

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
COMMERCIAL DIVISION
MISCELLANEOUS APPLICATION NO. 143 OF 2015
(ARISING FROM CIVIL SUIT NO. 533 OF 2013)

MK CREDITORS LIMITED.....APPLICANT
VERSUS
OWORA PATRICK.....RESPONDENT

BEFORE: HON. JUSTICE RUGADYA ATWOKI

RULING

The applicant herein filed a civil suit No. 553 of 2015 against the respondent for recovery of a sum of money under summary procedure in a specially endorsed plaint. When the suit came up for hearing, the respondent raised preliminary objections on points of law. These were heard and determined in favour of the respondent, and in the result, the suit was struck out. The applicant filed this application seeking court to review that ruling and order the suit to be heard on its merits.

The application for review was brought by way of notice of motion under 0.46 rr. 1, 2 & 8 of the CPR, and S. 98 of the CPA. It was supported by the affidavit of Male H. Mabirizi, the MD of the applicant company. Parties were given timelines within which to file submissions. The applicant complied but the respondent did not file within the time ordered.

Because of the failure to file submissions in time, I was asked to grant the application as it was unopposed. The cases of *Amrit Goval v. Harichand Goval & 3 Others* (Civil Application No. 109 of 2009)(CA), *Kampala Financial Services Ltd. v. Muwanea & Another* HCCS No. 228 of 2013, and *Byaruhanga Joseph v. Nalongo Elizabeth Wandera* HC Civil Appeal No. 0062 of 2014 which dealt with failure to adhere to court orders in respect of given timelines were cited, together with *The Constitution (Commercial Court) (Practice Directions)* Rule 7.

The discretion is with the court on how to proceed where a party has not made submissions as and when ordered to do so. Order 17 r.4 gives guidance in this regard. It provides that,

'Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other necessary act to the further progress of the suit, for which time has been allowed, the court may, notwithstanding the default, proceed to decide the suit immediately. '

I decided to proceed with the determination of the application in absence of the submissions of the respondent.

The applicant in submissions relied on S. 82 of the CPA which reads thus;

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 complaint of the applicant was that the ruling of the court which dismissed the main suit had errors on the face of the record. This flows from O. 46 r. 1 CPR which reads thus;

(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 allowed,

and who, from the discovery of new and important matter of evidence which, after due diligence, was not within his or her knowledge or could not be produced 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 cause 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 deposed that there were four errors on the face of the record, and these needed to be reviewed by court and the appropriate orders made to rectify them.

The four ‘errors on the face of the record’ were the following.

1. The holding that the transaction was bound by the Money Lenders Act merely on a heading in optional brackets.
2. The holding that the forfeiture provision in the credit agreement on failure to pay nullified the entire credit agreement.
3. The consideration by the court of the unconscionable nature of interest, a matter of fact, at a preliminary level.
4. The holding that unconscionable interest nullifies the entire agreement.

In considering whether the above were errors on the face of the record, and therefore fell in the ambit of review provisions set out above, court had to make a determination whether this was indeed a proper case for exercise of courts powers of review.

In *Edison Kanvabwera v. Pastori Tumwebaze* SC CA No. 6 of 2004, it was held that the error in review proceedings could be one of fact or one of law. The applicant submitted that these were errors of law.

In this case above, the Supreme Court cited with approval *A.I.R. Commentaries: The Code of Civil Procedure by Manohar and Chitaley, vol. 5, 1908* where it is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear that no court would permit such an error to remain on the record.

The applicant relied heavily on the East African Court of Justice (Appellate Division) decision of *Independent Medico Legal Unit v. The Attorney General of the Republic of Kenya* {Application No. 2 of 2012; Arising from Appeal No. 1 of 2011 } in which the phrase ‘error on the face of the record’ was explained. I found that decision quite instructive. It explains error on the face of the record in the following terms.

- As the expression 'error apparent on the face of the record' has not been definitively defined by statute, it must be determined by courts sparingly and with great caution.
- the 'error apparent' must be self evident; not one that has to be detected by a process of reasoning.
- No error can be an error apparent where one has to 'travel beyond the record' to see the correctness of the judgment.
- it must be an error which strikes one by mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.
- A clear case of error apparent on the face of the record is made out where, without elaborate argument, one could point to the error and say, here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it.
- In summary, it must be a patent, manifest and self evident error which does not require elaborate discussion of evidence or argument to establish.

The court noted that a similar doctrine for review of court judgments which is well established and which is widely practiced is the 'slip rule', by which courts are empowered to correct inadvertent mistakes of computation, of arithmetical calculations, clerical errors of e.g. spellings, proper names, addresses and others of similar genre, which invariably slip into courts judgments by the, 'slip of the pen'.

In respect of the 1st 'error', the Judge looked at the 'credit agreement. The document spoke for itself. It clearly stated, 'Credit Agreement (As required by the Money Lenders Act'. No extraneous matters should be introduced to explain it as the applicant sought to impute. The argument that the credit transaction was secured by a mortgage, thereby taking the agreement out of the Money Lenders Act was a matter which the applicant may have intended, and he crafted the security as a mortgage. He was free to draft the agreement without basing it on the Money Lenders Act as it clearly states in the heading. This was not an error apparent on the face of the record.

The 2nd 'error' on the effect of forfeiture in the credit agreement was a matter which was

subject to more than one interpretation. If the learned Judge's interpretation differed from that of the applicant, or even if, for arguments sake, it was erroneous, that would not qualify it to be an error apparent on the face of the record. The same argument holds for the 4th 'error'.

The 3rd was that the matter of unconscionable interest could not be discussed during the preliminary hearing was again based on prevailing law. This was said to be an illegality. Once an illegality is brought to the attention of court, it overrides all matters of pleadings. Court could not close its eyes to the same, whatever the stage this was brought to its attention. The applicant was free to counter the allegations.

It has been held that courts power of review should not be used as an alternative, or a backdoor to an appeal. The Kenya case of National Bank of Kenya v. Ndungu Niau [1966] LLR 469 (CAK) was quoted to have held that, 'An order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that other Judges of coordinate jurisdiction and even the Judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue.'

I did not find that the ruling of the court had 'errors apparent on the face of the record' to justify interfering with the same. In the premises, the application is dismissed. Since the respondent did not file submissions as and when so directed, I will order that each party shall bear their own costs.

Rugadya Atwooki

Judge

12/09/2017

Court: this ruling shall be read to the parties by the assistant Registrar of the court.

Rugadya

Judge

12/09/2017