5 **THE REPUBLIC OF UGANDA**

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 285 OF 2021

(ARISING FROM MISCELLANEOUS CAUSE No. 44 OF 2020)

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CENTENARY RURAL DEVELOPMENT BANK LTD .....APPLICANT

VERSUS

ODONGIPOU STANISLAU EMMANUEL.....RESPONDENT

15 **BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

RULING

This application was brought by Notice of Motion under the provisions of sections 82 and 98 of the Civil Procedure Act, Cap 71 and Order 46 Rules 1 ,2 and 8 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules SI 71-1 wherein
20. the Applicant seeks the following orders: -

1. Reviewing and setting aside of the findings and orders that the Applicant lodged a mortgage on the Respondent's land comprised in Kyadondo Block 184 Plot 43.
2. Reviewing and setting aside of the award of general damages and costs
25 to the Respondent in the decision of this Court dated 26th February,2021.
3. The costs of this application be provided for.

Facts

This Application is supported by the affidavit of Ronald Sekidde an Advocate working with the Applicant as Legal Manager Litigation deponed in paragraphs
30 1-16 and summarized as follows: -

That on 16th September, 2020, the Respondent's Lawyers wrote to the Applicant's Head of Credit, the said letter is attached and marked Annexture 'A', to demand release of a mortgage on land comprised in Kyadondo Block 184 Plot 43.

5 That the transactions complained about were said to have occurred way back in 2007 and that the Applicant did not have any record of a mortgage on Kyadondo Block 184 Plot 43. That accordingly, the Applicant wrote to the Ministry of Lands to be availed a copy of the Mortgage Deed if any.

That at the time they were served with Misc. Cause No. 44 of 2020, the Applicant
10 had not received a reply from the Ministry of Lands and that they accordingly, filed their reply and submissions without the benefit of any documents from the Ministry of Lands. That however, on 16th December, 2020 they had instructed Muhumuza Kiiza Advocates to follow up with the Ministry of Lands and that by 21st December, 2020, Muhumuza Kiiza Advocates managed to obtain a search
15 report attached and marked Annexture 'C' in respect of Land comprised in Kyadondo Block 184 Plot 43.

That on 12th February, 2021 Muhumuza Kiiza Advocates forwarded to the Applicant a copy of the actual Mortgage Deed attached and marked Annexture 'D' which, was registered on Kyadondo Block 184 Plot 43. That this
20 new evidence, shows that the Applicant lodged a mortgage on Busiro Block 184 Plot 43 which was executed by Yusuf Kibalama Sentongo but, the Land office erroneously registered the mortgage on Kyadondo Block 184 Plot 43.

That the Applicant has never lodged a mortgage on Kyadondo Block 184 Plot 43 and that the Mortgage Deed above, is new and important evidence which,
25 after the exercise of diligence was not in the Applicant's knowledge or possession at the time Misc. Cause No. 44 of 2020 was litigated.

That the findings of Court and the award of general damages of UGX. 140,000,000 and costs was on the premise that the Applicant had lodged a mortgage on Land comprised in Kyadondo Block 184 Plot 43 without lawful
30 excuse.

That it is in the interest of justice to review the decision of this court.

The Respondent Odongipou Stanislau Emmanuel filed an affidavit in reply deponed in paragraphs 1-30 and summarized hereunder: -

That he is informed by his Advocates M/s Barungi Baingana & Co. Advocates
35 which information he verily believes to be true that, the Applicant's application is frivolous, vexatious, misconceived, an abuse of Court process and does not disclose any merits(s) or ground for review of the findings and orders of this Court and shall accordingly raise a preliminary objection at trial to have the same dismissed with costs to the Respondent.

5 That Misc. Cause No. 044 of 2020 was heard and determined on the 26th day of February, 2021 on its merits and the Applicant filed a reply and never denied any averment as contained in the affidavit in support and the ruling was delivered based on facts that are available on Court record.

That he is the registered proprietor on the certificate of title, a copy of which is 10 attached and marked Annexture 'D' since, the 20th day of July, 2001 vide Instrument No. KLA227124, of land comprised in Kyadondo Block 184 Plot 43 situate at Nsasa, Wakiso District.

That he conducted a search at the Land Registry office at Wakiso on the 14th day of September, 2020 and both the search he conducted and that 15 conducted by the Applicant on the 18th day of December, 2020, revealed that the Applicant on the 4th day of June, 2007 registered a mortgage vide Instrument No. KLA 341728 onto his land which, he contends was without a justified reason or cause as, the Applicant absolutely had no interest in the said suit land.

