THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1197 OF 2021

(Arising from Civil Suit No. 0959 of 2018)

KWESIGA MONICA …… APPLICANT

VERSUS

COMMERCIAL BANK OF AFRICA (U) LTD …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicant guaranteed a loan in the sum of shs. 280,000,000/= advanced on 14th May, 2014 by the respondent to M/s Mowi General Supplies Limited. The loan was secured by a mortgage over property registered in her name comprised in Kyadondo Block 250 Plot 885 at Bunga in Kampala, a debenture over the borrower's assets, and the two directors' personal guarantees. That loan was subsequently restructured on 5th June, 2016 when the borrower obtained an additional loan in the sum of shs. 340,000,000/= secured by a further charge on the same property. The restructuring involved retiring, by book entries, the then outstanding sum of shs. 328,525,966/= and substituting it with the further charge in the sum of shs. 294,000,000/= When the borrower defaulted on the restructured loan, the respondent issued a default notice on 26th July, 2017 demanding payment of shs. 305,295,091/= The borrower having failed to pay, the respondent on 20th December, 2018 advertised the security of land for sale. The borrower acknowledged the debt and undertook to clear it by 30th February, 2018. The borrower still failed to honour that undertaking, whereupon the respondent sold off the security of land but failed to hand over vacant possession due to the applicant's refusal to vacate the property, and thereby refunded the purchase price it had received.

The applicant on 16th May, 2018 filed a civil suit challenging that sale as fraudulent, illegal and wrongful. She sought an order cancelling the transfer of title to the land into the name of the purchaser and for an order against eviction from that land. In the meantime, the applicant having

refused to hand over vacant possession, the respondent filed originating summons on 29th October, 2018 seeking leave to take possession of the land and sell it off in order to recover the loan.

In a judgment delivered on 6th September, 2021 by my brother Judge Hon. Justice David Wangutusi, the applicant's objection against the propriety of the originating summons while she had a pending suit over the same subject matter, was overruled on ground that the sale having been rescinded, the applicant had lost her cause of action in the suit she had filed. Although the applicant claimed to have deposited personal funds onto the borrower's account and thereby discharged her obligation as guarantor, the court found that all money deposited onto the borrower's bank account could not be attributed to the individual depositors but to the borrower. It was money paid to discharge of the borrower's liability. The applicant had not only provided a personal guarantee but had also mortgaged her land as security for the loan. As guarantor, the applicant undertook to pay off the loan in the event of the borrower's default. In addition, the respondent had recourse against the security of land she offered in the event of the borrower's default. Judgment was therefore entered in favour of the respondent with orders that the applicant hands over vacant possession of the land to the respondent to facilitate a sale by mortgagee and also meets the costs of the suit.

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

The application is made under the provisions of section 82 of *The Civil Procedure Act* and Order 46 rules 1 and 8 of *The Civil Procedure Rules*. The applicant seeks an order reviewing and setting aside the judgment of this court delivered on 6th September, 2021 and directing the suit to be heard *de novo*. The grounds advanced for seeking that order are that there is an error apparent on the face of the record, in that the judgment was based on a personal guarantee that was neither pleaded nor formed one of the issues for determination before the court, since the suit sought determinations of rights under a mortgage. Secondly, the applicant's liability as guarantor arose from a charge and further charge, both of which had been fully satisfied and discharged at the time the suit was filed. The applicant having been fully discharged in respect of both the charge and further charge, it was erroneous for judgment to have been entered against her.

c. Affidavit in reply

In the respondent's affidavit in reply, it is contended that having delivered its judgment in the suit, this court is now *functus offico*. The court cannot revisit the matter on its merits. There is no error apparent on the face of the record. The applicant incurred liability both as guarantor and as mortgagor. She was contractually bound in both capacities until the loan was repaid in full. The court having found so, its decision can only be appealed if considered wrong but not reviewed since it does not manifest any apparent error. The applicant only seeks to have the court revisit its decision on the merits and reverse it. The application lacks merit and ought to be dismissed.

d. Submissions of counsel for the applicant.

M/s Waymo Advocates on behalf of the applicant submitted that the issue of the applicant's personal guarantee was never pleaded nor placed before court for its decision. It was erroneous of the court to have raised and considered it, simply because it was raised in rejoinder. The applicant's right to be heard on that issue was thus violated. The court misdirected itself when it failed to find that the first loan was discharged at the point of restructuring. The applicant adduced evidence of payments she made personally as guarantor toward liquidating the further charge which payments were misconstrued by court as having been made by the borrower. A rejoinder cannot introduce a new cause of action not pleaded in the main application. The personal guarantee was not pleaded. Instead of addressing issue relating to the mortgage that had been placed before it, the court considered the status of the applicant as guarantor. The applicant was condemned unheard as regards the issue of her personal guarantee. In making that decision, the court made conflicting findings that the applicant had paid the money and on the other hand that it was paid by the borrower. The court found that the applicant had paid shs. 160,000,000/= yet it is not contained in her affidavit. The application should therefore be allowed.

e. Submissions of counsel for the respondent.

