THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0534 of 2021

(Arising from Civil Suit No. 0005 OF 2019)

1. MUHAIRWE COLEB KATOROGO } …… APPLICANTS
2. PEACE ATUSINGWIRE KATOROGO }

VERSUS

1. GROFIN SGB (UGANDA) LIMITED }
2. GROFIN AFRICA FUND UGANDA LIMITED } …… RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

By an agreement dated 28th March, 2013 M/s Kiruhura Dairy Project Limited borrowed a sum of shs. 400,000,000/= from the respondents, at a rate of interest of 25% per annum. The loan was repayable in monthly instalments of shs. 13,979,745/= over a period of five years. The loan was secured by the applicants' property comprised in Freehold Register Volume 1263 Folio 14, Block 68 Plot 33 at Rushere, Kenshunga-Nyabushozi in Kiruhura District. By a second agreement dated 27th April, 2015 M/s Kiruhura Dairy Project Limited borrowed another sum of shs. 400,000,000/= from the respondents, at a rate of interest of 23% per annum. The loan was repayable in 48 equal monthly instalments over a period of 49 months. The loan was secured by the applicants' property comprised in Freehold Register Volume MBR 180 Folio 7, Block 68 Plot 146 at Rushere, Kenshunga-Nyabushozi in Kiruhura District. Part of the money advanced to the borrower was applied towards purchase of a Scania Refrigerated Truck registration number UAX 206 Z registered to the respondents until full discharge of the loan. M/s Kiruhura Dairy Project Limited defaulted on the two loans leading to an accumulated outstanding debt of shs. 100,719,570/= on the first loan and shs. 415,571,655/= on the second loan as at 28th February, 2018. The borrower acknowledged its indebtedness by a letter dated 5th October, 2018.

On account of that default, the respondents attached and sold off the truck realising thereof shs. 35,000,000/= which was used to offset part of the outstanding amount. By reason of the fact that

the loan continued to attract interest, despite that offset, by 31st January, 2019 the amount outstanding on the first loan was shs. 291,635,199/= while that on the second loan was shs. 482,324,6467/= This prompted the respondents to institute proceedings by way of originating summons seeking an order granting them the right to take possession of the securities offered by the applicants. That order was granted by the court on 21st December, 2020.

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

The application is made under section 83 of *The Civil Procedure Act,* Order 46 rule 1 (a) and (b) and 4 of *The Civil Procedure Rules*. The applicants seek an order setting aside a judgment entered against them in the main suit on 21st December, 2020. The applicants contend that there is an error apparent on the face of the record and further that there are new and important matters of evidence which could not be adduced during the hearing of the suit since the applicants were not served. The applicants contend that although they provided security for two loan facilities extended to M/s Kiruhura Dairy Project Limited, they are illiterate and did not fully appreciate the implications of the transaction. When the debtor defaulted, the respondents attached and sold off a truck belonging to the borrower but did not apply the proceeds towards the outstanding loan. Instead they filed a suit by way of originating summons by which they sought orders of possession of the security offered for the loans. Despite that default, the applicants have paid over shs. 1,173,676,900/= (one billion, one hundred seventy three million, six hundred seventy six thousand, nine hundred shillings) in settlement of the outstanding obligations. The applicants were surprised to learn that there were proceedings in court between M/s Kiruhura Dairy Project Limited and the respondents which culminated in the order granting the respondents the right to take possession of the securities offered by the applicants. The applicants were impersonated by unknown persons in the said proceedings. They never instructed the advocates who purported to represent them in the said proceedings. Despite the applicants' repeated demands for a statement of account from the respondents, the respondents have not obliged them. Considering the unconscionable terms of the loan facilities, upholding the decision will result in unjust enrichment of the respondents.

c. The affidavit in reply;