20 That he has been advised by his advocates that there is no new evidence to show that the Applicant lodged or registered a mortgage on land comprised in Busiro Block 184 Plot 43 at Kababi, but was erroneously registered by the Land office on Kyadondo Block 184 Plot 43 Land at Nsasa, as the Applicant wants this honorable Court to believe.

25 That there are no new facts or evidence that has been brought to the attention of this Court to warrant review of its order dated 26th February, 2021, apart from a confirmation that the Applicant lodged and, or registered a mortgage on the Respondent's title since 2007 vide instrument Number KLA341728.

That the Respondent is not aware that the land office erroneously registered the 30 said mortgage onto his land comprised in Kyadondo Block 184 Plot 43 Land at Nsasa and that the said mortgage has existed on his title for 14 (Fourteen) years.

That the Applicant has never attempted to either remove the mortgage or lodge any complaint to the Commissioner Land Registration to have the said alleged error corrected and the register amended as required by law.

35 That Kyadondo as a Block and Busiro are separate and distinct and even, the location where the said land is situate is different and that this cannot be a mere error but was intended by the Applicant since, the Mortgage Deed attached on the application has different details including the date and Instrument number as that of Yusuf Kibalama Ssentongo which, confirms the finding of Court that

5 the Applicant has no reasonable cause or excuse to lodge a mortgage on the Respondent's Land title.

That he has been advised by his Advocates M/s Barungi, Baingana & Co. Advocates that the findings of Court were based on the fact that the Applicant lodged a mortgage on his land comprised in Kyadondo Block 184 Plot 43 at
10 Nsasa and that it was lodged without lawful excuse or reasonable cause by the Applicant which is still the position.

That this Court finds this application for review devoid of merits and be dismissed with costs.

The Applicant deponed an affidavit in rejoinder by Ronald Sekidde in
15 paragraphs 1-16 and reiterated their averments in the affidavit in support of the application and further contended that according to the Mortgage Deed which, has been retrieved from Land office, the Applicant lodged a mortgage on Land comprised in Busiro Block 184 Plot 43 but the Land office erroneously registered it on Land comprised in Kyadondo Block 184 Plot 43.

20 That the Applicant has no objection to the Commissioner Land Registration vacating the mortgage erroneously registered on Land comprised in Kyadondo Block 184 Plot 43.

Representation

The Applicant was represented by Counsel Nelson Nerima of Nambale, Nerima
25 & Co. Advocates & Legal Consultants while the Respondent was represented by Counsel Ronald Mugisa of M/s Barungi Baingana & Co. Advocates.

Counsel for the parties herein filed written submissions as directed by the Court.

Issue for determination

Counsel for the Applicant and Respondent filed submissions but did not specify
30 the issue for the determination by Court.

This Court as required under Rule 3 of Order 15 of the Civil Procedure Rules SI 71-1 deemed it fit to phrase the issue for determination as below: -

Whether the Application raises grounds for Review?

Arguments by Counsel for the Applicant

35 Counsel cited the provision of section 82 of the Civil Procedure Act and Order 46 Rules 1 and 2 of the Civil Procedure Rules to submit that the said provisions allow

5 any person considering himself or herself aggrieved by a decree or order, to apply for review and that the same provision, gives this Court unfettered discretion which, should be exercised judiciously to review its ruling.

Counsel argued that the Applicant explained in detail, the steps it took to instruct lawyers to obtain a copy of the disputed Mortgage Deed from Land
10 office and that the Mortgage Deed attached and marked Annexture 'D' was only obtained on 12th February, 2021 after the hearing of the case.

Counsel argued further that in the 5th and 6th lines of the Mortgage Deed, the particulars of Land is indicated as Block 184 Plot 43 Mengo Busiro and that the stamp at the bottom right hand corner indicates that the Mortgage Deed was
15 lodged with the Mailo Registry on 24th May, 2007. That the Respondent has not rebutted this evidence that the Applicant lodged a mortgage on Land comprised in Busiro Block 184 Plot 43 at Mengo and not on Kyadondo Block 184 Plot 43.

Counsel further submitted that it is unreasonable for the Respondent to expect
20 the Applicant to instantly retrieve a copy of the Mortgage Deed lodged way back in 2007, which is 14 years ago and that the Financial Institutions Act, under section 46(6) mandates Financial Institutions to preserve financial ledgers and other financial records for a period of not less than ten (10) years. That this case arose after the expiry of 10 years which, is the maximum period for mandatory
25 preservation of records.

