THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0861 OF 2021

(Arising from Civil Suit No. 0902 of 2018)

FARM INPUTS CARE CENTRE LIMITED ……. APPLICANT

VERSUS

KLEIN KAROO SEEDS MARKETING (PTY) LTD ……. RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

On 16th November, 2018 the respondent filed a suit against the applicant under summary procedure seeking recovery of US $ 70,797.19 being the price of seeds supplied to the applicant on credit. Service was effected on the applicant on 12th December, 2018. The applicant not having sought leave to appear and defend the suit within the prescribed time, a default judgment was entered in favour of the respondent on 19th February, 2019.

It is on 3rd July, 2019 that the applicant sought to have the default judgment set aside and leave granted to it to appear and defend the suit. The applicant attributed the delay in making the application to the mistake, negligence or error of its counsel. The applicant contended that it had a plausible defence to the suit in that the respondent supplied sub-standard seeds that were not fit for the purpose; in the alternative, that the respondent had discounted the price which the applicant had thereafter paid in full. The applicant contended further that they had instructed counsel upon receipt of the summons, but were surprised when seven months later they were served with a taxation hearing notice. The respondent opposed the application on ground that the applicant had no plausible defence to the suit since it had not provided proof of the alleged poor quality of the seeds supplied. The discounted rate was conditional upon the applicant paying by 30th September, 2018 which the applicant failed to meet, hence the claim for the full amount. The applicant could not rely on the mistake of counsel to explain its inactivity over the seven months' period.

After hearing the submissions of counsel, the court delivered its decision on 25th March, 2021 dismissing the application with costs on ground that there was no evidence to show that the applicant had timeously instructed its counsel to make the application to appear and defend the suit, especially in light of the fact that they never followed up the alleged instructions until seven months later. Had instructions been given as claimed, the applicant would not have waited that long to make a follow up. That they did so only after being served with a taxation hearing notice was an indication that they had in fact not instructed counsel before. The applicant had not exhibited any diligence.

b. The application;

The application is made under section 82 of *The Civil Procedure Act,* and Order 46 and rule 8 of *The Civil Procedure Rules*. The applicant seeks review of the order of this court dismissing the belated application for leave to appear and defend the suit. The applicant seeks orders that the decision be set aside, the court re-hears the application and that the applicant be granted unconditional leave to appear and defend the suit. The grounds are that there is an error or mistake apparent on the face of the record constituted by the court having raised its own question, considered it and adjudicated upon it. That question was not before court, it was never raised in the pleading of the parties, no evidence was led on it and no arguments made thereon.

c. The affidavit in reply;

In the affidavit reply sworn by the respondent's Managing Director, Mr. Tnus Van Kampen, the respondent avers that the applicant sought to attribute its failure to apply for leave to appear and defend the suit within the time prescribed by the rules, on its counsel. It contended that it had instructed counsel to file the application but he had not. The respondent countered that the applicant too had been negligent in not following upon on the alleged instructions. The court found the applicant's averment was not supported by evidence and dismissed the application. There is no mistake or error on the face of the record that requires correction.

d. Submissions of counsel for the applicant;

Counsel for the applicant, Mr. Peter Allan Musoke, submitted that the error apparent on the face of this record is that the court raised its own question, considered it and adjudicated upon it. That question was not before court, it was never raised in the pleading of the parties, no evidence was led on it and no arguments made thereon. The court failed to consider and adjudicate upon the issues that the parties actually raised. The court therefore ought to review the decision and set it aside.

e. Submissions of counsel for the respondents.

Counsel for the respondents, M/s S & L Advocates, submitted that the court's ruling was based on the issue before it and was delivered after a proper consideration of those issues. The application was based on the applicant's contention that the applicant had instructed counsel who unfortunately did not file an application for leave to appear and defend the suit within the prescribed time. The applicant advanced the argument that it should not be faulted for its counsel's mistake. The court found that the applicant had failed to discharge its burden of proof of having given such instructions to counsel. The court was therefore not satisfied that failure to file a timely application for leave to appear and defend the suit was attributable to counsel, more especially since the applicant claimed to have realised that failure more than seven months later. The applicant misconstrued the decision. There is no mistake or error apparent on the face of the record and therefore the application ought to be dismissed.

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.

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.

According to Order 36 rule 11 of *The Civil Procedure Rules*, the court may, if satisfied that the service of the summons was not effective, or for any other good cause, which has to be recorded, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit. "Any other good cause" means a reason sufficient on grounds at least analogous to those specified in the rule (see *Sardar Mohamed v. Charan Singh [1959] E.A. 793; Tanitalia Ltd. v. Mawa Handels Anstalt [1957] E.A. 215* and *Ahmed H. Mulji v. Shirinbai Jadavji [1963] E.A. 217*).

In the application for setting aside the default judgment, fault was sought to be attributed to counsel, which if proved would qualify as "any other good cause." Indeed it is now trite that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant (see the Supreme Court decisions in *Andrew Bamanya v. Shamsherali Zaver, S.C. Civil Appln. No. 70 of 2001*; *Ggoloba Godfrey v. Harriet Kizito S.C. Civil Appeal No.7 of 2006*; and *Zam Nalumansi v. Sulaiman Bale, S.C. Civil Application No. 2 of 1999).* However, to come to that conclusion, the court had to be satisfied that indeed counsel had been instructed timeously.

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 (see Order 15 rule 3 of *The Civil Procedure Rules*). Although an issue may not have been specifically raised during the hearing, where both parties had a full and fair opportunity to litigate the issue, after full contest in which both parties had a fair opportunity to prove their respective case, it can actually be determined and

necessarily decided by the court. The record indicates that Mr. James Zeere, counsel who appeared for the respondent, argued that there was no proof of instruction and that for seven months the applicants had not checked with their advocates.

The court reviewed the material before it as constituted in the pleadings, considered the submissions of counsel and the law before it came to its conclusion. It found that the conduct of the applicant was inconsistent with its claim of having instructed counsel timeously, yet there was no other evidence to corroborate the applicant's claim. The applicant itself was found complicit in the belated action, hence undeserving of the court's discretion. The argument that the court raised its own question, considered it and adjudicated upon it since it was never raised in the pleading of the parties, no evidence was led on it and no arguments made thereon and hence was not one of the questions before court, is therefore misconceived. What the applicant has placed before this court as justification for the review therefore are arguments demonstrating that the court misinterpreted the facts 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.

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 the application fails and it is dismissed with costs to the respondent.

Delivered electronically this 24th day of September, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
24th September, 2021