THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0519 of 2021

(Arising from Miscellaneous Cause No. 010 of 2020)

DEOX TIBEINGANA …… APPLICANT

VERSUS

1. VIJAY REDDY }
2. VISARE (U) LIMITED } …… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

On or about 29th December, 2012 the applicant executed a memorandum of understanding with the respondents, whose sole purpose was the joint purchase of land measuring 1.57 acres to be partitioned off land comprised in Kyadondoo Block 255 Plot 86 at Munyonyo. It was agreed that they were to thereafter sell it to a third party with a view to a profit. The applicants contributed US $ 250,000 to that venture. When they failed to secure a buyer, the parties executed another memorandum of understanding on or about 5th August, 2013 where it was agreed that the applicant was to undertake development of the land and refund the respondents' contribution of US $ 250,000 with interest at 11% per annum from 1st June, 2013. By 31st October, 2013 the outstanding amount due from the applicant under that arrangement was US $ 375,592. The applicant having defaulted on his obligation to pay, the respondent submitted the matter to arbitration for the recovery of that sum.

The dispute was subjected to arbitration resulting in an arbitral award handed down on 4th March, 2016 in favour of the respondents. The respondents were awarded US $ 375,592 with interest at 24% per annum from 31st October, 2013 until payment in full. The applicant filed an application for setting aside the award. In a decision delivered on 21st December, 2016, this Court dismissed that application but varied the rate of interest to 11% per annum from 31st October, 2013 until payment in full. The respondent commenced the process of execution of the award on 17th January,

2017 resulting into a consent order signed on 13th March, 2017 by which the applicant undertook to pay the respondent a sum of US $ 250,000 within 90 days from 2nd March, 2017, and thereafter monthly instalments of US $ 107,592 for the next six months ending on 2nd June, 2017. The applicant was to clear the accumulated interest at the rate of 11% per annum from 31st October, 2013 by 28th February, 2018.

The applicant has since then filed over twelve applications, both in this court and in the Court of Appeal, challenging the execution of the award. Those applications culminated in an order of the Deputy Registrar of this court delivered on 2nd February, 2020 following the arrest of the applicant in execution of the award, wherein the learned Deputy Registrar ordered the applicant to pay the outstanding amount of US $ 448,008 (approximately shs. 1,657,629.600/= by then) in full, within fifteen (15) days (expiring on 19th February, 2020) or else he would be committed to civil prison as a judgment debtor.

The applicant filed a reference to this court challenging that decision and seeking to have it set aside. The applicant contended that the order by the learned Deputy Registrar was illegal, unconscionable and unconstitutional. The applicant argued that ordering him to pay that amount without directing a prior joint reconciliation of accounts, was unjust, illegal and unfair. It was unfair to order that applicant to pay such a colossal sum within so short a time. In her decision delivered on 17th March, 2020 the Judge found that there was no manifest injustice or unfairness in the order sought to be set aside and that since there was no pending application before the Constitutional Court seeking interpretation of the constitutionality of execution of the decree, the court could not make any orders in that respect. The court construed the application to be an abuse of court process and dismissed it with costs. The Deputy Registrar was ordered to renew the warrant of arrest in execution of the award.

b. <u>The application</u>.

The application is made under sections 82 and 98 of *The Civil Procedure Act,* Order 46 rules 1 (b), 4 and 8, and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks review of the order of this court delivered on 17th March, 2020 on account of a mistake or error apparent on

the face of the record. It is contended that during the hearing of the reference from the decision of the Deputy Registrar directing the applicant to pay the outstanding amount of US $ 448,008 in full, within fifteen (15) days or else he would be committed to civil prison as a judgment debtor, the Judge misdirected herself when she disregarded the issue of the constitutionality of arrest and imprisonment of the applicant as a judgment debtor in execution of the decree, further when she ordered payment of compounded interest on the decretal sum. The mistake is constituted by her presupposition that a reference to the Constitutional Court arising out of proceedings before her, should be preceded by a petition to that court.

