can be added at a trial of the suit and if the court is persuaded and sets aside the judgment, the trial will commence and hence the need to add Aniket Patel as a party to ensure that all controversies are resolved. The Applicant has demonstrated that Aniket connived with the Respondents by fraudulently creating a company where all the proceeds claimed would be channelled and dealt with the Respondents contrary to the company policy. The court should investigate these allegations which can only be done with Aniket's involvement.

As far as remedies are concerned, Counsel for the Applicant submitted that the Applicant has satisfied the condition for review and prayed that court grants the orders sought.

On the other hand the Respondents Counsel prayed that the court be pleased to dismiss the application for not disclosing any ground for review and if the court is inclined to grant the application, it should invoke its powers under Section 98 of the CPA and Rule 6 of Order 46 and Order 43, rule 4 (3) by ordering the Applicant to deposit security for due performance of the

Decree in HCCS No. 11 of 2010. Counsel submitted that the Respondent's bill of costs in the case of HCCS No. 11 of 2010 was also taxed and allowed at Uganda shillings 22,518,811/= which also remains unpaid and continues to attract interest at a rate of 10% per annum. By filing this application the Respondents continue to incur further professional and other expenses.

He further submitted that much as the Applicant's address is registered as Plot 35/36 Bombo Road it was admitted by the Applicant's director that the address is shared by another company in the names of Crown Paper E.A Limited having similar employees and dealing in the same products which confusion prompted them to apply for substituted service of the taxation hearing notice on the Applicant and thus if the application is granted a stay of execution of the decree in HCCS No. 11 of 2010 shall inevitably and necessarily issue against the Respondents restraining them from realizing the fruits of their judgment until the disposal of suit. He invited the court to invoke its inherent jurisdiction and discretion to ensure against the abuse of due process and multiplicity of proceedings by ordering the Applicant to deposit in court the said decretal sum of USD 347,317.26 plus the taxed costs of Uganda shillings 22,518,811/= as security for due performance of the decree and costs be awarded to the Respondent.

In rejoinder, Counsel for the Applicant submitted that while the court can grant remedies under inherent powers subject to conditions it deems fit, ordering the Applicant to furnish security for due performance would cause hardship on the part of the Applicant for the claim they did not admit and that the facts being given by Respondents yet were not in evidence amount to giving evidence from the bar which is a trap and that sufficient evidence has been given to warrant court to grant the orders sought and allow the application with costs.

## **Ruling**

I have carefully considered the Applicant's application together with the affidavit evidence for and in opposition thereto as well as the written submissions of Counsels. The application was brought under section 82 of the Civil Procedure Act cap 71 Laws of Uganda and Order 46 rules 1 (1) of the Civil Procedure Rules. Section 82 provides that:

“82. Review.

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) 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 order, and the court may make such order on the decree or order as it thinks fit.”

The expression “any person considering himself or herself aggrieved” by a decree or order from which no appeal has been preferred, includes a person who is a party to the proceedings sought to be reviewed. It has also been held to extend to third parties considering themselves aggrieved. The expression “any person considering himself aggrieved” was considered in **Re: Nakivubo Chemists [1979] HCB 12** to mean a person who has suffered a legal grievance. The expression “legal grievance” was defined in **Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465** per James L.J and quoted by Lord Denning in **Attorney General of Gambia vs. N’jie [1961] AC 617 at 634**. The words “*person aggrieved*” “do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made but means a man who has suffered a legal grievance”. “It means a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title”. In **Attorney General of Gambia vs. N’jie [1961] AC 617 at 634** Denning L.J. further held that the definition of James L.J. is not to be regarded as exhaustive. “Lord Esher M. R. pointed out in *ex parte. Official Receiver in re Reed, Bowen & Company* that the words “*person aggrieved*” are of wide import and not subject to a restrictive interpretation. They do not include of course a mere busy body that is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”

The Applicant raises a fundamental question as to whether it was served with summons and participated in the proceedings as a Defendant. The Applicant is therefore alleging technically that it is a person aggrieved by an order made without its participation.

Secondly Order 46 rule 1 (1) of the Civil Procedure Rules was also cited and provides as follows:

Order 46 rule 1 (1) CPR

“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 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 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.”

The Applicant is a person considering himself or herself aggrieved by a decree from which an appeal has not been preferred. The grounds for review depend on whether a new and important matter of evidence has been discovered which with the exercise of due diligence was not within the knowledge of the Applicant or could not be produced when the suit was heard. Secondly, whether there is a mistake apparent on the face of the record or some other sufficient reason.

