THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION No. 1028 OF 2020

(Arising from Civil Suit No. 0958 of 2018)

OJIJO PASCAL ……..…… APPLICANT

VERSUS

ESEZA CATHERINE BYAKIKA ……. RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The respondent filed a suit under summary procedure against the applicant seeking recovery of shs. 221,120,000/= The applicant filed an application for leave to appear and defend the suit which was allowed on 7th October, 2019 on condition that he took out an deposited in court within a period of thirty (30) from the date of the ruling, a bank guarantee in the sum of shs. 100,000,000/= the applicant having failed to fulfil that condition, the respondent applied for a default judgment which was entered accordingly on 20th March, 2020.

b. The application;

The application is made under the provisions of section 82 of *The Civil Procedure Act*, and Order 46 rules 1 (1) (b) and 8 of *The Civil Procedure Rules*, seeking a review of the order that granted him leave to appear and defend the suit, on ground that it was made on the false assumption that the applicant had access to the amount advanced to him by the respondent for investment, whereas not, since it had already been invested in multiple ventures to the respondent's knowledge. Furthermore, that it was not practicable for the applicant to raise such an amount of money within the period of thirty days, as required by the order. The discretion to grant leave to appear and defend the suit was not exercised judiciously resulting in an injustice since he has thereby been prevented from presenting his defence on the merits.

c. Affidavit in reply;

In her affidavit in reply the respondent refutes the applicant's claim. She contends that the applicant nether complied with the order nor sought its execution. Having filed the application during the month of November, 2019 the applicant abandoned it until the respondent's counsel took the initiative to have it fixed on 23rd November, 2021. The applicant even then did not appear in court. The sole purpose of filing the application is to delay execution of the decree passed in favour of the respondent. The application does not disclose any error apparent on the face of the record nor is it based on discovery of any new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the applicant at the time when the order was made.

d. Submissions of counsel for the applicant.

M/s Muwema and Co. Advocates and Solicitors did not file any submissions on behalf of the applicant despite having been accorder time to do so.

e. Submissions of counsel for respondent.

M/s MMAKS Advocates on behalf of the respondent submitted that the application does not disclose any error apparent on the face of the record nor is it based on discovery of any new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by the applicant at the time when the order was made. The applicant has not presented any other sufficient cause analogous to the two grounds. The applicant simply disagrees with the reasons given by the Judge to justify the orders he made. The grounds relied upon sound only in appeal and not in review. Considering the dilatory manner in which the applicant has handled the application, its purpose is only for delay of execution of the decree, hence it is an abuse of court process. The application should therefore be dismissed with costs to the respondent.

The decision.

The ruling 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. The applicant has not advanced any material that may be considered under this head.

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. The applicant has not advanced any material that may be considered under this head. It has instead been contended in this application that it was wrong for the court to have proceeded on the false assumption that the applicant had access to that amount advanced to him by the respondent for investment, whereas not, since it had already been invested in multiple ventures to the respondent's knowledge. Furthermore, that it was not practicable for the applicant to raise such an amount of money within the period of thirty days, as required by the order. Not to have made such findings cannot be classified as an error apparent on the face of the record.

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 are arguments 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, not an error apparent on the face of the record. This ground fails.

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

"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 discretion to grant leave to appear and defend the suit was not exercised judiciously resulting an injustice since he has thereby been prevented from presenting his defence on the merits, is completely unpersuasive. These arguments go to the merits of the decision and sound only on appeal.

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 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 hereby dismissed with costs to the respondent.

Delivered electronically this 31st day of May, 2022

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