10c. The affidavit in reply

In his affidavit in reply, the 1st respondent avers that the application is an abuse of court process intended to frustrate the process of execution. The applicant has filed multiple applications before for review and stay of execution intended to frustrate the process of execution, the majority of which have been dismissed with costs. There is no mistake or error apparent on the face of the record that requires review. The grounds raised by the applicant are matters for an appeal not review. He prays that the application be dismissed with costs.

d. Submissions of counsel for the applicant

Counsel for the applicant, M/s KSMO Advocates, submitted that the issue seeking interpretation of the constitutionality of execution of the decree was brought to the attention of court. Instead of referring the, matter to the Constitutional court, she said there is no pending matter before the Constitutional Court. She did not address that question of interpretation. The court should vary the decision by referring the matter to the Constitutional Court. The Judge disregarded the issue of compounded interest. It was by an award of court. The decree included compounded interest. This was brought to the attention of the court. The principal sum included compounded interest. Section 26 of *The Civil Procedure Act* does not aloe compounding interest. In the affidavit in reply they did not deny the facts. There were alternatives for recovery including sale of property, which were offered and a prayer for payment in instalments.

e. Submissions of counsel for the respondent.

Counsel for the respondent, M/s Muwema and Co. Advocates submitted that the Judge considered the issue of constitutionality and if the applicant was dissatisfied with the decision they should have appealed. It was not a mistake on the record. There was an award by the arbitrator. The rate was issued from 24% to 11% by the Judge. The applicant is uncooperative and he sought to delay by promising titles which he later sought to be set aside. He was given more time to pay. It is intended to deny the respondent the fruit of his judgment. The application is an abuse of court process.

f. The decision.

The order sought to be reviewed was delivered by a Judge who has since been transferred from the Commercial Division. This being an application for review placed before a Judge who did not deliver the decision sought to be reviewed, I am mindful of the decision in *Outa Levi v. Uganda Transport Corporation [1975] H.C.B 353*, where it was held that an application for review of a decree or order ought to be made to the judge who made it, except where that judge is no longer member of the bench in which case review could be by another judge. However, that is not the only situation in which an order may be reviewed by a Judge other than the one who made the order. The jurisdiction to grant the orders sought is derived from Order 46 rule 2 of *The Civil Procedure Rules* which provides as follows;

> 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 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.

The implication is that applications for review premised on the discovery of a new and important matter or evidence or on the existence of a clerical or arithmetical mistakes or error apparent on the face of the decree or order, may be considered by any Judge other than the one who passed the decree or order sought to be reviewed. In paragraph 14 of the affidavit in support of the notice of motion seeking review of the order of this court, it is clear that the basis of the application is that

the applicant has found a mistake or error apparent on the face of the record. For that reason, this is not among those applications whose grounds are restricted only to the Judge who made the order sought to be reviewed. This court has jurisdiction to review the order.

According to section 82 of *The Civil Procedure Act*, any person considering himself or herself aggrieved; - (a) by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by the 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 person applying under that provisions needs only to be one whose interests, rights, or duties are inevitably adversely affected by the decree. The section does not impose any conditions on the exercise of that power.

However Order 46 rules 1 of *The Civil Procedure Rules*, is not that wide. It empowers this court to review its own decisions where there is an "error apparent on the face of the record." The error or omission must be self-evident and should not require an elaborate argument to be established. This means an error which strikes one on mere looking at the record, which would not require any long drawn process of reasoning on points where there may conceivably be two opinions (see *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173)*. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under order this Order and rule. In exercise of the jurisdiction under this provision, it is not permissible for an erroneous decision to be reheard and corrected. An application for review, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court.

The case of *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173* defined n error apparent on the face record, thus:

> An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an

> error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. That the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law is not a proper ground for review. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised his discretion in favour of the successful party in respect of a contested issue. If the court reached a wrong conclusion of law, in circumstances of that nature, it could be a good ground for appeal but not for review otherwise the court would be sitting in appeal on its own judgment which is not permissible in law.

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. The application raises two issues, namely;

i. Whether the court's rejection of the prayer to make a reference to the Constitutional Court constitutes an error or mistake apparent on the face of the record.
ii. Whether the interest recoverable as decreed is compounded such that it is a mistake apparent on the face of the record for court to have allowed its recovery.

First issue; whether the court's rejection of the prayer to make a reference to the Constitutional Court constitutes an error or mistake apparent on the face of the record.

