THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION NO. 122 OF 2023

[ARISING FROM MISCELLANEOUS APPLICATION NO. 595 OF 2022]

[ALL ARISING FROM CIVIL SUIT NO. 796 OF 2021]

ABJ ENGINEERING AND CONTRACTING CO. KSC	**]**	**APPLICANT**

VERSUS

1. ALIGN ELETRICAL GROUP COMPANY LIMITED	**]**	
2. KIBUMBA ANDREW	**]**	**RESPONDENTS**
3. KIBENGE PHILLIP	**]**	

Before: Hon Justice Thomas Ocaya O.R

Ruling

Introduction

The Applicant commenced this application under the provisions of Section 82 of the Civil Procedure Act ["CPA"] and Order 46 Rules 1 and 8 of the Civil Procedure Rules ["CPR"] for review of the ruling and order in HCMA 595 of 2022 ["the main application"] from which this application arises.

The Applicant was the Respondent in the main application brought by the current Respondents herein for security of costs in HCCS 796 of 2021 ["the main suit"]. The application was decided in the favour of the Respondents herein (applicant) and the court ordered the current Applicant (Respondent therein) to furnish to the Respondents (applicants in the application) security for costs.

The Applicant contended that the ruling and order ought to be reviewed. The Applicant contended that the ruling in the main application was rendered without considering the applicant's submissions which were placed on record before the ruling was rendered. According to the applicant, this constituted an error apparent on the face of the record and therefore warranting review.

The Respondent opposed the application and contended that a court may rely on the evidence only to make a ruling and accordingly, the failure to consider the submissions of a party is not an error apparent on the face of the record.

Representation:

The Applicant was represented by M/s Waymo Advocates while the Respondent was represented by M/s Byamukama Kaboneke & Advocates.

Evidence and Submissions

The Applicant led evidence by way of an affidavit in support of the notice of motion deponed by Roland Kokasi Odinga an advocate practicing with the applicant's advocates in the present matter.

The Applicants led evidence by way of an affidavit in reply deponed by the 2nd Applicant. Both Counsel made written submissions that I have considered in coming to this ruling.

Decision

The Applicant brought this application under the provisions of **Section 82** of the Civil Procedure Act ["CPA"] and **Order 46 Rule 1** and **8** of the Civil Procedure Rules ["CPR"].

In his exhaustive decision in **Colleb Katorogo & Anor v GroFin SGB & Anor HCMA 534/2021**, Justice Mubiru explained the purpose of an application for review:

"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 those 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……. 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."

Section 82 CPA and Order 46 CPR impose two sets of competence criteria; the criteria to determine capacity/competence to bring the application and the criteria on which the competence of the application itself is assessed.

As far as the commencement criteria is concerned, it must be shown that

(a) There exists a decree or order which an appeal is allowed by the Act, but from which no appeal has been preferred

(b) There must be an aggrieved person.

Existence of decree/Order

It is not in dispute that there is a ruling in in HCMA 595 of 2022 ["the main application"] in which the Learned Lady Justice Jeanne Rwakakooko ordered the

Applicant to provide security for costs to the Respondents. Accordingly, this condition has been met by the Applicants.

Grievance

An application for review cannot be competently brought by a person who is not aggrieved within the meaning of Section 82 CPA. An aggrieved person is one who has suffered a legal grievance by virtue of the decree or order. See **Re Nakivubo Chemists [1979] HCB 12, Yusuf v Nokrach [1971] EA 104, Mohammed Alibhai v W.E Bukenya Mukasa SCCA 56/1996, Bamugaya Deo v Peter Tinkasimire & Anor HCMA 90/2018**

A person suffers a legal grievance if a decree or order affects their interests, rights, or duties adversely. See **Muhammad Hussein v Griffiths Isingoma Kakiiza and Others; S.C.C.A 8 of 1995, Colleb Katorogo & Anor v GroFin SGB & Anor HCMA 534/2021**

To make the determination whether there is a legal grievance, the contentions of the Applicant must be assumed to be correct in order for the assessment to be made. See **Attorney General v Wazuri Medical Care Limited HCMA 283/2022**

Taking the Applicant's assertions as accurate, the ruling and order affects the Applicant because the Applicant has been condemned to provide security for costs to the Respondents, failure to provide which, the Applicant's suit stands liable to be dismissed.

