THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION NO. 505 OF 2013

SANYU SCOVIA GATETE:: APPLICANT

Versus

1. **RUTAJENGWA ELISTARIKO**
2. **TUSIIME JANAT** **::RESPONDENTS**

BEFORE: THE HON. JUSTICE DR. FLAVIAN ZEIJA

RULING

This is an application for review brought by way of Notice of Motion under sections 82 & 98 CPA, Order 46 rules 1,2 & 8 CPRs and Order 52 rules 1,2,3 CPRs S.I 71-1

It is seeking for review and setting aside of particular findings and orders arising from the decision of court in Civil Suit No. 511 of 2013.

The grounds on which this application is premised are contained in the application and buttressed in the Applicant's affidavit in support of the application that;

1. The Respondents filed Civil Suit No.511 of 2013 claiming to have been the Applicant's business partners in a shop at Plot 6 Nakivubo Road and claiming an equal share as partners in her properties comprised in FRV 454 Folio 10 at Plot 27 Martin Road; LRV 3550 Folio 21 at Plot 24 Mackay Road; and FRV 584 Folio 19 at Plot 35 Nakivubo Place.

2. The Respondents also sought an equal share of money held on the Applicant's account in DFCU Bank.

3. The Applicant's defense was that the Respondents were not her partners and the suit properties were not partnership properties but were owned by the Applicant in a sole capacity.

4. That in the Judgment, the trial judge decided as follows:

   a) That the Plaintiffs merely worked as employees and were well rewarded for their services.
   b) That the business was a sole proprietorship and not a partnership
   c) That FRV 584 Folio 19 at Plot 35 Nakivubo Place was bought using money from the Applicant's Bank Account and a loan obtained by her and was not partnership property.
   d) That LRV 3550 Folio 21 at Plot 24 Mackay Road was bought using a loan obtained by the Applicant, and was not partnership property.
   e) That FRV 454 Folio 10 at Plot 27 Martin Road was bought using a loan obtained by the Applicant and was not partnership property.
   f) That the Plaintiffs do not have an interest in the funds standing on credit in the DFCU bank account.
   g) That the Applicant did not fraudulently acquire transfer and registration of Plot 35 Nakivubo Place in her names.

5. The same judgment however later made contradictory findings and orders that:

   a) The Plaintiffs made a non-financial contribution towards the purchase of Plot 35 Nakivubo Place, and they accordingly have an interest in the property.
   b) The Plaintiffs had a constructive trust in respect of Plot 35 Nakivubo Place.

6. The trial judge proceeded to grant the following remedies to the Plaintiffs:

   a) That the Plaintiffs have an interest in and are entitled to an equal share with the Defendant in property comprised in FRV 584 Folio 19 Plot 35 Nakivubo Place.
   b) That the Plaintiffs' names be added on the title as joint owners of FRV 584 Folio 19 at Plot 35 Nakivubo Place.
   c) That there is justification to maintain the caveats lodged on FRV 584 Folio 19 at Plot 35 Nakivubo Place until the Plaintiffs get their just share.
   d) That a permanent injunction be issued to prohibit the Defendant from claiming sole proprietorship of FRV 584 Folio 19 at Plot 35 Nakivubo Place.
   e) That an account be taken to ascertain what was collected or is being collected as rent from FRV 584 Folio 19 at Plot 35 Nakivubo Place.
   f) That any increase in the value of FRV 584 Folio 19 at Plot 35 Nakivubo Place, including rental income, should be shared equally by the Plaintiffs and Defendant after deducting all expenses
   g) That the interest on the rent amount determined after taking accounts is awarded at a rate of 20% per annum from March 2011, till the date of sharing.
   h) That the Plaintiffs be paid general damages of UGX. 1,000,000,000 with interest at 6% per annum from the date of judgment.