The Applicant’s application cannot rely on some discovery of new evidence because the gist of the Applicant’s case is that it was not heard because it was not served and the suit proceeded in its absence and it was not aware of the proceedings. It is therefore not a case where the Applicant produced some evidence and subsequently discovered some other important evidence which was not available to it when the decree was passed even with the exercise of due diligence. The Applicant’s application is also not about an error apparent on the face of the record. Lastly the question left is whether there is any other sufficient cause. If the Applicant was not served and

did not participate, it means that it could not have defended itself, let alone file a written statement of defence and adduce evidence in support thereof.

This application is peculiar by the mere fact that there is a written statement of defence and the Applicant was represented by Counsel in the proceedings. The task of the court in the premises is to investigate whether there is sufficient reason to review the judgment.

The word ‘review’ is not defined by the Civil Procedure Act. Chambers 21<sup>st</sup> Century Dictionary Revised Edition defines it as: “an act of examining, reviewing or revising, or a state of being examined, reviewed or revised...”

In my understanding of the term, a judgment will be reviewed if it rests on premises which include insufficient facts. Had the court had the full facts it would have reached a different conclusion. For instance where there is an error apparent on the face of the record, the correction of the error may lead to a different conclusion. The review of the judgment should proceed from the grounds that may lead to the court concluding that the judgment was flawed and needs to be reviewed.

The Applicant’s grounds however lead to the conclusion if accepted that the judgment should be set aside and a new trial conducted.

In the case of **Yusufu versus Nokrach {1971} EA 104** Phadke J at page 106 considered the expression in the rule “any other sufficient reason” following the interpretation of an Indian rule in pari materia with the Ugandan Order 46 rule 1 (1) of the Civil Procedure Rules. He held:

“Order 42, r. 1 (1), (revised 46 rule 1 (1)) Civil Procedure Rules is identical with O. 47, r. 1 (1) of the Indian Civil Procedure Rules, and the A.I.R. Commentaries on the Indian Code of Civil Procedure by Chitaley & Rao (4th Edn.) Vol. III are of much assistance in examining the scope and applicability of the rule.

Under the heading “any person aggrieved”, the authors say that a person aggrieved means a person who has suffered a legal grievance. I entirely agree with this interpretation. ... Under the heading “any other sufficient reason”, the authors refer to the decision of the Privy Council in Chhaju Ram v. Neki (1). The case gives the opinion of the Privy

Council upon the interpretation of the expression “any other sufficient reason”. I have studied the decision and I would summarise the observations made therein on this subject, as under:

(1) It is obvious that the code contemplates procedure by way of review by the court which has already given judgment as being different from that by way of appeal to a court of appeal.

(2) The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or “any other sufficient reason”. The expression “sufficient” would naturally be read as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure to bring to the notice of the court new and important matters, or error on the face of the record.

(3) Rule 1 of O. 47 must be read as in itself definitive of the limits within which review is permitted, and the expression “any other sufficient reason” is to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously.

...I do not agree with Mr. Munabi’s submission that the expression “any other sufficient reason” gives a discretion to the court to consider generally the merits of an application for review. If such a contention were to prevail every decree or order could be reopened for review on any ground whatsoever as if the application were an appeal. I entertain no doubt that a review is not the same thing as, or even a substitute for, an appeal. As observed by the Privy Council there are definite limits within which review is permitted. A point which may be a good ground of appeal may not be a good ground for review.”

From the above decision I can say that an application for review need not adduce grounds of appeal. Appeals are limited by time for purposes of lodgement. Secondly, an appeal proceeds from a challenge to an error in the judgment. A review of a judgment on the other hand deals with new matters not in evidence which have since the hearing been discovered. It deals with mistakes that are apparent on the face of the record so that the presiding judge to whom the



application is made has his or her mind drawn to an error which if it had been detected in time would have affected the outcome. The judge may also review for any other sufficient reason. The grounds advanced by the Applicant in this matter can only result in setting aside the judgment in its entirety. To do so, one does not need an order for review of the judgment but an application to set aside the judgment for reason that the Applicant's right to be heard was allegedly violated. The allegation is that the Applicant was not even aware of the suit. This is not a ground for review of a judgment but a basis for setting aside the proceedings and judgment in its entirety and allowing the Applicant to file a defence for the first time. It is analogous to giving leave to defend since it is alleged that the Applicant was never been part of the proceeding. In other words the application ought to have proceeded under Order 9 of the Civil Procedure Rules to set aside judgment or for an order of dismissal of the suit because to set aside the judgment does not do away with the pleading of the defence per se. If the Applicant was not heard, it means it never had a defence and therefore it ought to be served afresh with summons. It literally means proceedings took place in default of a defence and therefore the ex parte judgment may be set aside under Order 9 rule 12 of the Civil Procedure Rules. However, because the Defendant was represented by Counsel, the rules do not specifically deal with the situation because it is alleged that the lawyers were not duly instructed. The Applicant could therefore have moved under Order 9 rule 27 of the Civil Procedure rules to set aside an ex parte decree.