In the affidavit reply sworn by the respondents' Investment Executive, Mr. Arigye Maraba Munyangabo the respondents contend that the originating summons was duly served upon the applicants. A firm of advocates filed affidavit in reply on behalf of the applicants. When a date was fixed for the hearing of the suit, the applicants were served personally but hey opted to be represented by their said advocate at the hearing. The hearing proceeded interparty resulting in the now impugned judgment. To-date the applicants still owe the respondents shs. 418,851,622/= on the first loan and shs. 693,685,966/= on the second loan, which debts continues to attract interest. The applicants' last payments were shs. 10,300,000/= on 30th November, 2018 towards the first loan and shs. 21,000,000/= on 28th August, 2019 towards the second loan. The respondents are therefore justified in proceeding with foreclosure. The applicants were availed statements of account during the hearing of the originating summons. The application has no merit and ought to be dismissed with costs to the respondents.

d. Affidavits in rejoinder;

In the affidavits in rejoinder sworn by the applicants, the applicants contend that whereas the applicants procured the Scania Refrigerated Truck registration number UAX 206 Z on 5th November, 2015 at the price of shs. 200,000,000/= the respondents sold it off barely three years later on 15th November, 2019 at the price of shs. 35,000,000/= which was not a fair market price. The signatures attributed to the 1st applicant on the signed originating summons as proof of personal service is a forgery. The applicants never instructed the law firm which purported to represent them during the proceedings. Although the 2nd applicant was served only with the hearing notice and not the originating summons, she never fully comprehended the content of the hearing notice served upon her and shortly thereafter fell ill from the after effects of a motor accident she suffered in May, 2017 and was admitted in hospital for an extended period running from 21st October, 2020 and discharged on 17th January, 2021. On account if that illness, she was unable to instruct counsel nor notify the 1st applicant of the proceedings.

e. Submissions of counsel for the applicants

Counsel for the applicant, M/s TASLAF Advocates submitted that the judgment ought to be reviewed and set aside since the applicants were not served with the originating summons. Impersonators purported to appear in their place and to represent them during the proceedings. The proceedings were conducted on basis of a fatally defective affidavit of service, which constitutes an error apparent on the face of the record. The applicants have discovered new evidence relating to sale of the truck at an unconscionably low price, which evidence was not available during the hearing of the originating summons. The 2nd applicant could not and was unable to instruct counsel nor appear in court on the day of hearing since she was hospitalised. The applicants have a defence to the suit since they fully discharged the debt, the loan contracts are unenforceable for lack of translation to the illiterate applicants, and the applicants were not availed financial statements relating to the loans. They prayed that the application is allowed.

f. Submissions of counsel for the respondents.

Counsel for the respondents, M/s S & L Advocates submitted that the 2nd respondent in her affidavit in rejoinder admitted having been served. Upon effecting service on the applicants, an affidavit of service was filed by the process server. The applicants responded by engaging counsel who filed an affidavit in reply. It is the same advocate who appeared on their behalf at the hearing of the originating summons. The fact that the applicants have not taken any action against the alleged impostors demonstrates the sad claim is false. The matter before court was one seeking an order for taking possession of the collateral. The alleged discovery of the fact that the truck was undervalued at sale has no bearing on those proceedings. The applicants would with reasonable diligence have discovered that sale since some time had elapsed since the truck had been impounded and taken out of their custody. The alleged illiteracy of the applicants is controverted by evidence of execution of the contract of purchase of the truck. The applicants cannot see to have the decree set aside as ex-parte since they were represented by counsel. The application therefore ought to be dismissed with costs.

g. The decision.

The judgment 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 the affidavit in support of the notice of motion seeking review of the order of this court, it is clear that the main thrust of the application is that the applicants have 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. The application for review may be made to the Judge, who delivered the judgment or to this successor-in-office provided the review is sought on the ground of (i) discovery of new and important matter or evidence or (ii) some clerical or arithmetical mistake or error apparent on the face of the decree. This court has jurisdiction to review the order.

Review connotes a judicial re-examination of the case in order to rectify or correct grave and palpable errors committed by court in order to prevent a gross miscarriage of justice. 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" or "discovery of a new and important matter of evidence," or "for any other sufficient reason," which has been judicially interpreted to mean a reason sufficient on grounds, at least analogous to those specified in the rule. For applications based on the first ground, 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. It may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of an appellate court.

i. <u>Discovery of a new and important matter of evidence</u>.