Accordingly, this requirement is also met.

Grounds for Review

A review of **Section 98 CPA and Order 46 Rule 1 CPR** reveal that an application for review may be premised on the following grounds;

(a) A discovery of a new and important matter of evidence

(b) Error apparent on the face of the record

(c) Sufficient Reason analogous to the above grounds

The Applicant contended that there was an error apparent on the face of the record, to wit, the ruling and order in the main application had been rendered without considering the Applicant's submissions in that matter.

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. See **Colleb Katorogo & Anor v GroFin SGB & Anor HCMA 534/2021, Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173**

I have perused the file in the main application on ECCMIS, the platform used by the Applicant to file its submissions. A review of the relevant record reveals that the Applicant lodged their documents on 17th August 2022 and the same were admitted on 25th November 2022. By that time, the ruling had been delivered over 22 days earlier.

Had the Respondent filed? Prior to ECCMIS, filing was done by obtaining an assessment for court fees, paying the same, having the receipt verified, lodging the documents at the registry, checking of documents, (if acceptable) having them endorsed and stamp where after stamped and endorsed copies would be returned to the person filing. See **Pinnacle Projects v Business in Motion HCMA 362/2010, Global Capital Save & Anor v Alice Okiror & Anor SCCA 57/2021**

With the migration to ECCMIS, documents are lodged electronically and after payment of court fees. Once the documents are acceptable, they are admitted. The

date the documents are admitted is the date they are filed for purposes of the CPR. The admission is what has substituted the stamping and endorsement of the documents, which was used previously to demonstrate that filing has been completed. See **Lawrence Martin Mugerwa v Mugubi Stephen & Anor SCCA 15/2022, Equity Bank Limited & Ors v Simbamanyo Investments & Peter Kamya CACA 709/2022**

Accordingly, the Applicant filed submissions on 17th August 2022 but were only admitted on the 25th November 2022 when the documents were admitted. I am cognizant that the role to admit documents is that of the Registrar and not a litigant. However, a litigant is under an obligation to aggressively and diligently pursue their defence and claim and follow the same up, including to ensure that documents are admitted. See **Femisa International Limited & Ors v Equity Bank Ltd HCMA 357/2022**, **Onesmus Bakanga & Anor v UEDCL HCMA 1495/2020, Geraldine Busingye Begumisa v EADB & Ors HCMA 436/2022**

There is no evidence on record that, in the two months between when the submissions were lodged, and when they were admitted, the Applicant had followed up with the Registrar to ensure that the submissions are admitted; there was no record of a follow up letter or such other correspondence.

In my view, a failure to consider documents not on record is not an error apparent on the face of the record. See **Jeremy Chelanga & Anor v The Board of Management Kamatony Primary School ELC 96/2016**

This notwithstanding, even assuming that the failure to have the documents admitted was not of the Applicant, it is important, in those circumstances, to consider whether the failure to consider the Applicant's submissions, by itself, constitutes an error apparent on the record.

In **Managing Director, NSSF & Ors v Sara Namugerwa & 198 Ors CACA 285/2016**, the Court of Appeal held that a failure by the court to entertain submissions when the matter had been reserved for hearing was an error apparent on the face of the record warranting review.

This is different from the instant case where parties took directions to file submissions, and a party's submissions were not on record by the time of preparation of the ruling. I have found some guidance in the Kenyan case of **Jeremy Chelanga & Anor v The Board of Management Kamatony Primary School ELC 96/2016** where the court held thus:

"The question is: is failure to consider submissions if they are on record and are not brought to the attention of the Court fatal to a decision? To answer that, another question begs an answer: what is the purpose of submissions in any proceedings? I will begin my answer to this question by citing an excerpt from the Court of Appeal decision in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**. In the case, their Lordships had this to say:

"Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

From the quotation above, it is clear that submissions have a part to play in any proceedings before the Court. But, they do not and cannot take the place of pleadings and evidence by the parties. They are a party's parting shot in any issue before the Court. They constitute his voice on the opinion he holds on the issue. This does not mean that the opinion is final or a command to the court to ensure

that it follows them or considers them. They may be right or wrong about the issue for determination. They may even be misleading or skewed on the point in issue. The court is not bound to take them into consideration. As the Court of Appeal rightly stated in the decision cited above, "there are many cases decided without hearing submissions but based only on evidence presented." So, submissions are only a small voice in any proceedings, which can be ignored: the big voice and which steers the court is in the pleadings and evidence.