Counsel contended that the Applicant in this case is aggrieved since, it is required to pay colossal sums of money for something it did not do and therefore, has suffered a legal grievance for purposes of review.

Counsel contends further that the Applicant is not opposed to the Commissioner
30 Land Registration being directed to vacate the erroneous encumbrances from Land comprised in Kyadondo Block 184 plot 43 but their grievance is being condemned to pay damages and costs.

Counsel further contends that the Applicant prayed for damages of UGX. 60,000,000 (Uganda Shillings Sixty Million only) but that the Court awarded UGX
35 140,000,000(Uganda Shillings One Hundred Forty Million only).

Arguments in reply by Counsel for the Respondent

Counsel argued that this Application is premised on the discovery of new evidence, however, there is no discovery of a new matter or evidence in this

5 application. That Miscellaneous Cause No. 044 of 2020 was heard and determined on its merits on the 26th day of February, 2021 where, the Applicant participated in the proceedings and a ruling was delivered based on the facts that are available on the Court record.

Counsel further argued that there are no new facts or evidence to show that 10 the Applicant ever lodged or registered a mortgage on Land comprised in Busiro Block 184 Plot 43 at Kababi and obtained a loan of UGX. 10,000,000 (Uganda Shillings Ten Million only) from the Applicant.

Counsel contended that the Applicant is liable to pay damages and that the award of general damages is at the discretion of Court as, was held in the case 15 of *Robert Cuossens Vs Attorney General SCCA No. 08 of 1999*. That it was justiciable on the circumstances of this case, for the Court to award UGX 140,000,000 as the Applicant is liable.

Arguments in rejoinder by Counsel for the Applicant

Counsel reiterated their earlier submissions and argued further that the 20 Applicant has produced the actual Mortgage Deed which, it lodged in respect of Land comprised in Busiro Block 184 Plot 43 and that the Respondent has not produced any Mortgage Deed which, the Applicant lodged on Land comprised in Kyadondo Block 184 Plot 43 and that the Applicant is being condemned to pay damages and costs for a mistake it did not commit.

25 Decision

Section 82 of the Civil Procedure Act, Cap 71 and Order 46 Rule 1 and 3 of the Civil Procedure Rules, SI 71 will be reproduced hereunder for emphasis: -

Section 82 provides that:

Any person considering himself or herself aggrieved— (Emphasis is mine)

30 (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this 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 35 thinks fit.

5 Order 46 Rules (1) and (3) provides that: -

Application for review of judgment.

(1) Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

10 (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the
15 record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.(Emphasis is mine)

3. Grant or dismissal of application.

20 (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant it; except that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was
25 not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation. (Emphasis is mine)

Review of a Judgment or Order may be allowed on any of the grounds hereunder: -

30 (i) Discovery of new and important matter or evidence after the exercise of due diligence by the Applicant or;
(ii) Some mistake or error apparent on the face of the record, and
(iii) Any other sufficient cause.

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5 It is worth noting that a party who claims any of the grounds above for review, should be an aggrieved person within the meaning of section 82 of the Civil Procedure Act Cap 71 and Order 46 Rule (1) of the Civil Procedure Rules SI 71-1. (**See *Mohamed Allibhai Vs W.E Bukenya Mukasa & Departed Asians Property Custodian Board S.C Civil Appeal No. 56 of 1996*** on the definition of an
10 aggrieved person)

I am persuaded with the decision in ***Kinyara Sugar Limited Vs Hajji Kazimbiraine Mahmood & 3 others HC Misc Appl. No. 39 of 2018*** (Arising from H.C.C.S No. 30 of 2017) relied on by Counsel for the Applicant which, cited with approval the
15 case of ***Tullow Uganda Limited & Tullow Uganda Operations PTY Limited Vs Jackson Wabyona & Uganda Revenue Authority HC Misc Appl. No. 197 of 2017*** where Madrama J. (as he then was) defined an aggrieved person as:

> *"A person who has been injuriously affected in his rights or has suffered a legal grievance. The expression legal grievance was adopted from the*
> 20 *case of Exparte Side Bothan in re Side Botham (1881)14 Ch. D 485 at 465 where James L.J held that:*
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> *"the words "person aggrieved" do not really mean a person who is disappointed of a benefit which he might have received if some other*
> 25 *order had been made. A person aggrieved is a person who has suffered a grievance, a man against whom a decision has been pronounced, which has been an injury or grievance in respect of his property or otherwise."*

30 In the instant case, the Applicant seeks for review on the ground of the discovery of new and important evidence.

I have looked at the pleadings on record both in this application and in Misc. Cause No. 044 of 2020 and find that the record reveals that the Respondent
35 herein through his Lawyers, wrote a letter to the Applicant on 16th September, 2020 attached and marked Annexture 'A' to the affidavit in support of the application, demanding for the release of the said mortgage on the Respondent's title comprised in Kyadondo Block 184 Plot 43 situate at Nsasa, Wakiso district.