7. That the dispute was technically disposed of when the trial judge rightly found that Plaintiffs merely worked as employees; were well rewarded for their services; that the business was a sole proprietorship and not a partnership; that the suit properties were bought using money from the Applicant's bank account and a loan obtained by her; that the Plaintiffs do not have an interest in

the funds standing on credit in my DFCU bank account; and that the Applicant did not acquire the suit properties through fraud.

8. That in view of the above findings of the trial judge, the resolution of other issues and grant of remedies to the Plaintiffs thereunder is an error apparent on the face of the record.

9. That it unjust to order the Applicant to share property with the Respondents yet correctly ruled that she did not obtain registration fraudulently and that the property was not partnership property.

10. That the property comprised in FRV 584 Folio 19 at Plot 35 Nakivubo Place is encumbered with a mortgage and further charges to DFCU Bank to secure a loan of UGX. 1,200,000,000; overdraft of UGX. 1,000,000,000 and additional facilities.

11. That if judgment and orders of the court are implemented, the Applicant will cease to be the sole owner of the property and the security will become impaired.

12. That the Applicant stands the real risk of having the loans recalled which will cripple her businesses.

13. The property is also subject to existing tenancy agreements, utility contracts, maintenance contracts etc. and any abrupt change to 3 owners would necessitate consulting the Respondents on any decision or transaction which shall lead to paralysis and inefficiency.

14. That the Applicant's relationship with the Respondents has broken down and it would cause a lot of inconvenience and embarrassment for her be a joint owner with the Respondents.

15. The Applicant has made substantial improvements to the property and it would be unfair and unjust for the Respondents to

share the rent equally with the Applicant as ordered by the trial judge.

16. The Applicant is aggrieved by the decision of the trial judge and it is in the interest of justice to allow this application for review.

In opposition to the grounds in support of the application, the 1st Respondent deponed that;

1. The Applicant lodged a Notice of Appeal and there is therefore an Appeal process pending determination by the Court of Appeal which renders the present application for review and set aside untenable.

2. The Applicant also lodged two applications Nos. 1270 and 1271 of 2020 whose contents are unknown to the Respondents since the said applications have never been served on them.

3. All the complaints in the present application are grounds for appeal and not grounds for review as there is no error apparent on the face of the record.

4. The application is misconceived, frivolous and an abuse of court process and should therefore be dismissed with costs to the Respondents.

The 2nd Respondent did not file an affidavit in reply to the application. The 1st Respondent swore an affidavit in reply in his own capacity and not on behalf of the 2nd Respondent. As it stands therefore, the 2nd Respondent adduced no evidence and the only evidence that this court is going to rely on is that of the 1st Respondent adduced in his personal capacity.

In rejoinder, the Applicant deponed that the Notice of Appeal referred to in the affidavit in reply was withdrawn and there is therefore no pending notice of appeal, memorandum or record of appeal filed in the court of appeal. The Applicant further reiterated that the application raises grounds for review.

Representation

At the hearing of this application, the Applicant was represented by Nambale, Nerima & Co. Advocates. The Respondents were represented by Kahuma, Khalayi & Kaheeru Advocates.

The Law

Applications for review and set aside are materially governed by the provisions of section 82 of the Civil Procedure Act, Cap 71 and Order 46 rules 1 and 2 of the Civil Procedure rules. For ease of reference, I will reproduce the said provisions hereunder.

Section 82 of the Civil Procedure Act provides;

> **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.*

Order 46 rules 1 and 2 provide;

> **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.

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

2. To whom applications for review may be made.

*An application for review of a decree or order of a court, upon some ground **other than** the discovery of the new and important matter or evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed*

Consideration of court

I notice from the record that the two applications Nos. 1270 and 1271 of 2020 which the 1st Respondent refers to as not having been served and still pending are applications of stay of execution and interim stay of execution respectively. It is unclear whether the Applicant still has any intention of pursuing the said applications which in my view have no bearing on the present application. In any case, the said applications were not served on the Respondents and they have not taken any steps to oppose them. As such, the Respondents have not demonstrated how the contested applications prejudiced them.