On the issue of whether Mr. Kavuma was an instructed lawyer, S. 74 (1) a) of the Advocates Act which provides that

‘An advocate shall not take instructions in any case except from the party on whose behalf he or she is retained or some person who is the recognized agent of that party.’

The Applicant therefore raises a very serious allegation against Messieurs Muwema & Mugerwa advocates for having participated on behalf of the Applicant who is the Defendant to High Court Civil Suit Number 11 of the 2010. It is an allegation that the said firm of advocates acted without instructions. The two allegations are intertwined in that if the Applicant was not served, then the Applicant could not have instructed advocates to file a written statement of defence and appear for it or the Defendant in the matter. Corollary to the issue is the contention of Mr Gopal D. Patel who is one of the directors of the Applicant that the Messieurs Muwema & Mugerwa Advocates

withdrew from representing the Applicant by the time the suit was filed. He conceded that the said advocates were the Company lawyers before this.

I have carefully considered this testimony in cross examination based on the affidavit of Mr Patel sworn to on 22<sup>nd</sup> of February 2016 and filed on court record on 23<sup>rd</sup> February 2016. He confirmed that annexure "B" is correct. Annexure "B" is a letter from M.B. Gimara Advocates Attorneys & Legal Consultants dated 12<sup>th</sup> of June 2014 written to the Registrar, High Court, Commercial Division, Kampala. It deals with the subject of HCCS 324 of 2011. In paragraph 3 thereof they wrote that:

"Though Messieurs Muwema and Mugerwa Advocates initially represented the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, the said Firm has since withdrawn from the conduct of the matter with the result that the said Defendants are not represented and their whereabouts remain unknown to us."

The Defendants in the cited suit number include Mr Gopal Patel, Mr Aniket Patel and Crown Converters Ltd. Mr Patel was cross examined on 22<sup>nd</sup> June 2016 on his affirmations in the affidavit to the effect that Mr Terrence Kavuma was not instructed by the Applicant to represent the Applicant in the suit. He was asked whether he was aware that Mr Terrence Kavuma worked for Muwema & Mugerwa Advocates and he testified that he was not aware. This presupposes as will later be seen that the Applicant had instructed Muwema & Mugerwa and Co Advocates on some matters. Secondly, that the said firm had represented the Applicant in a suit. He testified that originally Messieurs Muwema & Mugerwa Advocates represented the Applicant but later withdrew from the conduct of the matter in April 2011. The witness was no clear about which specific case, the said firm of advocates withdrew from. Did they withdraw from being company secretaries?

This suit was filed in January 2010. By the year 2011 Messrs Muwema and Mugerwa Advocates represented the Applicant in HCCS No. 324 of 2011 which had been instituted later in time and is a different suit from HCCS No. 11 of 2010. HCCS No. 324 was instituted after the Respondent had commenced HCCS No. 11 of 2010 in January 2010. Specifically summons in HCCS 11 of 2010 was issued on 14<sup>th</sup> January, 2010 and a written statement of defence of the Applicant was

filed on 29<sup>th</sup> January 2010. An amended WSD was filed on 15<sup>th</sup> June, 2011. An amended plaint had been filed on the 27<sup>th</sup> of May 2011.

The initial deposition of Mr Gopal Patel was that Mr Terrence Kavuma had not been instructed to represent the Applicant. He however agreed that Muwema & Mugerwa advocates had been instructed and instructions had been withdrawn in 2011. Later on in cross examination he testified that he did not know that Mr Terrence Kavuma worked with Messieurs Muwema & Mugerwa Advocates.

The question of whether the Defendant has been served or not is a fundamental question because it deals with the right to hearing. I have considered the contention that one Eunice who received the summons said to be served on the Applicant was not an employee of the Applicant. It is further alleged that there was collusion between the Plaintiff and one Aniket Patel a former director of the Applicant to have the claim transferred to the Applicant when it was a transaction between Aniket Patel and the Plaintiff.