There is an expectation imposed upon litigating parties to place the whole of their case before the court at the time of the initial hearing. A review cannot be sought merely for fresh hearing or

arguments or correction of an erroneous view taken earlier. It is the settled jurisprudence process of review is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial. In all such cases, the test for review of the matter and permitting the calling of new evidence is the same. An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he or she was content to have the trial judge deliver judgment based on the evidence produced at a trial in which that litigant actively participated. Therefore the applicant must satisfy the Court that the proposed evidence would probably change the result, and that it could not have been discovered by the exercise of due diligence.

The process of review may not be used for the purpose of remedying tactical errors or oversights at trial, The unavailability of the "new evidence" must not result from the lack of due diligence on the part of the applicants or their counsel. The new and important matter of evidence discovered must be one which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by the applicant at the time when the order was made. The evidence upon which the review is sought must be relevant and of such a character that if it would have been brought into the notice of the court, it might have possibly altered the judgment.

Since review of the judgment is neither an appeal nor a second inning to the party who has lost the case because of his negligence or indifference, the party seeking review on this ground must show that there was no failure on his or her part in adducing all possible evidence at the trial. The party seeking review must show that he or she exercised the greatest care in adducing all possible evidence and that the new evidence is relevant and that if it had been given in the suit it might possibly have altered the judgment. This provision applies to evidence that existed at the time of a motion or trial but that could not have been discovered with reasonable diligence prior to a court ruling upon the motion or the trial's completion.

It was contended that the new evidence discovered is that although M/s Kiruhura Dairy Project Limited bought the Scania Refrigerated Truck registration number UAX 206 Z on 5th November, 2015 at the price of shs. 200,000,000/= the respondents sold it off barely three years later on 15th November, 2019 at the price of shs. 35,000,000/= which was not a fair market price. I find that

whereas this evidence existed at the time of the impugned proceedings and judgment, even if it had been given at the hearing of the originating summons it would not possibly have altered the judgment. This is because it was not material to the question whether or not M/s Kiruhura Dairy Project Limited had defaulted so as to justify foreclosure of the applicant's right of redemption, which was the only issue before court.

The right of redemption allows individuals who have provided their property as security for a borrower who has defaulted on their mortgages the ability to reclaim their property by paying the amount due (plus interest and penalties) before the foreclosure process closes with a decision of court. A successful redemption will also typically require the borrower to repay any costs incurred to the lender or other parties as a result of the foreclosure process. The amount outstanding far exceeded even the purchase price of the truck such that even if the applicants had proved that it was sold at an under value that fact would not constitute a total liquidation of the debt.

What a mortgagor needs to do to stop a foreclosure proceeding before the foreclosure happens is to pay off the debt, including interest plus any fees or penalties. This can happen any time between when foreclosure proceedings begin and the foreclosure sale. If a borrower manages to pay off what is owed, the foreclosure is called off. Since the applicants did not tender alternative modes of payment, the foreclosure on their properties was an inevitable outcome of the proceedings. That the truck was sold off at a price lower than its market value would not have altered that outcome.

In any event, since the truck had been in possession of the debtor before it was attached, this was evidence that could have been discovered with reasonable diligence prior to the impugned judgment. It is incredible that the applicants could not, from the very nature of the situation, know that the truck had been impounded for default by the borrower and that it would consequently be sold. The range of this inquiry was not and could not be extensive, and, with the slightest degree of diligence, it occurs to me, the applicants could have ascertained the price at which it was sold It does not appear from these affidavits, aside from some general statements and conclusions, that the applicants asked the respondents or anyone else who was involved with impounding the vehicle or otherwise in close contact with the transaction and who would be most likely to know of the facts. The applicants' affidavits do not disclose facts to show diligence towards attempts to secure

evidence relating to the outcome of the sale, yet such facts are necessary to show that due diligence had been exercised by the applicants to discover the same in time and negative fault on their part.