According to article 137 (5) (b) of *The Constitution of the Republic of Uganda, 1995* where any question as to the interpretation of the Constitution arises in any proceedings in a court of law, the Court "shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision" in accordance with clause 137 (1). According to article 137 (3) thereof, a question as to the interpretation of the Constitution arises when it is contended that; - (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of the Constitution.

The Constitutional Court adjudicates matters requiring interpretation of the Constitution, and not necessarily, enforcement of the Constitution (see *Mbabali Jude v. Edward Kiwanuka Sekandi, Const. Petition No. 28 of 2012*). However, there is a difference between the interpretation and application of the Constitution. Although interrelated, the normative processes of interpretation and application are distinct. Interpretation is the process of ascertaining the express and implied meaning of text in context, while application is the process of determining the consequences which, according to the text, should follow in a given situation. When undertaking interpretation, the court engages in the process of ascertaining the meaning of a constitutional rule or norm. It is the construction of the scope and bearing of a specific provision and its terms. Interpretation is thus essentially a matter of clarification and definition of the meaning of a constitutional norm or rule. Interpretation only comes into play when it is impossible to make sense of a provision, or when it is susceptible of different meanings. In order to interpret the Constitution, certain interpretative rules or principles or techniques are to be followed.

On the other hand, in the application of Constitutional norms or rules, the court engages in a process of determining the consequences which the rule or norm attaches to the occurrence of a given fact. The Court will first make its own determination of the facts and then apply the relevant constitutional rule or norm to the facts which it has found to have existed. Although in doing so courts tend to first determine the Constitutional provision means so as to discern its normative

scope and meaning and then apply it to the circumstances of the case, the court is not engaged in interpretation but rather seeks to become aware of the true content and to qualify those valid Constitutional rules or norms that are potentially applicable according to the claims and facts under dispute, even if not invoked by the parties.

In this regard, judicial qualification of the applicable law is but the first step towards the eventual resolution of the dispute. Strictly speaking, when the meaning of a Constitutional provision is clear, it is "applied," not "interpreted." A competent court determining a cause is at liberty to find and pronounce itself as to whether or not, in its finding, a particular set of facts of the case, are contrary to or are in compliance with the Constitution. By doing so, such a court is not interpreting the Constitution. The said court is just applying the constitution to the facts of the case before the Court (see *Mbabali Jude v. Edward Kiwanuka Sekandi, Const. Petition No. 28 of 2012*).

To aid in the determination of whether or not a matter calls for interpretation rather that application of a Constitutional rule or norm, it was stated in *Ismail Serugo v. Kampala City Council and The Attorney General, Constitutional Appeal No.2 of 1998*, that the petition or reference;

> must show on the face of it, that interpretation of a provision of the constitution is required. It is not enough to allege merely that a constitutional provision has been violated. The applicant must go further to show *prima facie*, the violation alleged and its effect before a question could be referred to the Constitutional Court.

An issue that calls for interpretation of the Constitution by the Constitutional Court must involve and show that there is an apparent conflict between the Constitution and an Act of Parliament or some other law, or an act or omission by some person or authority (see *Mbabali Jude v. Edward Kiwanuka Sekandi, Const. Petition No. 28 of 2012*). The issue must be of such a nature that cannot be resolved without first obtaining clarification and definition of the meaning of a constitutional norm or rule by the Constitutional Court.

In ground 5 of Miscellaneous Application No. 108 of 2020 considered by Her Lordship Elizabeth Kabanda, the applicant sought for "an order that the decision by the Learned Registrar to have the applicant committed to civil prison for failure to pay a civil debt is unconstitutional, illegal and unconscionable." In support of that ground, counsel for the applicant submitted that for a judgment

debtor to be committed to civil prison, it must be on account of the fact that he or she has the money but has stubbornly refused to pay. Automatic committal for failure to pay a debt would be a violation of the Constitution. It is illegal to detain civil debtors just because they have no money. Therefore Order 22 of *The Civil Procedure Rules* and section 46 of *The Civil Procedure Act* contravene article 137 (5) of the Constitution. The question ought to be referred to the Constitutional Court. He continued and stated that "the applicant intends to refer the question to the Constitutional Court." In her ruling, the learned Judge stated that "the applicant has not shown that there is a pending Constitutional application under article 137 of the Constitutional Court (sic), seeking interpretation of [the] constitutionality of execution of [the] decree of court by warrant of arrest. Courts do not operate in [a] vacuum."