M/s Kyazze, Kankaka and Co. Advocates on behalf of the respondent submitted that there is no error apparent on the face of the record. Coming to a wrong conclusion after considering the law

and facts placed before it is not an error apparent on the face of the record. Matters relating to the applicant's personal guarantee were introduced in her pleadings when she claimed to have made payments personally in full discharge of her liability. The respondent's affidavit in rejoinder was in response to those averments and both counsel made submissions on the point. It was not a misdirection for the court to have considered it. The decision was based on the totality of the evidence before court, which included the personal guarantee and the mortgage. The court cannot be asked to re-evaluate that evidence since in doing so it would be reconsidering the decision just like an appellate court. Review is not designed to correct misdirection on points of law or fact, which is only done on appeal. The trial Judge having applied his mind to the facts before him and the law applicable thereto, disagreement with the conclusion he reached is not a matter for review.

f. <u>The decision</u>.

The judgment sought to be reviewed was delivered by a Judge who has since retired. 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.

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 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. The applicant's contention that her liability was determined on basis of the security of her personal guarantee rather that as mortgagee, yet the latter was the issue before court. Since her liability as personal guarantor was never pleaded and was thus not an issue placed before court for determination, the court's decision on that point was arrived at in violation of her right to be heard, and this constitutes an error apparent on the face of the record.

According to Order 37 rule 4 of *The Civil Procedure Rules*, any mortgagee, whether legal or equitable, may take out as of course an originating summons, returnable before a judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance or delivery of possession by the Mortgagee.

Originating Summons (OS) is one of the two modes of commencing a civil suit. A suit is commenced by this mode where the dispute concerns matters of law, and there is unlikely to be any substantial dispute of fact. The affidavits are the pleadings for the case. The affidavit filed in

support serves as the plaint, while the affidavit in reply serves as the written statement of defence. This procedure exists in the interests of efficiency and cost. It provides a simple, informal, expeditious and inexpensive method of obtaining a final judgment, where no oral evidence is required, and the proceedings can be determined by way of affidavit evidence. An originating summons is the appropriate procedure where the main point at issue is one of construction of a document or statute or is one of pure law. It is not appropriate where there is likely to be any substantial dispute of facts that the justice of the case would demand the settling of pleadings.

The plaintiff is required to set out in the originating summons a concise statement of the questions which the plaintiff seeks the court to decide or answer, or, a statement of the relief or remedy claimed (where appropriate). The originating summons should also contain sufficient particulars to identify the cause of action in respect of which the plaintiff claims the relief or remedy. In the instant case, the issues raised for trial related to the relief of foreclosure, i.e. taking possession until the mortgagee has exercised the power of sale (see section 25 (c) and (d) of *The Mortgage Act, 8 of 2009*). That aside, under 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. Although an issue may not have been 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.

In paragraph 11 of her affidavit in reply, the applicant annexed a plaint where she was named as plaintiff. In paragraph 3 (b) of that plaint, the applicant averred that she provided security of a personal guarantee of the loan in issue in her capacity as director of the borrower. In paragraph 5 (d) of the written statement of defence to that suit, which too was attached to the affidavit on reply, the respondent averred that the applicant had failed in her duty as guarantor of the loan. In paragraph 20 of the affidavit in reply the applicant denied being indebted to the respondent. It is settled law that all annexures attached to pleading become part of the pleading (see *Sayyad Tahir Hussain Mainuddin v. The State of Maharashtra, 2007 (109) Bom L R 1906* and *Jeraj Shariff &*

Co v. Chotai Fancy Stores [1960] 1 EA 374). By annexing pleadings containing averments relating to the personal guarantee, the applicant thereby effectively pleaded her capacity as guarantor for the loan, as part of her defence to the originating summons.

In paragraph 26 of the affidavit in rejoinder, the respondent refuted the applicant's denial of liability as guarantor, by attaching copies of the personal guarantee. In his submissions, counsel for the applicant sought to absolve the applicant as guarantor and attribute liability to the borrower as principal debtor. Counsel for the respondent submitted that the applicant had failed in her duty both as guarantor and as mortgagor. It is therefore apparent that not only was the issue pleaded but also it was addressed by both counsel in their submissions. It was therefore not erroneous of the court to have framed and resolved it as one of the issues arising in the trial.

The power of sale allows the mortgagee to convey the mortgaged property to a purchaser, free and clear of the interest of the mortgagor and any other subsequent interests in the property. The applicant' right, title and equity of redemption to and in the mortgaged property described as Kyadondo Block 250 Plot 885 at Bunga in Kampala, having been foreclosed, it was rightly ordered and adjudged that the applicant forthwith delivers to the respondent or as the respondent directs, possession of the mortgaged property or of such part of it as is in the possession of the applicant.

Once an issue concerns the actual facts giving rise to the claim, and it was in fact actually litigated and was necessary to a final judgment on the merits, the court is entitled to make a finding on it whether or not the parties raised it as one of the issues for the court's determination. A judgment may be pronounced not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the court's judgment, in order to ensure the reliability, conclusiveness, completeness and fairness of a judgment. This principle serves mainly the public policy of reducing litigation. Unfairness and waste of judicial resources would otherwise flow from allowing repeated litigation of the same subject matter as long as plaintiff is able to locate new issues to be litigated.

To permit the applicant to argue on questions of appreciation of evidence would amount to converting the application for review into an appeal in disguise. What the applicant has placed

before this court as justification for the review is an argument demonstrating that the court 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 Such cannot be construed as an error apparent on the face of the record.

In conclusion, 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 she 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 31st day of January, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
31st January, 2022.