



THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

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**MISC. APPLICATION NO. 351 OF 2022
(ARISING FROM HIGH COURT CIVIL SUIT NO. 78 OF 2016)**

10 **NAMAGANDA LTD APPLICANT**

VERSUS

1. MIAO HUAXIAN

2. DFCU BANK RESPONDENTS

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**BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE
RULING**

A. INTRODUCTION

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1. This Applicant seeks to review and set aside the Order of this Court directing the 1st Respondent to cede all the rent collected and due from the suit property from the date of purchase by the Applicant until delivery of vacant possession.

- 25 2. The Application was brought under S.82 and 98 of the Civil Procedure Act, O.46 rr. 1(a), 2, 3 and 8 of the Civil Procedure Rules (as amended) and S.33 of the Judicature Act.
3. The Application was supported by the affidavit of Vincent Mawanda who averred that if enforced, the impugned order for unquantified rent would prejudice the Applicant.
- 30 4. In reply, the 1st Respondent averred that this Application is incompetent because there is a pending appeal filed by her against the entire Judgment of this Court in HCCS No. 078 of 2016. In its Affidavit in Reply deponed by Isaac Mpanga, the 2nd Respondent averred that from the pleadings, proceedings and Submissions in HCCS No. 078 of 35 2016 and HCMA No. 76 of 2016, rent was a contested issue and as such, the Court rightly determined and awarded it to the Applicant. He also stated that since an appeal has been filed by the 1st Respondent, this Application is incompetent.
- 40 5. In Rejoinder, the Applicant averred that the Notice of Appeal filed by the 1st Respondent is only in respect of part of the Judgment and not against the entire Judgment as alleged by the Respondents. Furthermore, that during the hearing of HCCS No. 78 of 2016, the 2nd Respondent tendered in evidence a Valuation Report (**DEx.27**) indicating the monthly rental income collected from the suit property as 45 UGX. 46,250,000/=. That since the Valuation Report was admitted on Court record, without protest by all parties, this Court ought to determine the total accrued rent on the basis of the said report.
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B. REPRESENTATION

6. Counsel Nelson Nerima of Nambale, Nerima & Co. Advocates represented the Applicants, while the 1st Respondents were represented Counsel Collin Kyeyune of Mukilbi & Kyeyune Advocates and Counsel Ernest Sembatya of MMAKS Advocates appeared for the 2nd Respondents.

7. The Parties filed Written Submissions, which I have carefully perused and considered. I have also addressed my mind to the law and the authorities referred to by the partes. However, before I delve into the merits of the Application, I shall determine the competence of this Application in light of the Appeal filed by the 1st Respondent.

C. DETERMINATION BY COURT

6. Review is provided for under **S.82 of the Civil Procedure Act** and **O.46 of the Civil Procedure Rules (as amended)** and it is intended to remedy grievances which a litigant brings to the attention of Court after the Judgment. *(See Kinyara Sugar v Limited v Hajji Kazimbiraine Mahmood & Others HCMA No. 003 of 2020)*

7. **O.46 r.1 (2) CPR** provides that:

"A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being Respondent, he or she can present to the appellate Court the case on which he or she applies for the review."

8. Suffice to note, as was rightly stated by the Applicant, the Court's powers of review under **S.82 of the Civil Procedure Act** are wider than those under **O.46 of the Civil Procedure Rules**.

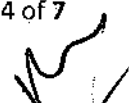
9. The Respondents' proposition that due to the pendency of an appeal by the 1st Respondent, this application is incompetent, is in my view, misconceived.

Rule 76 (3) of the Judicature (Court of Appeal Rules) Directions provides that:

"Every Notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision; and where it is intended to appeal against only a part of the decision, it shall specify the part complained of, the address for service of the appellant and the names and addresses of all persons intended to be served with copies of the Notice."