Thus, I now go back my first question, is failure to consider submissions on record an error apparent on the fact of record? The simple and straight answer is, "yes". Courts are enjoined to consider submissions on record. They may not be bound by them, as stated above but it is important that they consider them. In the persuasive authority of Paul Odhiambo Onyango & another v Kalu Works Limited [2020] eKLR it was stated: "Failure to take into account submissions which are not on the court record is not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same." But is that error fatal to the decision of the Court hence to warrant a review of a court's decision? "No", except if they raise a point which the Court, in its analysis, should have considered but it failed to so do hence in not considering them the court arrived at a decision which was obviously wrong."

See also **Bernard Kiiru Mwangi v Faulu Microfinance Bank Limited [2021] eKLR, Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR,**

I have been persuaded by the above cases. Accordingly, a failure to consider submissions in and of itself, is not an error apparent on the face of the record where all the evidence and the facts were considered by the court, and where there is no point which was canvassed in the submissions and not captured in the ruling/decision leading the court to arrive to an obviously wrong decision.

I have had the opportunity to review the Applicant's submissions in the main application which were annexed to the affidavit in support as well as the ruling of this court which was also annexed.

I note that the only matter the trial judge did not have the opportunity to consider is whether the filing of the affidavit in reply by one of the three applicants without the attachment of the approvals of the others rendered the application fatally defective. In my view, the consideration of this objection would not have changed anything since the failure to attach a document indicating approval of other parties to one of them or any other person deponing an affidavit on their behalf is not fatal. Affidavits are evidence and any person can adduce evidence on behalf of others, whether they are a party or not. The fact that an affidavit is prepared by the advocates representing the parties and filed is sufficient evidence in my view, unless it is demonstrated that that other parties to litigation did not authorize the deponent to depone an affidavit on their behalf, such as a letter, statutory declaration or other reputable communication. There is no requirement to attach a written approval to an affidavit deponed in representative capacity and it is the duty of the person seeking to impeach the credibility of such an affidavit to demonstrate that it was not authorized, rather than the person seeking to rely on the affidavit. See **Order 19 Civil Procedure Rules. Allan Makula v First Finance Group HCMA 212/2022, Beeline Travel Care & Anor v Finance Trust Bank HCMA 296/2022**

Accordingly, the decision sought to be relied on by the Applicant in **Kaheru & Anor v Zinorumuri David HCMC 82 of 2017** is not good law.

In clarifying as above, I am not re-determining the main application, but rather demonstrating how the non-consideration of the submissions did not result into an unconsidered point of law that resulted into an obviously wrong decision.

I must however note that I noticed an error on the record not traversed by the parties in their pleadings though belatedly alluded to in the Respondents submissions in reply, namely, the fact that the court ordered the provision of security for costs but did not indicate when such security should be provided.

Order 26 Rule 2(1) of the CPR provides;

"If the security is not furnished within the time fixed, the court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw from the suit."

An order requiring security for costs should say when such security is to be provided since non-compliance results in the termination of the suit. The grant of an order for security of costs without a timeframe is an error apparent on the record as the purpose for the grant of such an order is defeated if a time limit is not inserted.

Accordingly, I would review the decision in the main application and modifying the order for provision of security by requiring the Applicant to render the quantum of security for costs ordered within ***forty-five days (45) days*** from the date of delivery of this ruling.

Costs of this application shall be in cause.

I so order.

Delivered electronically this 30th day of June 2023 and uploaded on ECCMIS.

Ocaya Thomas O.R

Judge,

30th June 2023