It is trite that in order to make a reference to the Constitutional Court, the trial court must be satisfied that the matter sought to be so referred is indeed one that requires interpretation rather than enforcement of the Constitution. Ground 5 of the Notice of Motion placed the matter before the judge for determination, not as a matter is respect of which a reference would be sought. Apart from making superficial comments, counsel for the applicant did not substantiate the pleadings to justify the declaration that to have the applicant committed to civil prison for failure to pay a civil debt would be unconstitutional, illegal and unconscionable. He did not cite any provision of the Constitution that would be so contravened. The one he cited is that which guides the making of references. Furthermore in his submissions, counsel for the applicant was non-committal. While in his pleadings he sought a pronouncement from the court on that point, he at the same time said it should be referred to the Constitutional Court. He followed that up with an expression of mere intention to have it submitted.

What the applicant has placed before this court as justification for the review are arguments demonstrating that the court misinterpreted the provisions of the law and that a different court would have reached a different conclusion on the same facts and arguments, not an error apparent on the face of the record. A review should not seek to challenge the merits of a decision but rather irregularities in the process towards the decision. Some instances of what constitutes a mistake or error apparent on face of record are: where the applicant was not served with a hearing notice; where the court has not considered the amended pleadings filed or attachments filed along with

the pleadings; where the court has based its decision on a ground without giving the applicant an opportunity to address the same; and violation of the principles of natural justice.

It turns out that what the applicant contends to be an error on the face of the record is not self-evident irregularity in the process towards the decision, but rather a drawn out process of reasoning, examination and scrutiny of the law and facts on the merits. It is evident that what the applicant is attempting to achieve is the reversal of what he considers to be an erroneous decision, by forcing a rehearing and correction by the same court which made the decision, yet an application for review, it must be remembered, cannot be allowed to be an appeal in disguise. The court exercising the power of review cannot sit in appeal over its own decision. To put it differently, an order cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court. Therefore this ground of the application fails.

Second issue; <u>whether the interest recoverable as decreed is compounded such that it is a mistake apparent on the face of the record for court to have allowed its recovery</u>.

In paragraph 15 of his affidavit in support of the application, the applicant contends that the order of the Deputy Registrar of this court delivered on 2nd February, 2020 following the arrest of the applicant in execution of the award, wherein the learned Deputy Registrar ordered the applicant to pay the outstanding amount of US $ 448,008 in full, within fifteen (15) days included a component of compounded interest.

The principal sum awarded was US $ 250,000 with interest at 11% per annum from 31st October, 2013 until payment in full. This implies that the debt was accumulating interest at the rate of US $ 27,500 per annum or US $ 2,292 per month. Therefore, by 2nd February, 2020 the total amount of interest accumulated over a period of six years three months was US $ 165,000 + US $ 6,876 = US $ 171,876. When this added to the principal, the amount would be US $ 421,876 exclusive of costs. I therefore find this to be an arithmetical error rather than compounded interest. Had interest been compounded the amount would have been approximately US $ 226,670 which when added to the principal would have resulted in a sum of US $ 476,670 exclusive of costs.

Under section 99 of *The Civil Procedure Act*, clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties. This error can be corrected at the time the applicant appear before court to show cause why execution of the decree should not issue. It is not a matter for review.

In conclusion, Having considered the pleadings filed by both parties as well as their submissions, I find that the court's intervention is not being sought to correct self-evident errors or omissions on the part of the Court, apparent on the face of the record, which do not require elaborate argument in order to be established but rather matters which another Judge could have taken a different view. What the applicant is asking this court to do is to reverse a decision taken on basis of what he considers to be an incorrect exposition of the law and an erroneous conclusion on a matter on basis of misconstruing the law or improper exercise of discretion. It sounds only on appeal and not in review. This therefore is not a proper subject for proceedings for review and the application is accordingly dismissed with costs to the respondents.

Delivered electronically this 26th day of August, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
26th August, 2021.