Counsel for the Respondents submitted that the purported notice of withdrawal of the notice of appeal by the Applicant is ineffective in so far as it was not served on the Respondents to consent or concede to the withdrawal. The notice of withdrawal was brought to the attention of the Respondents through the affidavit in rejoinder and it has never been served on them. As such it was Counsel for the Respondents' contention that the appeal still subsists until the right procedure of withdrawal is followed. On the other hand, Counsel for the Applicant submitted that a Notice of Appeal is not an appeal but rather an expression of the intention to appeal. That the said withdrawal was endorsed by the Registrar and there is therefore no existing notice of appeal in the High Court and neither is there a pending appeal in the Court of Appeal. Counsel for the Applicant made reference to rule 83 of the Court of Appeal Rules to the effect that an appeal is commenced by filing a memorandum and record of appeal in the Court of Appeal.

It is my considered view that the notice of appeal was withdrawn and the withdrawal of it was endorsed by the Registrar. The Respondents' contestation in this regard is that they should have been notified of the withdrawal in order to obtain their consent or refusal thereof in accordance with prudent practice. I agree with Counsel for the Respondents that the right procedure in the withdrawal of the notice of appeal was circumvented by the Applicant but what then is the legal implication of failure to notify the Respondents or their Counsel of the withdrawal until later at the stage of filing and serving the affidavit in rejoinder? The rules of procedure as handmaidens of justice in this regard are meant to accord the opposing party the earliest opportunity to explore the available legal options in the circumstances. Whereas it was desirable for the Applicant to have served the Respondents with the notice of withdrawal of the notice of appeal, I find that non-compliance is not fatal to the present application since the Respondents cannot be said to have suffered any prejudice. They have had ample opportunity to make submissions on the existence or non-existence of a pending appeal. As it stands,

there is no pending notice of appeal to which the High Court can make any reference and neither is there any pending memorandum of appeal or record of appeal in the Court of Appeal that this court can authoritatively make reference to. It would therefore be an absurdity for this court to purport to impose an appeal as the Respondents' counsel imputes.

As to whether there is an error apparent on the face of the record, Counsel for the Respondents invited this court to uphold the principle enunciated in the case of ***MK Creditors Limited v. Owora Patrick, Miscellaneous Application No. 143 of 2015*** in which Rugadya Atwooki J (as he then was) cited the decision in ***Independent Medico Legal Unit v AG of the Republic of Kenya (Application No.2 of 2012 arising from Appeal No.1 of 2011)*** to the effect that the 'error apparent' must be self- evident and not one that has to be detected by a process of reasoning. Contrariwise, Counsel for the Applicant submitted that the trial court's later finding that the Respondents have interest in Plot 35 Nakivubo Place is an apparent error or mistake given that the judge had in the same decision already rejected the Respondents' claims that they were the Applicant's partners and that they contributed to the purchase of the property. Counsel for the Applicant referred this court to the case of ***Elizabeth Nalumansi Wamala v. Jolly Kasande & 2 Others, Supreme Court Civil Application No. 29 of 2017*** to stress the point that a court of law may under its inherent powers review its final order to achieve the ends of justice and logic.

I have had the opportunity to study the impugned decision in Civil Suit No. 511 of 2013 and I have also made consideration of the authorities referred to by both Counsel in this application.

It is trite that the High Court has wide discretionary powers to make such orders as may be necessary to achieve the ends of justice, with the emphasis being that such discretion must be exercised judiciously. Certainly, the exercise of court's discretion should not extend to entertaining frivolous and misconceived applications. The question

that therefore comes to mind is whether this application is such one that it should not merit the court's attention. The 1st Respondent deponed, on the information of his Counsel, that the present application is misconceived, frivolous and an abuse of court process.