10. **Rule 76 (3) of the Judicature (Court of Appeal Rules) Directions** is couched in mandatory terms. The Notice of Appeal filed by the 1st Respondent states that it is only against part of the Judgment but does not specify the part complained of as required by **Rule 76(3)** above. No Memorandum of Appeal has been filed or put before this Court to prove that the issue of rent is a ground of appeal common to both the Applicant and the 1st Respondent. It would be speculative and superfluous for this Court to reject this Application on unsubstantiated grounds.

Accordingly, I find that this Application is competent. I will now deal with the **merits of the Application**.



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D. MERITS OF THE APPLICATION

I have taken into account the respective submissions by Counsel for the parties and will not replicate them here.

110 12. The grounds for review were articulated in the case of **FX Mubuuke - vs- UEB HCMA No. 98 of 2005** and these were held to be:

i. a mistake manifest or error apparent on the face of the record.

115 ii. discovery of new and important evidence which after exercise of due diligence was not within the Applicant's knowledge or could not be produced by him or her at the time when the decree was passed or the order made.

iii. other sufficient reason exists.

120 13. In **Simba K Ltd & 4 other -vs- Uganda Broadcasting Corporation SCCA No. 003 of 2014**, the Supreme Court held that:

*"The case of **Odd Jobs -vs- Mubia [1970] EA 476**, is to the effect that a court can decide an unpleaded matter if the parties have led evidence and addressed court on the matter in order to*
125 **"arrive at a correct decision in the case and to finally determine the controversy between the parties."**

14. In the instant case, this Court, while granting a Temporary Injunction to the 1st Respondent in HCMA No. 76 of 2016, directed that all rent

collected from the suit property be deposited in Court. The 1st
130 Respondent failed to comply with the said Order and was accordingly
cited for Contempt of Court in High Court Misc. Application No. 424 of
2018. Both in its Witness Statement and in its Final Submissions, the
Applicant prayed for recovery of the rent that accrued from the suit
135 property from the date of purchase thereof until delivery of vacant
possession by the 1st Respondent. Similarly, in her Submissions, the
1st Respondent sought a refund of all the rent she had remitted to the
Court.

15. From the above, I am satisfied that the recovery and quantum of rent,
despite not being specifically pleaded by the parties, was an issue that
140 had to be determined in totality by the Court. I have also noted that in
HCMA No. 76 of 2016, HCMA No. 424 of 2018 and HCCS No. 78 of
2016, whereas this Court made several Orders pertaining to rent, the
quantum of the rent was never ascertained.

16. However, at the hearing of HCCS No. 78 of 2016, the 2nd Respondent
145 tendered in evidence a Valuation Report (*annexure A to the
Applicant's Affidavit in Rejoinder*) indicating that the monthly rental
income collected and due from the suit property was **UGX.
46,250,000/=**. Whereas both the Applicant and the 1st Respondent had
the opportunity to cross-examine the 2nd Respondent's Witness on the
150 Valuation Report, none of them contested the figure of **UGX.
46,250,000/=** contained in the Report as monthly rent.

17. Following the decision in **Paul Kasagga & Another -vs- Barclays
Bank HCMA No. 112 of 2009**, I find that the earlier Order issued in



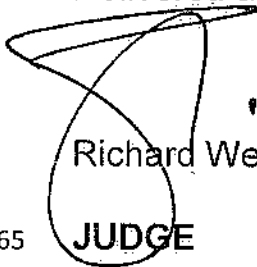
155 favor of the Applicant for recovery of an unascertained sum of rent, is
an error apparent on the face of the record.

18. Having found as above, I hereby award the Applicant, as rent, **UGX. 46,250,000/=** per month, from the date of purchase by the Applicant, until delivery of vacant possession to the Applicant.

160 19. The rest of my Orders are maintained as earlier issued. Each party
shall bear its own Costs.

I so order.

Delivered at Kampala this 31st day of May 2022.



Richard Wejuli Wabwire

165 **JUDGE**