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5 The Respondent, through his Counsel filed a cause on 2nd October, 2020 and a reply was filed for the Applicant herein on 10th November, 2020. However, on 13th October, 2020, the Applicant through its Legal Manager wrote to Ministry of Lands, Housing and Urban Development, as seen in Annexture 'B' attached to the affidavit in support of this application, requesting to be availed with a copy
10 of the Mortgage Deed if any.

The provision of the law under Rule (1) (b) of Order 46 above presupposes that, any person who considers himself or herself aggrieved by a decree or order from which no appeal is allowed, should have exercised due diligence prior to the discovery of new and important matter or evidence, to show that it was not
15 within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made.

The term due diligence means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. ***(See Black's Law Dictionary 7th Edition at pg.468)***

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In the given circumstances of this matter, it is evident that the Applicant did not reasonably, take the necessary steps to obtain the Mortgage Deed at the time when the Respondent brought to their attention the existence of an encumbrance on his title in September 2020, allegedly lodged by the Applicant
25 until the Respondent filed a cause in October, 2020 and the Applicant thereafter, decided to take action on 13th October, 2021 as above.

On record, is a letter dated 11th February, 2021, by M/s Muhumuza Kiiza the Applicant's Lawyers who, wrote to the Applicant Bank notifying them that they were able to obtain the Mortgage Deed executed on the 24th May, 2007 as
30 security between the Applicant Bank, a one Nakibuule Sarah with Kibalama Yusuf.

The Applicant therefore, had the opportunity to inform the Court of the new matter or evidence before the ruling was delivered on 26th February, 2021 but they chose not to do so.

35 In the result, I find that the Applicant did not exercise due diligence when, they allegedly discovered new matter or evidence on 12th February, 2021 and cannot claim that it was not within their knowledge when the order was made by this Court on 26th February, 2021.

5 I am unable to agree with the submission by Counsel for the Applicant that the Applicant explained in detail, the steps it took to instruct their Lawyers to obtain a copy of the disputed Mortgage Deed from the Land office which, was only obtained on 12th February, 2021 as attached and marked Annexture 'D' to the affidavit in support of this application, after the hearing of the cause.

10 The Applicant failed to discharge the evidential burden to the standard required under Rule 3 (2) of Order 46 of the Civil Procedure Rules SI 71-1 which, is strict proof of the allegation of the discovery of new matter or evidence that was not within their knowledge when the Decree or Order was passed or made.

Accordingly, the Applicant, cannot be seen to be aggrieved by the decision 15 that was rendered by this Court, after the alleged discovery of new matter or evidence by the Applicant.

The argument by Counsel for the Applicant that the Applicant's duty as a bank, is to lodge Mortgage Deeds for registration and that any error in registering an instrument under a wrong Block and Plot, is answerable by the Commissioner for 20 Land Registration whom, the Respondent chose not to make a party to Misc. Cause No. 044 of 2020 is untenable.

In regard to damages, I am in agreement with the authority of ***Robert Cuossens Vs Attorney General SCCA No. 8 of 1999*** cited by Counsel for the Respondent on the proposition of law that the award of general damages is at the discretion of 25 Court; suffice to add that it is compensatory in nature on injuries or damages that arise naturally in the normal course of events. ***(See Stroms Vs Hutchinson [1905] AC 515)***

In the case of ***Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305*** it was held 30 that:

> *"In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered."*

35 It is also settled law, that review is a matter of discretion however, the circumstances of each case should be considered. ***(see the case of Abdulla Jaffer Dewji Vs Ali Raza Mohamedali Sheriff Dewji [1958] EA 558)***

5 Following the decisions above, I find that this is a proper case for this Court to exercise its discretion and exercise it judiciously to refuse to review its Orders in regard to general damages.

With regard to costs, according to section 27(2) of the Civil Procedure Act Cap 71, costs follow the event unless for good reasons the Court otherwise orders.

10 I do not find any good reason to deny the Respondent costs of this application and in the main cause.

This Court finds that this application is devoid of merit and is dismissed with costs.

Dated, signed and delivered by email to Counsel for the parties this 26th day of April, 2022.

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SUSAN ABINYO

JUDGE