In ***Mohammed Mohammed Hamid Hamid v. Roko Construction Limited SCMC No. 18/2017,*** the Supreme Court stated that before the court can exercise its discretionary power, the applicant must demonstrate to the court's satisfaction that the application for review is not frivolous. While explaining the rationale, Arach Amoko, JSC quoted with approval; Tumwesigye JSC, in the case of **Kiganda John and Another vs. Yakobo M.N Senkungu and 5 others, Civil Application No. 16 of 2017, (SC)**, where he stated as follows:

> ***" In my view, the question is whether the applicant's application for review of this court's decision in SCCA No 17 of 2014 should be treated as frivolous and not worthy of serious consideration, or is such as should warrant this court's attention. Deciding this question at an early stage is important because the decisions and orders of this court as the final court of this country's judicial system should not be open to constant and needless application for their alteration. There must be an end and finality to litigation. But there may be special circumstances that may warrant alteration of the court's decision or orders where, if not done, blatant injustice may be occasioned. That is why it was found necessary to include rule 2(2) in the rules.***
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> ***Therefore, in my view, the question as to whether the application for review should be treated as analogous to a notice of appeal must, as a necessary condition, be linked to deciding whether the application for review stands a reasonable likelihood of success."***

The current application is one where the Applicant decries that the decision of the trial court was self-contradictory to the extent that it accorded her a benefit while it deprived her of it simultaneously, in what the Applicant describes as an apparent error in respect of property comprised in FRV 584 Folio 19 Plot 35 Nakivubo Place. I do

not agree with Counsel for the Respondents that such an allegation can merely pass for frivolity.

Upon examining the judgment and decree in Civil Suit No. 511 of 2013, I notice that the learned trial judge made certain findings which are pertinent to finaliy dispose of this application. On page 26 of the judgment she found that;

> ***"...the property was sold to the Defendant in her individual capacity and not to the business firm or jointly to the parties. Even though most of the money for purchasing the property came from the DFCU Bank Account; the account was I the sole names of the Defendant. And the loan amount of Shs. 250,000,000 borrowed to top up the purchase price was obtained by the Defendant. The funds used to purchase the property comprised in LRV 276, Folio 17 Plot 35 (now FRV 385, Folio 19, Plot 35) was not partnership money and the property was not bought on account of or for purposes of the partnership; as none existed."***

On page 18 line 4-5 of the judgment, the learned trial judge further made a finding that;

> ***"It appears to me from the facts of this case that, although the Plaintiffs were not paid a salary, they were well rewarded for their services and relying on the case of Khan v Khan [2015] EWHC 2625 (CH), I can conclude that they were employees and not partners"***

On page 37 line 16 of the judgment, the learned judge stated,

> ***"...None the less, it is my finding that the skill and labor that the Plaintiffs provided to the business contributed to the making of the money by the Defendant out of which the properties were purchased by the Defendant.***

On page 44 line 22 -24, the learned judge states;

> ***"As already stated in this judgment, the Plaintiffs made a non –financial contribution towards the purchase of Plot 35 Nakivubo Place, and they accordingly have interest in that property. But they have no interest in Plot 24 Mackay Road and Plot 27 Martin Road and the amount standing on credit in the DFCU Bank A/C No.OIL6020131100. The Defendant is accordingly a constructive trustee for the Plaintiffs and herself in respect of the property comprised in Plot 35, Nakivubo Road."***

The findings quoted above are simply a tip of the iceberg of the many factual and legal contradictions crosscutting the judgment in Civil Suit No. 511 of 2013.