While an applicant would not be required to do everything conceivably possible in accessing the evidence and is only expected to act with reasonable diligence in discharging the duty, the mere assertion that a fact was established by the applicant only after the rendering of the Judgement is not sufficient for demonstrating that due diligence had been exercised. The applicant must offer a reasonable explanation on proper evidence as to why the new and important matter of evidence could not have been discovered through the exercise of reasonable diligence. An applicant advancing this ground bears the burden of demonstrating how he or she exercised due diligence. The applicants have not provided sufficient indication that these facts were unknown to them, despite the exercise of due diligence, and thus not available at the time of trial.

Examining what would constitute "reasonable diligence" will no doubt always have to be assessed on a case by case basis. However, a party seeking to satisfy the reasonable diligence test ought to be looking at how the new evidence was in fact discovered, and whether during the time of the first trial they had the financial and practical ability to have discovered the evidence. In the circumstances of this case, it is manifest that the applicants failed to exercise reasonable diligence to secure the alleged newly discovered evidence in time for the trial, which it is reasonably apparent could have been secured had proper diligence been exercised. This ground therefore fails.

ii. Error apparent on the face of the record.

An error apparent on the face of the record is one which is based on clear ignorance or disregard of the provisions of law. Such error is an error is one which is a patent error and not a mere wrong decision. Conclusions arrived at on appreciation of evidence cannot be classified as errors apparent on the face of the record. In a review it is not open to this Court to reappraise the evidence and reach a different conclusion, even if that is possible. The case of *Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173* defined an 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. 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 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.

If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in an application for review unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. It has been contended in this application that it was wrong for the court to have proceeded based on a forged affidavit in reply, a false affidavit of service and with counsel who purported to represent the applicants, yet he had not been so instructed. In the first place, there was no evidence of forgery before the court and the court could not be expected to have made a finding of fact in that regard. Having perused the affidavit of service, the court made a finding of fact that the applicants had been effectively served. More so, there was counsel before court representing the applicants, without anything to put the court on inquiry as to the genuineness of the instructions. Proceeding in those circumstance cannot be classified as an error apparent on the face of the record.

To permit the applicants to argue on questions of appreciation of evidence would amount to converting the application for review into an appeal in disguise. What the applicants have placed before this court as justification for the review are arguments demonstrating that the court misinterpreted the provisions of the law and made wrong findings of fact based on the evidence before it 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. This ground too fails.

iii. A reason sufficient on grounds, at least analogous to those specified in the rule.

"Sufficient reason" has to be at least analogous (*ejusdem generis*) to either of the other two grounds and the mere reason that decree was passed or order made on erroneous ground that court failed to appreciate the important matter or evidence, would not make any good ground for review. When a statute includes a list of terms and a catch-all phrase, the set of items covered by the catch-all phrase is limited to the same kind or type of items that are in the list. The reason advanced therefore must be of the same kind or similar in its essentials with either glaring error or discovery of new evidence. Both involve catastrophic error in the proceedings, outside the merits of the decision, which renders the outcome grossly unjust.

The applicants' contention that the 2nd applicant never fully comprehended the content of the hearing notice served upon her and that she shortly thereafter fell ill from the after effects of a motor accident she suffered in May, 2017 and was admitted in hospital for an extended period running from 21st October, 2020 and discharged on 17th January, 2021 do not qualify as "other sufficient reason." To the extent that they intended to support the averment that she never instructed counsel who appeared on her behalf at the hearing, they are completely unpersuasive. No objective facts have ben adduced to show that action has been taken against the alleged impersonators. They are as well unpersuasive regarding the denial of service of court process.

Similarly, that the applicants have a defence to the claim, made repeated demands for a statement of account from the respondents which the respondents have never honoured and the contention that the terms of the loan facilities are unconscionable such that upholding the decision will result in unjust enrichment of the respondents, are not reasons analogous to the first two. These go to the merits of the decision and sound only on appeal.

In conclusion, it turns out that what the applicants contend 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 applicants are attempting to achieve is the reversal of what they consider 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 respondents.

Delivered electronically this 25th day of October, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
25th October, 2021