My task is to deal with the question of fact as to whether the Defendant was served. A critical assessment of the situation leads to the conclusion that the question of whether one Eunice was an employee of the Applicant has been subsumed by a more critical question of whether the Applicant had instructed Messieurs Muwema & Mugerwa Advocates to file a written statement of defence pursuant to the service. This is because where the purpose of service has been met, no prejudice would have been occasioned to the Defendant who acted promptly and instructed Counsel to file a defence in time. This is because such an allegation for want of service is raised when the Defendant failed to file a defence and the matter proceeded in default of defence. In this case the Applicant on the face of the record filed a written statement of defence within the time prescribed in the summons on 29<sup>th</sup> of January, 2010. The matter then did not proceed in default of a defence. The supplementary affidavit in reply of Mwesigwa Richard, the court process server attached annexure "A" which is the endorsed summons showing that it had been acknowledged by one Eunice. Service was made on 19<sup>th</sup> January, 2010. Thereafter the Applicant filed a written statement of defence on 29<sup>th</sup> January, 2010 within the period prescribed in the summons. The written statement of defence was drawn and filed by Muwema & Mugerwa Advocates & Solicitors.

I have carefully taken note of paragraph 5 of the written statement of defence in which the said firm drafted the WSD that showed that most of the consignments the basis of the claim in the plaint were never delivered to the Defendant. Secondly, it is averred that the Defendant is not liable for the goods consigned to it but delivered to other third parties with the full knowledge and active participation of the Plaintiff. Subsequently the reply to the written statement of defence was received by Muwema & Mugerwa Advocates on 17<sup>th</sup> February, 2010. On 15<sup>th</sup> June 2011 again the said firm of Messieurs Muwema & Mugerwa Advocates filed an amended written statement of defence in which they emphasised that most of the consignment referred to the plaint was never delivered to the Defendant. Secondly, that the Defendant is not liable for the goods consigned to it but delivered to other third parties with the full knowledge and active participation of the Plaintiffs. Fourthly, that the Defendants paid the second Plaintiff/Respondent Messrs Ponderosa Logistics Ltd for the transport and clearing charges for the containers delivered to it. Lastly, that the Defendant is not liable to pay the second Plaintiff for transport and clearing charges for goods consigned to it but delivered to the other third parties with the full knowledge and active participation of the Plaintiff.

I have also studied the defence proposed by Mr Gopal Patel. In the affidavit in support of the notice of motion he deposes that he learnt about the suit in the newspaper advert where the Applicant was being served by substituted service of an application for taxation hearing. The taxation hearing notice was issued on the 11<sup>th</sup> of May 2015 about 2 ½ years after the judgment in December 2012. In paragraph 7 of the affidavit in support of the application he deposes that Mr Terrence Kavuma or any advocate were never instructed and did not have any discussion of the merits of the case to enable them to adequately represent the Applicant. The Applicant for some reason omitted to mention Messrs Muwema & Mugerwa Advocates. Secondly, the Applicant complains that Mr Terrence Kavuma did not call any witness from the Applicant Company and proceeded to defend it as if there were no persons with authority in the company/Applicant. The rest of the depositions give the facts alleged in the WSD that the goods were delivered to third parties. In the affidavit in rejoinder he deposes that the said Eunice who received summons had never been a receptionist or an employee of the Applicant. The other depositions deal with the fact that one Aniket Patel connived with the Respondent and purported to have goods delivered to the Applicant. This is exactly the import without mentioning names of what is pleaded in the

written statement of defence. It is averred in the written statement of defence that the goods consigned to the Applicant were actually delivered to third parties.

In the further supplementary affidavit and particularly in paragraph 6 thereof Mr Gopal Patel deposes as follows:

"That the Applicant never instructed Mr Kavuma Terrence to defend civil suit number 11 of 2010 as at the time Messieurs Muwema & Mugerwa Advocates had withdrawn from representing the Applicant in all cases. (A copy of letter showing that the said lawyers had withdrawn from representing the Applicant is herein attached and marked as Annexure B)."

The deponent was cross examined about this paragraph of his affidavit wherein he admitted that originally Muwema & Mugerwa Advocates represented Crown Converters Ltd but withdrew his services in April 2011. It further emerged that the Applicants ceased to do business in 2011. Mr Gopal Patel testified that the Applicant was taken over by Crown Papers EA Ltd. This is because Crown Converters Ltd ceased doing business and the premises were leased to Crown Paper EA Ltd. In re-examination he testified that the Applicant is in existence but does not do business.