According to **A.I.R. Commentaries: The Code of Civil Procedure by Manohar and Chitaley, volume 5, 1908,** cited with approval by the supreme court in **Edson Kanyabwera v Pastori Tumwebaze Civil Appeal No. 6 of 2004,**

> *"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 incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The* ***"error"*** *may be one of fact, but it is not limited to matters of fact, and includes also error of law. The manifest error of law in that case was in respect to contravention of Order 5 rule 17 of the civil procedure rules." (Underlined for emphasis)*

In the present case, it appears as if the ambiguous factual and legal errors and contradictions in the judgment were meticulously orchestrated. When the trial judge found that the Respondents were well remunerated for the services they rendered to the Applicant in their capacity as employees, there was no basis for inferring a constructive trust especially that court had not made any factual finding, whether express or implied, on the existence of a 'common intention' that both parties should have a beneficial interest in any of the properties. If court had found the existence of clear evidence, express or implied, of the common intention that any of the properties was to be shared beneficially, I would have hesitated to interfere with the final orders of the learned trial judge. I am however unable to restrain myself in light of the glaring factual and legal errors. Non-intervention would only serve to open floodgates to employees to burden the courts with endless inferences of constructive trusts on the foundation of the non-financial contributions made to the

advancement of their employers' businesses. Such a precedent would obviously be absurd. It is trite that employees are a critical asset for the survival of the organization. However, there can never be any constructive trust arising from their services rendered to the employee to obtain an interest in the organization other than their remuneration. It is even apparent as an error on the face of the record that the properties, the subject of the suit were never at any one-time business properties. There was no existence of the partnership. The bank accounts through which the money was expended to procure them were in the names of the applicant. It can only be manor from heaven that the respondents developed interest in the properties.

The 1st respondent seems to have paraded his illiteracy to justify the reason why the applicant registered properties in her names. Yet he claims to have been in charge of stores. Stores is a complex area of work that requires to do stock taking and registering goods in bin cards on a daily basis. How did he manage that Job? It is even more apparent that the 2nd respondent was in charge of accounts-issuing receipt. That for all intents and purposes is an educated person!

Even if they were operating from the same shop, they would never obtain an interest in the applicant's properties. When I was still a lecturer at the University, I carried out a study (research) on enforcement of informal contracts. It was conducted in downtown Kampala. I established that the method of doing business is that one person rents a shop and accommodated about 5 more business people who run independent businesses within the same shop. While the official tenant pays rent, the rest contribute to the same rent or become silent subtenants. They only acquire some space therein. Their businesses for all intents and purposes are separate and independent(See Ntayi, J.M., Rooks,G., Eyaa, S., & Zeija, F. 2010b. Contract and conflict in the supply chain: The case of Ugandan SMES. Research published by ICBA).

In the result, I vacate all the remedies issued in favor of the Respondents in Civil Suit No. 511 of 2013 and replace them with the following;

1. The Applicant (Defendant) is the sole owner of the suit properties.

2. The Respondents (Plaintiffs in the suit) have no interest (legal or equitable) in any of the suit properties and are therefore not entitled to any share therein, having been fully remunerated for the services they rendered to the Applicant (Defendant).

3. The Respondents are equally not entitled to share in the balances on DFCU Bank Account No. OIL6020131100 which is solely owned by the Applicant.

4. The Commissioner Land Registration or Registrar of Titles is directed to remove the Respondents' caveats lodged on the suit properties, to wit;

    a) FRV 584, Folio 19, Plot 35, Nakivubo Road

    b) LRV 3550 Folio 21, Plot 24 Mackay Road, Kampala

    c) FRV 454 Folio 19, Plot 27 Martin Road, Kampala

5. A permanent injunction is issued restraining the Respondents (Plaintiffs) and/or their Agents and Servants from claiming any interest in the suit properties.

6. The Applicant has been engulfed in protracted litigation for close to a decade in utter deprivation of her right to quiet enjoyment of her hard earned properties. I would award modest general damages to a tune of UGX. 100,000,000 (One Hundred

Million Shillings) with no orders as to interest since they are relatives.

7. In as far as the Applicant did not make any prayer as to costs, I am inclined to let each party bear their own costs, given that they are brother and sister and for the good of the family, may reconcile in future.

Dated at Kampala .....29th..... day of ..October..... 2021

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Flavian Zeija (PhD)

PRINCIPAL JUDGE