The only conclusion I have reached is that Messieurs Muwema & Mugerwa advocates were instructed by somebody in the Applicant Company to file a written statement of defence irrespective of who received the summons. Moreover Mr Gopal Patel admitted that Muwema & Mugerwa advocates used to represent the Applicant until they withdrew their services in 2011. It is a revelation that it is Muwema & Mugerwa who withdrew their services generally rather than the Applicant withdrawing instructions. Yet Counsel Terrence Kavuma attended court and put up a spirited fight for the Applicant throughout the hearing. On the 12<sup>th</sup> of December 2011 Counsel Terrence Kavuma informed court that the MD of the Applicant was out of the country whereupon he sought an adjournment. He said the MD was out for health reasons. The suit was adjourned for hearing the defence case on the 5<sup>th</sup> of March 2012. On the 5<sup>th</sup> of March 2012 Counsel Terrence Kavuma was reported sick and an adjournment was granted to the next date of 10<sup>th</sup> of April 2012. On the 10<sup>th</sup> of April he informed court that he was unable to get his witness and proceeded to close the Defendant/Applicants case and the matter proceeded for written

submissions. Upon the submissions judgment followed. If Muwema & Mugerwa Advocate had withdrawn their services why did Terence Kavuma appear? Why did another member of the same firm hold his brief and represent that he was indisposed when the suit came for hearing the defence?

These proceedings commenced in 2010 and were completed in 2012. The Applicant's Mr Gopal Patel also brought into evidence a charge sheet annexure E to the supplementary affidavit which is dated 19<sup>th</sup> of January, 2015 long after proceedings in this matter had terminated in a judgment. Judgment was delivered on 4<sup>th</sup> of December 2012. In the charge sheet several persons are charged including former directors and employees of the Applicant. The persons charged were: Mr Aniket Patel, the former Managing Director of the Crown Converters Ltd, Mr Dave Shailesh Kumar sales executive officer of Crown Converters Ltd and Mr Alpesh Kumar Tailor Jagdishbhai former accounts clerk of Crown Converters Ltd.

Lastly, Mr Gopal Patel attached annexure "F" showing that a complaint was registered with the Law Council on 5<sup>th</sup> of October 2015 saying that the Applicant was not aware of the court case and no court process was served on the company. He learnt about the case on the newspaper advert in 2015. I have already noted that the newspaper advert is of May 2015. It relates to proceedings after the Applicant Company ceased doing business and the directors could not be traced.

For the moment and from the record, the Applicant was fully represented by Messieurs Muwema & Mugerwa advocates. The said firm only withdrew from the conduct of the case subsequently. Moreover, the testimony that they withdrew from the conduct of the case is inconsistent with the appearance of Mr Terence Kavuma in the proceedings as Counsel for the Applicant.

In the premises, the Applicant was notified of the summons and plaint and duly instructed advocates to file a defence and the matter proceeded as it did. The lawyers made a spirited effort to oppose the suit apparently amid great difficulty of tracing witnesses. These facts are inconsistent with the depositions of Mr Gopal Patel. If the Applicant indeed has a case against the said firm of advocates, its claims can proceed from there. The advocates will not be condemned in this proceeding without hearing them. Furthermore, Messrs Muwema and

Mugerwa were the lawyers of the Applicant and therefore the Applicant can pursue any claims against them for any professional misconduct which has not been proved in this suit. In the premises and as far as the facts have been assessed as above it is my holding that no sufficient reasons or grounds have been adduced to review the judgment of the court wherein the Applicant was fully represented. Moreover Mr Gopal Patel admitted that at one stage Messieurs Muwema & Mugerwa advocates represented it. Last but not least the Applicant ought to have moved the court under order 9 rule 27 of the Civil Procedure Rules to set aside the judgment and joined the firm of advocates to the action.

In the premises the Applicant's application will not be considered on the other grounds which go to the merits of the suit on the ground that the first allegation goes to the root of whether the matter proceeded ex parte against the Applicant or not. I have found that the Applicant was fully represented and there is no sufficient ground for reviewing the judgment of this court and making any consequential orders such as of setting aside the judgment. In the premises, the Applicant's application stands dismissed with costs.

Ruling delivered in open court on the 14<sup>th</sup> of October 2016

**Christopher Madrama Izama**

**Judge**

Ruling delivered in the presence of:

Counsel Tom Odeke holding brief for Counsel Ojok for the Applicant,

Applicant is absent

Juliet Kamuzze Counsel for the Respondent

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

**Judge**

14<sup>th</sup> October 2016